

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO.:

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

**RICHARD E. GATHRIGHT,
MICHAEL S. SHORE,
LAURA P. MESSENBAUGH, and
ROBERT W. BEARD,**

Defendants.

COMPLAINT

Plaintiff Securities and Exchange Commission (“Commission” or “SEC”) alleges and states as follows:

I. INTRODUCTION

1. From at least June 2010 until approximately mid-March 2012, SMF Energy Corp. (“SMF” or the “Company”) engaged in a fraudulent billing scheme, which misled investors by materially overstating SMF’s financial performance and falsely attributing SMF’s purported improved financial results to legitimate business factors, while not disclosing that in reality the purported improvement in its financial results was due to the fraudulent billing scheme.

2. Defendants Richard E. Gathright (“Gathright”), Michael S. Shore (“Shore”), Laura P. Messenbaugh (“Messenbaugh”), and Robert W. Beard (“Beard”) (collectively the “Defendants”) participated in that scheme. The Defendants knew, or were severely reckless in not knowing, that SMF, contrary to the terms of specific contracts, overbilled certain of its mobile fueling customers, including the United States Postal Service (“USPS”), by imposing a surcharge on those customers for fuel that was not actually delivered and by imposing surcharges

that were not allowed under the governing contracts. As a result of its fraudulent billing scheme, SMF, among other things, materially overstated its revenues, profit margins, shareholders' equity, and net income, as well as understated its liabilities, in its periodic and current reports filed beginning with the Form 10-K for the Fiscal Year ending June 30, 2010, which was filed on September 28, 2010. Absent the improper revenue, SMF would have had net losses during the entire period of the scheme instead of the positive net income it reported to investors.

3. During the fraudulent scheme, SMF was a Florida-based mobile-fueling company that was publicly-traded and made filings with the Commission. In March 2012, SMF's Board of Directors was advised that the USPS was being billed improperly under its contract with SMF due to the fraudulent billing practice and directed SMF to discontinue that billing practice. The resulting reduction in revenue caused the Company's financial condition to quickly deteriorate. In fact, SMF had to file for bankruptcy in April 2012 and ultimately went into liquidation. In May 2012, SMF self-reported potential securities laws violations to the SEC.

4. Each of the Defendants bears responsibility for the Company's fraudulent billing scheme and resulting false and misleading disclosures in SMF's SEC filings. Defendants Gathright, SMF's former Chief Executive Officer ("CEO"), Shore, SMF's former Chief Financial Officer ("CFO"), and Messenbaugh, SMF's former Chief Accounting Officer ("CAO"), knew, or were severely reckless in not knowing, that SMF was overcharging certain of its contract customers, including the USPS, which made the SEC filings they reviewed and signed false and misleading. Defendant Beard, SMF's former Senior VP of Marketing and Sales, engaged in the fraudulent scheme by signing the USPS contract and instructing SMF personnel to fraudulently charge the USPS. Defendants Gathright, Shore, and Messenbaugh also made false statements in management representation letters to SMF's independent auditor.

5. By engaging in this conduct, Defendants Gathright, Shore, and Messenbaugh violated Section 17(a) of the Securities Act of 1933 (“Securities Act”) and Sections 10(b) and 13(b)(5) of the Securities Exchange Act of 1934 (“Exchange Act”) and Exchange Act Rules 10b-5, 13b2-1, and 13b2-2 [15 U.S.C. §§ 77q(a), 78j(b), and 78m(b)(5), and 17 C.F.R. §§ 240.10b-5, 240.13b2-1, and 240.13b2-2], and aided and abetted violations of Section 17(a) of the Securities Act and Sections 10(b), 13(a), 13(b)(2)(A), 13(b)(2)(B), and 13(b)(5) of the Exchange Act and Exchange Act Rules 10b-5, 12b-20, 13a-1, 13a-11, 13a-13, and 13b2-1 [15 U.S.C. §§ 77q(a), 78j(b), 78m(a), 78m(b)(2)(A), 78m(b)(2)(B) and 78m(b)(5) and 17 C.F.R. §§ 240.10b-5, 240.12b-20, 240.13a-1, 240.13a-11, 240.13a-13, and 240.13b2-1]. In addition, Gathright and Shore violated Rule 13a-14 of the Exchange Act [17 C.F.R. § 240.13a-14]. By engaging in the conduct described below, Defendant Beard violated Section 17(a)(1) and 17(a)(3) of the Securities Act and Section 10(b) of the Exchange Act and Exchange Act Rules 10b-5(a) and (c), and 13b2-1 [15 U.S.C. §§ 77q(a)(1) and 77q(a)(3), and 78j(b), and 17 C.F.R. §§ 240.10b-5(a) and (c), and 240.13b2-1], and aided and abetted violations of Section 17(a) of the Securities Act and Sections 10(b), 13(b)(2)(A), and 13(b)(2)(B) of the Exchange Act and Exchange Act Rules 10b-5, and 13b2-1 [15 U.S.C. §§ 77q(a), 78j(b), 78m(b)(2)(A), and 78m(b)(2)(B), and 17 C.F.R. §§ 240.10b-5 and 240.13b2-1]. Unless enjoined, the Defendants are reasonably likely to engage in future violations of the federal securities laws.

II. DEFENDANTS

6. Gathright, age 61, is a resident of Pompano Beach, Florida and served as SMF’s President, CEO and Chairman of the Board of Directors from approximately 2002 to November 2011. During questioning by the Commission’s staff in connection with the SEC’s investigation into this matter, Gathright asserted his Fifth Amendment privilege against self-incrimination to nearly all questions asked by the staff.

7. Shore, age 47, is a resident of Miami, Florida and served as a Senior Vice President and CFO of SMF from approximately 2002 until approximately April 2012. Shore was a previously licensed Certified Public Account (“CPA”) in the state of Florida, but allowed the license to lapse as of December 31, 2000. During questioning by the Commission’s staff in connection with the SEC’s investigation into this matter, Shore asserted his Fifth Amendment privilege against self-incrimination to nearly all questions asked by the staff.

8. Messenbaugh, age 51, is a resident of Plantation, Florida and served as SMF’s CAO and Vice President of Finance and Accounting from approximately 2007 until at least March 2012. Messenbaugh holds a CPA license issued by the state of Washington. During questioning by the Commission’s staff in connection with the SEC’s investigation into this matter, Messenbaugh asserted her Fifth Amendment privilege against self-incrimination to nearly all questions asked by the staff.

9. Beard, age 61, is a resident of Alpharetta, Georgia and started working at SMF in approximately July 2005. Beard served as SMF’s Senior Vice President of Marketing and Sales, as well as its Investor Relations Officer from at least December 2006 until March 2012. During questioning by the Commission’s staff in connection with the SEC’s investigation into this matter, Beard asserted his Fifth Amendment privilege against self-incrimination to nearly all questions asked by the staff.

III. RELATED ENTITY

10. SMF was a publicly-held Delaware corporation, headquartered in Fort Lauderdale, Florida, whose primary businesses were commercial mobile-fueling and lubricant distribution. SMF’s common stock was registered pursuant to Section 12(g) of the Exchange Act and traded on the NASDAQ under the symbol “FUEL”.

IV. JURISDICTION AND VENUE

11. This Court has jurisdiction over this action pursuant to Sections 20(b), 20(d), and 20(e) of the Securities Act and Sections 21(d), 21(e), and 27 of the Exchange Act [15 U.S.C. §§ 77t(b), 77t(d), 77t(e), 78u(d), 78u(e), and 78aa].

12. This Court has personal jurisdiction over the Defendants and venue is proper in the Southern District of Florida because, among other things, SMF's principal place of business was in the Southern District of Florida and Defendants' acts and transactions constituting violations of the Securities Act and Exchange Act occurred in the Southern District of Florida. Moreover, Defendants Gathright, Shore and Messenbaugh currently reside in the District and also resided in the District during the commission of the fraudulent scheme alleged in this Complaint.

13. The Defendants, directly and indirectly, made use of the means and instrumentalities of interstate commerce, and the mails, in connection with the acts, practices and courses of business set forth in this Complaint.

V. FACTUAL BACKGROUND

A. SMF's Business Operations

14. SMF produced the majority of its fuel revenues by delivering gasoline and diesel fuel to its customers. SMF utilized the Oil Price Information Service ("OPIS"), a subscriber-based fuel pricing service, to set its fuel prices for its customers.

15. SMF typically billed its customers an OPIS-based price per gallon, plus a service charge, as well as various taxes. Some of SMF's customers had written contracts covering a specific period of time where fuel prices would be based on the OPIS price, plus an agreed upon fixed service charge (the "Fixed-Price Contract Customers"). The remaining customers were "at

will” (the “At-Will Customers”) and did not have contracts with any specific pricing terms or duration, but rather received services pursuant to written quotes.

16. During the relevant timeframe, SMF’s two largest customers - the USPS and YRC North American Transportation, Inc. (“YRC”) - were Fixed-Price Contract Customers.

B. SMF Considers and Adopts the Incremental Allowance Billing Scheme

17. In an effort to improve the Company’s financial condition by increasing its fuel revenues and margins, SMF implemented various fraudulent billing practices, including but not limited to practices that increased the amount of gallons of fuel invoiced beyond what was actually delivered to customers, or which raised the agreed upon or quoted service charge or price per gallon, all in ways that were hidden or designed to be difficult for customers to detect.

18. SMF began one of these practices in the spring of 2004, when SMF introduced a billing practice designed to increase its fuel revenues and gross margin. This billing practice, known as the Incremental Volumetric Allowance or Incremental Allowance (the “IA”), involved charging certain customers for fuel that was delivered plus an additional surcharge for fuel not actually delivered. For example, customers who were subject to an IA of 4% would be charged for an extra four gallons of fuel for every hundred gallons actually delivered.

19. SMF began charging the IA to certain of its customers in May 2004, and by the end of June SMF was charging a majority of its customers a 4% IA. However, in the years that followed SMF increased the IA to as high as 33%. Following the implementation of the IA, Gathright and others selected which customers would be charged the IA and the amount of the IA to be charged.

20. Because the IA charges inflated revenue by posting sales of fictitious gallons, SMF’s federal excise tax returns included those sales, which increased the amount of excise tax

due, and SMF in turn billed its customers for the tax on these gallons. Gathright, Shore, Beard, and Messenbaugh all knew that SMF charged its customers taxes on IA gallons.

C. The Escalation of the IA

21. SMF continued to charge certain of its customers the IA until approximately March 2012. During this time Defendant Beard directed SMF personnel in setting the IA percentage to charge customers, including the USPS. Also during this time, Gathright, Shore, and Beard each made decisions regarding the IA, including but not limited to whether to charge a customer the IA, setting the IA percentage for the customer, and eliminating the customer from the IA billing practice in the face of customer complaints or otherwise communicating with the customer and settling disputes about overbilling.

22. Defendant Messenbaugh joined SMF in 2007 and became aware of the IA by at least August 2007. Defendant Messenbaugh knew that IA gallons were “pretend” gallons, a characterization given by SMF’s financial consultant during a December 18, 2007 presentation that was attended by at least Defendants Shore, Messenbaugh, and Beard. That presentation confirmed SMF included the IA in its calculations of gallons sold and revenues that were reported in SMF’s financial statements.

23. The Defendants also periodically received information or reports on the IA and the customers that were charged the IA. For example, Defendant Shore received an email showing that the IA would rise to 18% for all IA customers in September 2008.

24. Defendant Beard became aware of the significant financial contribution the IA was making to SMF’s revenues by no later than May 2007. Although the IA percentage sometimes fluctuated and varied from customer to customer, as a general matter SMF increased the IA percentage over time, and used the IA to inflate quarterly revenues.

25. The Defendants were included in emails and reports indicating the escalation of the IA over time, as well as its increasing impact on SMF's financial performance.

26. At its peak, SMF charged an IA rate as high as 33% in the months prior to 2012. The IA generally fluctuated between the following ranges over the calendar years indicated:

Calendar Year	IA Percentage
2007	4-6%
2008	6-24%
2009	18-25%
2010	25-33%
2011	25-33%
2012	30%

27. As the IA percentage increased over time, the IA went from being a minor contributor to SMF's revenues, margins, and net income in 2004 to becoming a material contributor to the Company's financial performance beginning no later than the 2010 Fiscal Year end. This was especially true when the market price of fuel rose, which increased IA revenues as well as revenues relating to the actual sale of commodity fuel.

28. Because there was very little cost associated with the IA, the IA revenue was pure profit, which the Defendants used to paint an inaccurate financial picture to SMF's investors.

29. The Defendants knew, or were severely reckless in not knowing, that SMF included the reported revenues from the IA gallons in the amount of revenues it reported in its SEC filings for fuel sales, which materially overstated the revenue generated from the sale of fuel. In addition, they knew, or were severely reckless in not knowing, that SMF improperly included IA gallons in its SEC filings, which overstated the reported number of gallons sold. Although the IA was separately accounted for in SMF's internal records, it was not disclosed in the Company's public filings or financial documents publicly disseminated. SMF also did not disclose the risks associated with the IA billing practice in any public filing.

30. The impact the IA had on SMF's financials was significant and material. For example, during the scheme, without the revenue generated from the IA with respect to just the USPS and YRC, SMF would have had net losses, and its total reported revenues and numbers of gallons of fuel sold would have been materially less than reported to investors.

31. The Defendants knew, or were severely reckless in not knowing, of the material financial impact the IA was having on SMF's business and financial bottom line. Internal SMF emails show, among other things, that Defendants Gathright, Beard, and Messenbaugh communicated about how the IA impacted SMF's performance, forecasts, and financial targets. Additionally, the Defendants participated in internal SMF communications that quantified the IA billing practice with respect to IA gallons sold and the resulting revenues generated therefrom.

32. SMF did not break out the IA charge as a separate line item on customer invoices. From at least 2008 forward, SMF could have reflected IA gallons as a separate line item on the customer invoices. Instead, in furtherance of the fraudulent scheme, SMF combined the IA gallons with the actual gallons delivered on the customer invoices, an act designed to make it difficult for customers to detect the extra and fictitious gallons. The Defendants knew, or were severely reckless in not knowing, about this practice.

33. SMF customers who received documentation of the actual amount of fuel delivered were not charged the IA because the overcharge could be discovered. Internal SMF emails show that Defendants Shore and Beard each knew that some customers were being selected to be charged the IA because the customers did not receive such documentation. For example, Defendant Shore was told in a December 2008 email that SMF took steps to not charge the IA to customers that could detect it.

34. Gathright also made decisions with respect to the IA. For example, Gathright made the determination not to terminate the IA, and also played a role in selecting certain customers to receive the IA and setting the amount.

D. Other Overcharges

35. In addition to the IA, SMF also padded its customers' invoices through other hidden charges, one of which was known internally as the "Pad." This hidden charge worked as follows: SMF would invoice its fuel customers at a per gallon rate in excess of the OPIS price called for under the contract. SMF did not itemize the mark-up on its invoices, but rather combined it with the OPIS price, which its customers would be unlikely to know was inflated because OPIS prices were available only as part of a subscription-based service. The Defendants knew, or were severely reckless in not knowing, that SMF used the Pad and other hidden charges to fraudulently increase its revenues.

E. Customer Complaints and Material Violations of Customer Contracts

1. Customer Complaints

36. As alleged above, although SMF took steps to avoid charging the IA to those customers with ready means of detecting it, occasionally such customers were subject to the IA. Some of those customers compared their delivery records with their invoices and questioned the number of gallons being charged. There were also times when customers that were charged the IA asked to receive bulk tickets or meter readings. In both circumstances, the customers would be removed from SMF's list of customers to be charged the IA. Defendants Beard and Shore knew SMF tried to avoid charging the IA to customers that had a means of detecting it.

37. Defendants Gathright, Shore, and Beard were each involved in communicating or settling with customers that complained about being overcharged. For example, Defendant Beard communicated with a customer, a meat wholesaler, that complained about being

improperly charged and relayed those communications to at least Defendant Gathright. Defendants Gathright and Shore received updates on the meat wholesaler's complaints, and SMF ultimately settled the \$250,000 dispute for \$25,000 and a promise for the customer to use best efforts to purchase future fuel. Defendant Shore signed the Settlement Agreement.

38. Defendant Shore also communicated with another customer, a shredding company, about its perceived overcharges and settled that dispute, giving the customer an approximately 40% discount. In settling the complaint, Defendant Shore directed SMF's counsel to include in the settlement documents language prohibiting discussions with any entity or individual "under the sun" so other SMF customers would not learn about the overcharges.

39. In order to preserve SMF's ability to continue the overcharging and conceal its fraudulent nature, SMF, when communicating with customers that complained, would simply refund some or all of the amounts contested, providing a false or misleading explanation for the perceived overcharge, such as the expiration of a contract or agreed upon procedure, training issues with the drivers, or computer problems. Internal SMF forms used to request refunds or credits were sometimes initiated or approved by Defendants Shore and Beard. Internal SMF emails show Defendants Gathright, Shore, and Beard were involved in communicating to customers that complained about being overcharged.

2. SMF's Application of the IA to the USPS

40. SMF charged the USPS the IA beginning in 2004. By 2007, SMF could track the amount of IA gallons it was charging a particular customer, as well as the value of those IA gallons. By April 2007, Defendants Gathright, Shore, and other SMF managers received this type of report, including reports showing the USPS was being charged the IA.

41. On June 9, 2008, SMF bid on a new USPS contract to provide mobile fueling services to a significant number of USPS locations. On September 5, 2008, SMF was awarded

contract number 5CAMGT-08-B-0009 (the “USPS Contract”) for a two-year term commencing on November 2, 2009 and renewable at the option of the USPS for up to two additional two-year terms. The USPS Contract provided for SMF to service over 300 post offices and anticipated the delivery of 7.1 million gallons of fuel annually.

42. Under the USPS Contract, SMF was to charge USPS according to the daily OPIS prices, plus allowable taxes, and a “pumping/delivery fee,” which would vary by the location of the post office. No other charges, such as the IA, were permitted. Defendant Beard signed the USPS Contract and, as a result, knew, or was severely reckless in not knowing, that charging USPS the IA or the Pad was improper.

43. On September 16, 2008, Defendant Beard sent Defendant Gathright an email advising that the USPS Contract would generate almost 1.3 million IA gallons or approximately \$4.9 million in IA revenue. Beard explained the IA revenue would also grow as the IA charged at the new USPS locations increased from a 3% initially to the 18% being charged at the existing USPS locations. Defendant Shore also received the information Beard provided to Gathright. Defendant Beard directed an employee in SMF’s IT department how to set up and charge the USPS under its new contract, including charging the IA.

44. On October 30, 2008, Defendant Gathright was informed by the IT employee of her concerns that SMF would be improperly charging the USPS. She wrote, among other things, that she was “expecting an email from Bob [Beard] regarding the pricing for the new contract that is not as the contract states” since the company needed the margin, and that she “needed to be sure” that Gathright was aware of the practice. As part of her communication to Defendant Gathright, the IT employee included an email she received from another SMF manager, who also

copied Beard, among others, which set forth the IA percentages and start dates and directed the IT employee to set up these new USPS locations in SMF's billing system.

45. Notwithstanding these emails to Defendant Gathright, SMF immediately began improperly charging the USPS the IA. Beginning with the first delivery of fuel under the USPS Contract on November 2, 2008, SMF implemented an IA charge of 3% for several USPS locations, which was to incrementally increase to 9% by mid-November, and subsequently increase further. Later, the USPS locations were transitioned to the full IA amount, which fluctuated over time but ranged from 18% to at least 30% during the time covered by the USPS Contract. The USPS also was subject to improper Pad charges.

46. The USPS was SMF's single largest source of IA revenues, representing up to 50% of the assessed IA charges. Between approximately March 2011 and March 2012, SMF determined that it made IA charges of \$13.3 million, with between \$6.5 million and \$7 million attributable to the USPS at an average IA percentage of 28%. During 2011, SMF delivered almost 7 million gallons of fuel to the USPS, but billed the USPS for at least 8.7 million gallons, of which the IA gallons cost the USPS approximately \$6.1 million.

47. The USPS ultimately determined SMF had overcharged it approximately \$21.7 million during the period of January 2008 through April 2012, and filed a \$65,031,059 claim in SMF's bankruptcy, which includes treble damages and penalties under the False Claims Act.

48. The Defendants knew, or were severely reckless in not knowing, that the USPS was a Fixed-Price Contract Customer and was fraudulently charged the IA. Defendants Gathright and Beard received a copy of the USPS Contract. On information and belief, Defendants Shore and Messenbaugh either received a copy of the USPS Contract or had access to the USPS Contract.

49. Although the USPS was a Fixed-Price Contract Customer and was being charged the IA and Pad, the Defendants failed to report the issue to the Chair of SMF's Audit Committee, raise the propriety of the practice, or otherwise take steps to investigate the propriety of the practice or halt the practice altogether.

50. Also, despite knowing the USPS was a Fixed-Price Contract Customer and that SMF was going to charge the IA in violation of the USPS Contract, and despite having been advised against charging the IA to Fixed-Price Contract Customers, Defendant Gathright allowed and supervised SMF charging the IA to certain of its customers, including Fixed-Price Contract Customers like the USPS and YRC.

3. SMF Improperly Overcharged Other Fixed-Price Contract Customers

51. In addition to the USPS, SMF fraudulently overcharged other customers as well. For example, SMF's second largest customer, YRC, was also SMF's second largest IA revenue generator. On January 1, 2008, SMF entered into a fixed price contract with YRC and charged YRC an IA from the inception, initially at a rate of 6%, but which ultimately grew to at least 30%.

52. The overall financial impact to SMF of the IA charged to YRC was material and significant. For the period of approximately March 2011 through March 2012, YRC accounted for an estimated \$3.9 million in IA revenue. During the six-month period from July to December 2011, YRC was charged for approximately 570,000 IA gallons, or \$2.1 million in gallons of fuel that it did not receive.

53. Charging the IA to the USPS and YRC were not, however, isolated practices. To the contrary, SMF charged the IA to a large number of its customers, including other Fixed-Price Contract Customers such as the meat wholesaler and the shredding company discussed above.

The Defendants each received reports or information identifying which customers were being charged the IA and showing how the IA was impacting SMF's financial statements.

54. Defendant Beard participated in internal SMF communications discussing the volume of IA gallons being sold, the revenues generated by the IA, the amount of the IA percentage, and the impact of raising the IA percentage. In August 2011, Defendants Gathright and Messenbaugh each received a detailed analysis showing the IA's impact on SMF's net income and other metrics for Fiscal Years 2009 through 2011 and forecasted into 2012.

55. To award executive bonuses, SMF was required to earn a pre-tax profit, which it was able to accomplish in Fiscal Years 2010 and 2011 due to the IA. As a result of SMF's financial performance in Fiscal Year 2011, Defendant Messenbaugh received an \$11,010 bonus; Defendants Shore and Beard each received a \$20,447 bonus; and Defendant Gathright received a \$55,049 bonus, \$41,265 in restricted stock, and \$20,633 to pay for taxes related to the stock grant. As SMF increased the IA, the company also authorized the issuance of 900,000 shares of SMF stock as part of its 2009 Equity Incentive Plan when it filed a Form S-8 with the Commission on November 15, 2010. The Form S-8 incorporated by reference SMF's June 30, 2010 Form 10-K and its September 30, 2010 Form 10-Q. In the quarters that followed the registration, SMF issued shares of stock to Defendant Gathright and others, pursuant to the 2009 Equity Incentive Plan.

56. SMF's Forms 10-K for Fiscal Years 2010 and 2011, as well as its Forms 10-Q for Fiscal Year 2011 through the first quarter of Fiscal Year 2012, all of which were reviewed, signed, and certified by Defendants Gathright and Shore. Defendant Shore also reviewed, signed, and certified SMF's Form 10-Q for the second quarter of Fiscal Year 2012. Defendant Messenbaugh reviewed and signed SMF's Fiscal Year 2010 and 2011 Forms 10-K. Defendants

Gathright, Shore, and Messenbaugh each helped prepare the above Forms 10-K and 10-Q. Defendant Gathright reviewed and signed SMF's Forms 8-K for the same period of time. Each of the above Forms 10-K, 10-Q, and 8-K included, among other things, material misrepresentations regarding the amount of revenues and number of gallons sold or delivered.

57. Defendants Gathright, Shore, and Messenbaugh each knew, or was severely reckless in not knowing, that the USPS and YRC were Fixed-Price Contract Customers given they were SMF's two largest customers in Fiscal Years 2010 and 2011 and SMF stated in its Form 10-Ks for those years that SMF had written contracts with a few of its larger customers, including its two largest.

58. SMF, through the actions and inactions of the Defendants, failed to maintain a system of internal controls sufficient to ensure its Fixed-Price Contract Customers, like the USPS and YRC, were charged in accordance with their respective contracts. By allowing the IA to be charged to SMF's Fixed-Price Contract Customers, the Defendants circumvented or failed to implement the controls that should have been in place at SMF to ensure that customers were charged in accordance with their contracts and revenues and liabilities were recorded in accordance with GAAP. This same conduct caused SMF to make and keep inaccurately its books, records, and accounts resulting in SMF materially overstating its revenues, profit margins, shareholders' equity, and net income, as well as understating its liabilities, in its periodic and current reports filed beginning with the Form 10-K for the Fiscal Year ending June 30, 2010 going forward. Defendants Gathright and Shore each failed to design (or failed to cause others to design) disclosure controls and procedures that would have caused SMF to disclose and report that SMF recognized revenue from improper IA charges to Fixed-Price Contract Customers.

F. Violations of Laws from Collecting Taxes on IA Gallons

59. In 2006, North Carolina state tax authorities audited the state fuel taxes paid by SMF, which included the payment of taxes on IA gallons. During the audit, the North Carolina auditors discovered SMF's fraudulent IA billing practice, concluded it violated North Carolina law, and ordered SMF to cease immediately the practice of billing and collecting taxes on more gallons than SMF actually sold. By no later than mid-June 2008, Defendants were aware that North Carolina had ordered SMF to stop the IA billing practice.

60. In 2010, California state taxing authorities began an audit of SMF, focusing on SMF's payment of state fuel taxes on IA gallons. The Defendants were each aware of the audit and the issues relating thereto, but nevertheless allowed the IA billing practice to continue.

61. In December 2010, a recently hired accountant at SMF resigned, emailing Messenbaugh, who forwarded the email to Gathright and Shore, explaining that the "IA situation necessitated that [he] pursue a more secure future elsewhere." In a subsequent email to Gathright, the employee said he left SMF because of his concerns related to the propriety of collecting excise taxes from customers on undelivered IA gallons.

62. Despite the cease and desist order issued by North Carolina and the resignation and issues raised by the accountant, Defendants Gathright, Shore, and Messenbaugh took no action to further investigate the propriety of the IA or collecting taxes on IA gallons.

G. Elimination of the IA and Its Impact on SMF

63. In late 2011, Gathright left SMF and was replaced by Steven Goldberg, long-time director and Chair of SMF's Audit Committee since 2005. In mid-December 2011, Defendant Shore met with Goldberg and told him about the IA billing practice, quantifying the practice as generating \$200,000 to \$250,000 of revenue per week. Defendant Shore also provided Goldberg with a worksheet showing a large percentage of total IA revenue came from the USPS and YRC.

Goldberg was subsequently advised by counsel that the IA billing practice was improper and he alerted SMF's Board of Directors, which consulted counsel and received the same advice. In March 2012, the Company ended the IA practice.

64. SMF issued a press release on March 16, 2012 stating, among other things, that it was changing its pricing structure, substantially reducing projected sales revenues and future earnings and that it expected to report a loss in future quarters for the Fiscal Year. Eliminating the IA resulted in SMF no longer being able to support its operations. The Company filed bankruptcy on April 15, 2012.

H. Material Misrepresentations to SMF's Auditor

65. Defendants Gathright, Shore, and Messenbaugh each had a duty to SMF's shareholders to ensure the accuracy and integrity of SMF's billing and financial reporting and in its dealings with its external auditors. Defendant Gathright knew, or was severely reckless in not knowing, that SMF was not charging certain of its customers, including its Fixed-Price Contract Customers like the USPS and YRC, in accordance with SMF's contracts. Despite that knowledge, Defendant Gathright did not tell the auditors that information. This omitted disclosure was material to the auditor's work and public statements about SMF.

66. Similarly, Defendants Shore and Messenbaugh knew, or were severely reckless in not knowing, that SMF was not charging certain of its customers, including its Fixed-Price Contract Customers like the USPS and YRC, in accordance with SMF's contracts. Despite that knowledge, Defendants Shore and Messenbaugh did not tell the auditors that information. This omitted disclosure was material to the auditor's work and public statements about SMF.

67. Defendants Gathright, Shore, and Messenbaugh knew, or were severely reckless in not knowing, that SMF was including IA and Pad revenues in the revenues or increased

financial performance that it reported in its Forms 8-K dated September 28, 2010, November 15, 2010, February 15, 2011, May 11, 2011, September 28, 2011, and November 14, 2011.

68. Because SMF included IA and Pad revenue in its financial statements and public filings as alleged above, Defendants Gathright, Shore, and Messenbaugh knew, or were severely reckless in not knowing, that SMF's reported revenues and financial statements reported in its public statements and filings, including its Forms 10-K, 10-Q, and 8-K in Fiscal Years 2010 through the first quarter of 2012, did not comply with GAAP. Likewise, Defendants Gathright, Shore, and Messenbaugh knew, or were severely reckless in not knowing, that SMF was including IA gallons in the number of gallons sold that it reported in its public statements and filings, including in its Forms 10-K, 10-Q, and 8-K in Fiscal Years 2010 through the first quarter of 2012. Moreover, Defendants Shore and Messenbaugh knew, or were severely reckless in not knowing, that SMF's reported revenues and financial statements reported in the Form 10-Q for the second quarter of Fiscal Year 2012, which did not comply with GAAP and improperly included, among other things, IA revenues and IA gallons in the number of gallons sold.

69. The Defendants knew, or were severely reckless in not knowing, that but for the IA revenue from its Fixed-Price Contract Customers, including the USPS and YRC, SMF would have had net losses during the entire period of the fraudulent scheme. Despite that knowledge, Defendants Gathright, Shore, and Messenbaugh did not tell the auditors that information. This omitted disclosure was material to the auditor's work and public statements about SMF.

70. Defendants Gathright, Shore, and Messenbaugh each signed management representation letters to its outside auditor for Fiscal Years 2010 and 2011, each falsely stating, among other things:

- SMF's financial statements were prepared and fairly presented in conformity with US GAAP;

- each had no knowledge of fraud or suspected fraud affecting SMF;
- each was not aware of any illegal acts; and
- that SMF had complied with all aspects of contractual agreements that would have a material effect on the financial statements in the event of noncompliance.

71. Based on their respective knowledge of the IA set forth above, including, among other things, the internal SMF emails and reports described above, the USPS Contract and YRC Contract, and the SMF accountant that resigned citing the IA as the reason, Defendants Gathright, Shore, and Messenbaugh each knew, or was severely reckless in not knowing, that their respective statements to SMF's auditors in the Fiscal Year 2010 and 2011 management representation letters were incomplete, false, and misleading.

I. Material Misrepresentations to Shareholders and the Public

72. By improperly billing the IA to certain of its customers and recognizing revenues associated with those sales, SMF and Defendants Gathright, Shore and Messenbaugh materially misled shareholders and the investing public by misrepresenting and omitting information about its revenues, profit margins, shareholders' equity, net income and liabilities, as well as the nature and source of its revenues in its Forms 10-K for the Fiscal Years ended 2010 and 2011. Similarly, SMF and Defendants Gathright and Shore materially misled shareholders and the investing public by misrepresenting and omitting information about its revenues, profit margins, shareholders' equity, net income and liabilities, as well as the nature and source of its revenues in its Forms 10-Q for Fiscal Year 2011 through the first quarter of Fiscal Year 2012. SMF and Defendant Shore materially misled shareholders and the investing public by misrepresenting and omitting information about its revenues, profit margins, shareholders' equity, net income and liabilities, as well as the nature and source of its revenues in its Form 10-Q for the second quarter of Fiscal Year 2012. And, SMF and Defendant Gathright materially misled shareholders and the investing public by misrepresenting and omitting information about its revenues, profit margins,

shareholders' equity, net income and liabilities, as well as the nature and source of its revenues in its Forms 8-K dated September 28, 2010, November 15, 2010, February 15, 2011, May 11, 2011, September 28, 2011, and November 14, 2011. SMF, through the respective statements of Defendants Gathright, Shore, and Messenbaugh in the above Forms 10-K and 10-Q materially overstated SMF's revenues, profit margins, shareholder equity, and net income and understated its liabilities. SMF and Defendant Gathright also affirmatively misled shareholders and the investing public in the above Forms 8-K by materially overstating SMF's revenues and net income and by attributing SMF's improved financial performance on measures other than increased surcharges like the IA and the Pad. The same Defendants also did not disclose that the financial statements contained within the above Forms 10-K and 10-Q did not comply with GAAP. Each of these misleading statements and omissions was material because a reasonable investor would consider it important in making investment decisions given the above metrics directly relate to how the company was performing financially and because a reasonable investor would consider it important to know whether the company's financial statements complied with GAAP.

73. Defendants Gathright, Shore, and Messenbaugh also affirmatively misled shareholders and the investing public in their respective statements in the above SMF's Forms 10-K filed for Fiscal Years 2010 and 2011, and its Forms 10-Q from Fiscal Year 2011 through the second quarter of Fiscal Year 2012 by not disclosing that SMF was not complying with the terms of its contracts with its customers, including the USPS and YRC. Despite knowing that SMF was charging the USPS the IA and Pad, Defendants Gathright, Shore, and Messenbaugh also failed to disclose or report fraud involving management or other employees in these same public filings. Defendants Gathright, Shore, and Messenbaugh also did not disclose that

customers had complained about being overbilled and at least one employee had resigned from SMF, because of his concerns about the propriety of the IA. Defendants Gathright, Shore, and Messenbaugh also did not disclose that SMF manipulated the IA percentage as necessary to reach revenue and margin targets, or that SMF's improving financial performance was due, in large part, to the use of fraudulent surcharges or the manipulation of the IA percentage. Each of these omitted disclosures was material, in that a reasonable investor would consider them important in making investment decisions about SMF.

74. Defendants Gathright, Shore, and Messenbaugh also affirmatively misled shareholders and the investing public in SMF's Management Discussion & Analysis ("MD&A") sections of each of SMF's Forms 10-K filed for Fiscal Years 2010 and 2011. Defendants Gathright and Shore also affirmatively misled shareholders and the investing public in SMF's MD&A sections of each of SMF's Forms 10-Q filed for Fiscal Year 2011 through the first quarter of Fiscal Year 2012. Defendant Shore affirmatively misled shareholders and the investing public in SMF's MD&A section of SMF's Form 10-Q filed for the second quarter of Fiscal Year 2012. The MD&A sections in the above reports attributed SMF's increased revenues, performance, net income, profitability, growth, increased volume of fuel sales, and reduction of existing debt on legitimate business practices such as new business, increased customer additions, expansion into three new markets, investment in the development of infrastructure, recapitalization of \$40 million in bank debt and debt and equity securities. In truth, SMF's improved revenues, performance, net income, profitability, growth, increased volume of fuel sales, and reduction of existing debt were also based, in large part, on and due to SMF's manipulation of the IA percentage and secret application of price-per-gallon surcharges like the Pad, both of which violated the terms of SMF's contracts with its Fixed-Price Contract

Customers. Likewise, neither SMF nor Defendants Gathright, Shore, or Messenbaugh discussed in SMF's MD&A sections of the above periodic reports how the IA or Pad billing practices impacted SMF's financial condition or changes in its financial condition. These misleading statements and omissions were material because a reasonable investor would consider it important in making an investment decision to know whether SMF obtained revenue and increased performance and profitability on legitimate business practices or by fraudulent billing.

75. Defendants Gathright and Shore also signed and certified SMF's Forms 10-K filed for Fiscal Years 2010 and 2011, as well as SMF's Forms 10-Q filed for Fiscal Year 2011 through the first quarter of Fiscal Year 2012. Defendant Shore signed and certified SMF's Form 10-Q for the second quarter of Fiscal Year 2012. In those certifications, Defendants Gathright and Shore each certified, among other things, that: (a) they each had reviewed the report being filed with the Commission; (b) based on their respective knowledge, the report did not contain any untrue statement of material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading; (c) the financial statements and other financial information fairly present in all material respects the financial condition, results of operations and cash flows of the registrant; (d) they each had designed, or caused to be designed, disclosure controls and procedures; (e) each had disclosed, based upon the most recent evaluation of internal controls over financial reporting, to the registrant's auditors and audit committee all significant deficiencies and material weaknesses of internal controls over financial reporting and any fraud that involves management or other employees who have a significant role in internal control over financial reporting; (f) the filing fully complied with the requirements of section 13(a) or 15(d) of the Exchange Act; and (g) the information contained in the filing fairly presents, in all material

respects, the financial condition and result of operations of the Company. Defendants Gathright and Shore, with knowledge, falsely certified items (b), (c), (f) and (g) above given, among other things, that they knew that SMF could not charge the IA to Fixed-Price Contract Customers and that the USPS was a Fixed-Price Contract Customer and was nevertheless charged the IA and Pad. Defendants Gathright and Shore each knew, or should have known, that they falsely certified item (d) above because, among other things, they failed to design, or failed to cause others to design, disclosure controls and procedures that would cause SMF to disclose and report that SMF recognized revenue from improper IA and Pad charges to Fixed-Price Contract Customers. Defendants Gathright and Shore also should have known that they falsely certified item (e) above because, among other things, they failed to report fraud involving management or other SMF employees.

76. As alleged above, SMF engaged in a public offering when it filed its Form S-8 with the Commission on November 15, 2010. This offering incorporated by reference the materially misleading June 30, 2010 Form 10-K and the September 30, 2010 Form 10-Q that Defendants Gathright, Shore, and Messenbaugh all reviewed, and which were signed and certified by Defendants Gathright and Shore. Defendant Messenbaugh signed the Form 10-K. On information and belief, each of these three Defendants also reviewed (and Gathright signed) the Form S-8, which incorporated SMF's materially misleading public filings.

77. As alleged above, Defendant Gathright misrepresented and omitted material information in SMF's Forms 8-K dated September 28, 2010, November 15, 2010, February 15, 2011, May 11, 2011, September 28, 2011, and November 14, 2011. For example, in the September 28, 2010 Form 8-K, Defendant Gathright stated that SMF's net income was \$465,000 for Fiscal Year 2010, an improvement of \$2.8 million. Defendant Gathright stated the

improvement was partially attributable to lower selling, general and administrative expenses, and lower interest expenses. Defendant Gathright also quantified SMF's fourth quarter revenues to be \$53.7 million, an increase of \$13.8 million, or a 35% increase from \$39.9 million in the same period in Fiscal Year 2009. Defendant Gathright explained the increase consisted primarily of \$8.9 million attributable to price variances. Defendant Gathright also stated SMF's revenues increased \$4.9 million due to a 10% incremental increase in gallons sold compared to the same period in the prior year. In describing SMF's financial performance for the Fiscal Year, Defendant Gathright stated:

For our fiscal year ended June 30, 2010, we posted net income of \$465,000 versus a net loss of \$2.3 million in fiscal year 2009.

* * *

We have offset the reduction of demand from our customer base attributed to the recession with the addition of net new business, including the expansion of our business into three new markets. We consider this achievement to be particularly noteworthy in light of the fact that the 14% drop in demand from our existing customer base at the onset of the economic downturn in the fall of 2008 has not yet been recovered. Moreover, we have achieved profitability in fiscal 2010 notwithstanding not having any significant amount of emergency response work in the year compared to a year ago, as reflected by our net margin per gallon of 23.1 cents versus 25.8 cents per gallon in the prior year.

Although not stated, SMF's improved revenues, performance, net income, profitability, growth, and increased volume of fuel sales were also based, in large part, on and due to SMF's manipulation of the IA percentage and secret application of price-per-gallon surcharges like the Pad, both of which violated the terms of SMF's contracts with its Fixed-Price Contract Customers. Defendant Gathright made similar misrepresentations and omissions in SMF's Forms 8-K dated November 15, 2010, February 15, 2011, May 11, 2011, September 28, 2011, and November 14, 2011. These misleading statements were material because a reasonable

investor would consider it important in making an investment decision to know whether SMF obtained improvements in these metrics, including revenue and increased performance and profitability, on legitimate business practices or by fraudulent billing.

J. Numerous Red Flags Revealing SMF's Filings Did Not Comply with GAAP

78. As further described above, there were numerous red flags placing the Defendants on notice that SMF's filings did not comply with GAAP. A few examples: (a) Shore and Beard knew that customers were being selected to be charged the IA if they did not receive a bulk ticket, meter reading, or electronic download showing the actual number of gallons delivered; (b) Gathright, Shore, and Beard knew that customers that were charged the IA and complained about being overcharged were taken off the IA list; (c) North Carolina advised SMF that collecting taxes on IA gallons violated North Carolina law and ordered SMF to cease billing and collecting taxes on more gallons of fuel than SMF actually delivered; (d) the IA was used to increase SMF's margins and that the IA percentage had been increased over time; (e) the IA and other analogous charges were material to SMF's financial statements; (f) the contracts with the USPS and YRC contained fixed pricing terms that did not allow the IA to be charged; (g) the USPS was a Fixed-Price Contract Customer and was SMF's largest customer (h) an SMF accountant resigned his position stating the "IA situation necessitated that [he] pursue a more secure future elsewhere" and that he was leaving SMF because of his concerns relating to the propriety of collecting taxes from customers on undelivered IA fuel; and (i) an SMF employee told Gathright in an email that SMF was about to start improperly charging the USPS contrary to the terms of its contract with the USPS.

CLAIMS FOR RELIEF

COUNT I

**VIOLATIONS OF SECTION 17(a)(1) OF THE SECURITIES ACT
(As to all Defendants)**

79. The Commission repeats and realleges paragraphs 1 through 78 above of this Complaint as if fully set forth herein.

80. By reason of the foregoing, Defendants Gathright, Shore, Messenbaugh, and Beard, in the offer or sale of securities by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly knowingly, willfully or severely recklessly employed devices, schemes or artifices to defraud.

81. By reason of the foregoing, the Defendants, violated and, unless enjoined, are reasonably likely to continue to violate, Section 17(a)(1) of the Securities Act [15 U.S.C. § 77q(a)(1)].

COUNT II

**VIOLATIONS OF SECTION 17(a)(2) OF THE SECURITIES ACT
(As to Defendants Gathright, Shore, and Messenbaugh)**

82. The Commission repeats and realleges paragraphs 1 through 78 above of this Complaint as if fully set forth herein.

83. By reason of the foregoing, Defendants Gathright, Shore, and Messenbaugh, in the offer or sale of securities by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly obtained money or property by means of untrue statements of material fact or by omitting to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.

84. By reason of the foregoing, Defendants Gathright, Shore, and Messenbaugh, violated, and unless enjoined, are reasonably likely to continue to violate, Section 17(a)(2) of the Securities Act [15 U.S.C. § 77q(a)(2)].

COUNT III

**VIOLATIONS OF SECTION 17(a)(3) OF THE SECURITIES ACT
(As to all Defendants)**

85. The Commission repeats and realleges paragraphs 1 through 78 above of this Complaint as if fully set forth herein.

86. By reason of the foregoing, Defendants Gathright, Shore, Messenbaugh, and Beard, in the offer or sale of securities by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly engaged in acts, transactions, practices or courses of business which operated or would operate as a fraud or deceit upon the purchaser.

87. By reason of the foregoing, the Defendants violated, and unless enjoined, are reasonably likely to continue to violate, Section 17(a)(3) of the Securities Act [15 U.S.C. § 77q(a)(3)].

COUNT IV

**VIOLATIONS OF SECTION 10(b) AND RULE 10b-5(a) OF THE EXCHANGE ACT
(As to all Defendants)**

88. The Commission repeats and realleges paragraphs 1 through 78 above of this Complaint as if fully set forth herein.

89. Defendants Gathright, Shore, Messenbaugh, and Beard, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, knowingly, willfully or severely recklessly employed devices, schemes or artifices to defraud in connection with the purchase or sale of securities.

90. By reason of the foregoing, the Defendants violated, and, unless enjoined, are reasonably likely to continue to violate, Section 10(b) and Rule 10b-5(a) of the Exchange Act [15 U.S.C. § 78j(b) and 17 C.F.R. § 240.10b-5(a)].

COUNT V

**VIOLATIONS OF SECTION 10(b) AND RULE 10b-5(b) OF THE EXCHANGE ACT
(As to Gathright, Shore, and Messenbaugh)**

91. The Commission repeats and realleges paragraphs 1 through 78 above of this Complaint as if fully set forth herein.

92. Defendants Gathright, Shore and Messenbaugh, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, knowingly, willfully or severely recklessly made untrue statements of material facts and omitted to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, in connection with the purchase or sale of securities.

93. By reason of the foregoing, Defendants Gathright, Shore and Messenbaugh violated, and, unless enjoined, are reasonably likely to continue to violate, Section 10(b) and Rule 10b-5(b) of the Exchange Act [15 U.S.C. § 78j(b) and 17 C.F.R. § 240.10b-5(b)].

COUNT VI

**VIOLATIONS OF SECTION 10(b) AND RULE 10b-5(c) OF THE EXCHANGE ACT
(As to all Defendants)**

94. The Commission repeats and realleges paragraphs 1 through 78 above of this Complaint as if fully set forth herein.

95. Defendants Gathright, Shore, Messenbaugh, and Beard, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, knowingly, willfully or severely recklessly engaged in acts, practices and courses of business which operated

or would operate as a fraud or deceit upon any person in connection with the purchase or sale of securities.

96. By reason of the foregoing, the Defendants violated, and, unless enjoined, are reasonably likely to continue to violate, Section 10(b) and Rule 10b-5(c) of the Exchange Act [15 U.S.C. § 78j(b) and 17 C.F.R. § 240.10b-5(c)].

COUNT VII

VIOLATIONS OF SECTION 13(b)(5) OF THE EXCHANGE ACT (As to Gathright, Shore, and Messenbaugh)

97. The Commission repeats and realleges paragraphs 1 through 78 above of this Complaint as if fully set forth herein.

98. Defendants Gathright, Shore, and Messenbaugh each, in violation of Section 13(b)(5) of the Exchange Act, knowingly circumvented or failed to implement a system of internal accounting controls or falsified books, records or accounts described in Section 13(b)(2) of the Exchange Act.

99. By reason of the foregoing, Defendants Gathright, Shore, and Messenbaugh each violated, and, unless enjoined, are reasonably likely to continue to violate, Section 13(b)(5) of the Exchange Act [15 U.S.C. § 78m(b)(5)].

COUNT VIII

VIOLATIONS OF RULE 13b2-2 OF THE EXCHANGE ACT (As to Gathright, Shore, and Messenbaugh)

100. The Commission repeats and realleges paragraphs 1 through 78 above of this Complaint as if fully set forth herein.

101. Defendants Gathright, Shore, and Messenbaugh each, in violation of Rule 13b2-2 of the Exchange Act, directly or indirectly, as an officer or director of an issuer, in connection

with the preparation of an audit, made or caused to be made, misrepresentations or omissions to an accountant.

102. By reason of the foregoing, Defendants Gathright, Shore, and Messenbaugh each violated, and, unless enjoined, are reasonably likely to continue to violate Rule 13b2-2 of the Exchange Act [17 C.F.R. § 240.13b2-2].

COUNT IX

**VIOLATIONS OF RULE 13a-14 OF THE EXCHANGE ACT
(As to Gathright and Shore)**

103. The Commission repeats and realleges paragraphs 1 through 78 above of this Complaint as if fully set forth herein.

104. Defendants Gathright and Shore each, in violation of Rule 13a-14 of the Exchange Act, directly or indirectly, as an officer or director of an issuer, made false certifications in the Fiscal Year 2010 and 2011 Forms 10-K, Fiscal Year 2011 Forms 10-Q, and the first quarter Fiscal Year 2012 Form 10-Q. Additionally, Shore, in violation of Rule 13a-14 of the Exchange Act, directly or indirectly, as an officer or director of an issuer, made false certifications in the Fiscal Year 2012 second quarter Form 10-Q.

105. By reason of the foregoing, Defendants Gathright and Shore, violated, and, unless enjoined, are reasonably likely to continue to violate, Rule 13a-14 of the Exchange Act [17 C.F.R. § 240.13a-14].

COUNT X

**VIOLATIONS OF RULE 13b2-1 OF THE EXCHANGE ACT
(As to All Defendants)**

106. The Commission repeats and realleges paragraphs 1 through 78 above of this Complaint as if fully set forth herein.

107. The Defendants, in violation of Rule 13b2-1 of the Exchange Act, directly or indirectly, falsified or caused to be falsified books, records or accounts subject to Section 13(b)(2) of the Exchange Act.

108. By reason of the foregoing, the Defendants, directly or indirectly, violated, and, unless enjoined, is reasonably likely to continue to violate, Rule 13b2-1 of the Exchange Act [17 C.F.R. § 240.13b2-1].

COUNT XI

AIDING AND ABETTING VIOLATIONS OF SECTION 13(a) AND RULES 12b-20, 13a-1, 13a-11, AND 13a-13 OF THE EXCHANGE ACT (As to Gathright, Shore, and Messenbaugh)

109. The Commission repeats and realleges paragraphs 1 through 78 above of this Complaint as if fully set forth herein.

110. SMF violated Section 13(a) of the Exchange Act and Rules 12b-20, 13a-1, 13a-11, and 13a-13 thereunder by knowingly, or acting severely recklessly, failing to timely and accurately file the reports as the Commission has prescribed, and failed to include, in addition to the information expressly required to be stated in the reports, such further material information as was necessary to make the statements made therein, in light of the circumstances in which they were made, not misleading; and by filing or causing to be filed with the Commission materially false and misleading financial and informational statements.

111. Defendants Gathright, Shore, and Messenbaugh each aided and abetted SMF's violations of Section 13(a) of the Exchange Act and Rules 12b-20, 13a-1, 13a-11, and 13a-13 thereunder, by knowingly, or acting severely recklessly, providing substantial assistance to SMF.

112. By reason of the foregoing, Defendants Gathright, Shore, and Messenbaugh each aided and abetted SMF's violations of Section 13(a) of the Exchange Act and Rules 12b-20, 13a-1, 13a-11, and 13a-13 thereunder [15 U.S.C. § 78m(a) and 17 C.F.R. §§ 240.12b-20, 240.13a-1,

240.13a-11, and 240.13a-13], and are reasonably likely to again aid and abet violations unless enjoined.

COUNT XII

**AIDING AND ABETTING VIOLATIONS OF SECTION
13(b)(2)(A) OF THE EXCHANGE ACT
(As to All Defendants)**

113. The Commission repeats and realleges paragraphs 1 through 78 above of this Complaint as if fully set forth herein.

114. SMF violated Section 13(b)(2)(A) of the Exchange Act, by failing to make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflected the transactions of the issuer.

115. Defendants Gathright, Shore, Messenbaugh, and Beard each aided and abetted SMF's violations of Section 13(b)(2)(A) of the Exchange Act by knowingly, or acting severely recklessly, providing substantial assistance to SMF.

116. By reason of the foregoing, Defendants Gathright, Shore, Messenbaugh, and Beard each aided and abetted SMF's violations of Section 13(b)(2)(A) of the Exchange Act [15 U.S.C. § 78m(b)(2)(A)], and are reasonably likely to again aid and abet violations unless enjoined.

COUNT XIII

**AIDING AND ABETTING VIOLATIONS OF SECTION
13(b)(2)(B) OF THE EXCHANGE ACT
(As to All Defendants)**

117. The Commission repeats and realleges paragraphs 1 through 78 above of this Complaint as if fully set forth herein.

118. SMF violated Section 13(b)(2)(B) of the Exchange Act, by failing to devise and maintain a system of internal accounting controls sufficient to reasonably assure that transactions were recorded and financial statements were prepared in conformity with GAAP.

119. Defendants Gathright, Shore, Messenbaugh, and Beard each aided and abetted SMF's violations of Section 13(b)(2)(B) of the Exchange Act by knowingly, or acting severely recklessly, providing substantial assistance to SMF.

120. By reason of the foregoing, Defendants Gathright, Shore, Messenbaugh, and Beard each aided and abetted SMF's violations of Section 13(b)(2)(B) of the Exchange Act [15 U.S.C. § 78m(b)(2)(B)], and are reasonably likely to again aid and abet violations unless enjoined.

COUNT XIV

ADING AND ABETTING VIOLATIONS OF SECTION 17(a)(1) OF THE SECURITIES ACT (As to All Defendants)

121. The Commission repeats and realleges paragraphs 1 through 78 above of this Complaint as if fully set forth herein.

122. By reason of the foregoing, SMF and Defendants Gathright, Shore, Messenbaugh, and Beard each, directly or indirectly, singly or in concert, by use of the means of instruments of transportation or communication in interstate commerce or by the use of the mails, in the offer or sale of securities knowingly or recklessly employed devices, schemes and artifices to defraud, in violation of Section 17(a)(1) of the Securities Act [15 U.S.C. § 77q(a)(1)].

123. Defendants Gathright, Shore, Messenbaugh, and Beard aided and abetted violations by SMF and Defendants Gathright, Shore, and Messenbaugh of Section 17(a)(1) of the Securities Act; they each, directly or indirectly, had a general awareness that he or she was part of an overall activity that was improper or illegal; and knowingly, or was severely reckless in not

knowing, that they each provided substantial assistance to violations of Section 17(a)(1) of the Securities Act by SMF and Defendants Gathright, Shore, and Messenbaugh.

124. By reason of the foregoing, Defendants Gathright, Shore, Messenbaugh, and Beard aided and abetted violations by SMF and Gathright, Shore, and Messenbaugh of Section 17(a)(1) of the Securities Act [15 U.S.C. § 77q(a)(1)], and are reasonably likely to again aid and abet violations unless enjoined.

COUNT XV

AIDING AND ABETTING VIOLATIONS OF SECTION 17(a)(2) OF THE SECURITIES ACT (As to All Defendants)

125. The Commission repeats and realleges paragraphs 1 through 78 above of this Complaint as if fully set forth herein.

126. By reason of the foregoing, SMF and Defendants Gathright, Shore, and Messenbaugh, each, directly or indirectly, singly or in concert, by use of the means of instruments of transportation or communication in interstate commerce or by the use of the mails, in the offer or sale of securities obtained money or property by means of untrue statements of material fact or omissions to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, in violation of Section 17(a)(2) of the Securities Act [15 U.S.C. § 77q(a)(2)].

127. Defendants Gathright, Shore, Messenbaugh, and Beard aided and abetted violations by SMF and by Defendants Gathright, Shore, and Messenbaugh of Section 17(a)(2) of the Securities Act; they each, directly or indirectly, had a general awareness that he or she was part of an overall activity that was improper or illegal; and knowingly, or was severely reckless in not knowing, that they each provided substantial assistance to violations of Section 17(a)(2) of the Securities Act by SMF and Defendants Gathright, Shore, and Messenbaugh.

128. By reason of the foregoing, Defendants Gathright, Shore, Messenbaugh and Beard aided and abetted violations by SMF and Defendants Gathright, Shore, and Messenbaugh of Section 17(a)(2) of the Securities Act [15 U.S.C. § 77q(a)(2)], and are reasonably likely to again aid and abet violations unless enjoined.

COUNT XVI

**AIDING AND ABETTING VIOLATIONS OF
SECTION 17(a)(3) OF THE SECURITIES ACT
(As to All Defendants)**

129. The Commission repeats and realleges paragraphs 1 through 78 above of this Complaint as if fully set forth herein.

130. By reason of the foregoing, SMF and Defendants Gathright, Shore, Messenbaugh, and Beard each, directly or indirectly, singly or in concert, by use of the means of instruments of transportation or communication in interstate commerce or by the use of the mails, in the offer or sale of securities engaged in transactions, practices or course of business which would operate as a fraud or deceit upon the purchasers of SMF securities and upon other persons, in violation of Section 17(a)(3) of the Securities Act [15 U.S.C. § 77q(a)(3)].

131. Defendants Gathright, Shore, Messenbaugh, and Beard aided and abetted violations by SMF and by Gathright, Shore, and Messenbaugh of Section 17(a)(3) of the Securities Act; they each, directly or indirectly, had a general awareness that he or she was part of an overall activity that was improper or illegal; and knowingly, or was severely reckless in not knowing, that they each provided substantial assistance to violations of Section 17(a)(3) of the Securities Act by SMF and Defendants Gathright, Shore, and Messenbaugh.

132. By reason of the foregoing, Defendants Gathright, Shore and Messenbaugh aided and abetted violations by SMF and Defendants Gathright, Shore, and Messenbaugh of Section

17(a)(3) of the Securities Act [15 U.S.C. § 77q(a)(3)], and are reasonably likely to again aid and abet violations unless enjoined.

COUNT XVII

**AIDING AND ABETTING VIOLATIONS OF SECTION
10(b) AND RULE 10b-5(a) OF THE EXCHANGE ACT
(As to All Defendants)**

133. The Commission repeats and realleges paragraphs 1 through 78 above of this Complaint as if fully set forth herein.

134. By reason of the foregoing, SMF and Defendants Gathright, Shore, Messenbaugh, and Beard each, directly or indirectly, by use of the means and instrumentalities of interstate commerce, and of the mails in connection with the purchase or sale of securities, knowingly, willfully or recklessly employed devices, schemes or artifices to defraud, in violation of Section 10(b) of the Exchange Act and Rule 10b-5(a) thereunder [15 U.S.C. § 78j(b) and 17 C.F.R. § 240.10b-5(a)].

135. Defendants Gathright, Shore, Messenbaugh, and Beard aided and abetted violations by SMF and Defendants Gathright, Shore, and Messenbaugh of Section 10(b) of the Exchange Act and Rule 10b-5(a) thereunder; they each, directly or indirectly, had a general awareness that he or she was part of an overall activity that was improper or illegal; and knowingly, or was severely reckless in not knowing, that they each provided substantial assistance to violations of Section 10(b) of the Exchange Act and Rule 10b-5(a) thereunder by SMF and Defendants Gathright, Shore, and Messenbaugh.

136. By reason of the foregoing, Defendants Gathright, Shore, Messenbaugh, and Beard aided and abetted violations by SMF and Defendants Gathright, Shore, and Messenbaugh of Section 10(b) of the Exchange Act and Rule 10b-5(a) thereunder [15 U.S.C. § 78j(b) and 17

C.F.R. § 240.10b-5(a)], and are reasonably likely to again aid and abet violations unless enjoined.

COUNT XVIII

**ADING AND ABETTING VIOLATIONS OF SECTION
10(b) AND RULE 10b-5(b) OF THE EXCHANGE ACT
(As to All Defendants)**

137. The Commission repeats and realleges paragraphs 1 through 78 above of this Complaint as if fully set forth herein.

138. By reason of the foregoing, SMF and Defendants Gathright, Shore, and Messenbaugh each, directly and indirectly, by use of the means and instrumentalities of interstate commerce, and of the mails in connection with the purchase or sale of securities, knowingly, willfully or recklessly made untrue statements of material facts and omitted to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, in violation of Section 10(b) of the Exchange Act and Rule 10b-5(b) thereunder [15 U.S.C. § 78j(b) and 17 C.F.R. § 240.10b-5(b)].

139. Defendants Gathright, Shore, Messenbaugh, and Beard aided and abetted violations by SMF and Defendants Gathright, Shore, and Messenbaugh of Section 10(b) of the Exchange Act and Rule 10b-5(b) thereunder; they each, directly or indirectly, had a general awareness that he or she was part of an overall activity that was improper or illegal; and knowingly, or was severely reckless in not knowing, that they each provided substantial assistance to violations of Section 10(b) of the Exchange Act and Rule 10b-5(b) thereunder by SMF and Defendants Gathright, Shore, and Messenbaugh.

140. By reason of the foregoing, Defendants Gathright, Shore, Messenbaugh, and Beard aided and abetted violations by SMF and Defendants Gathright, Shore, and Messenbaugh of Section 10(b) of the Exchange Act and Rule 10b-5(c) thereunder [15 U.S.C. § 78j(b) and 17

C.F.R. § 240.10b-5(b)], and are reasonably likely to again aid and abet violations unless enjoined.

COUNT XIX

**AIDING AND ABETTING VIOLATIONS OF SECTION
10(b) AND RULE 10b-5(c) OF THE EXCHANGE ACT
(As to All Defendants)**

141. The Commission repeats and realleges paragraphs 1 through 78 above of this Complaint as if fully set forth herein.

142. By reason of the foregoing, SMF and Defendants Gathright, Shore, Messenbaugh, and Beard each, directly and indirectly, by use of the means and instrumentalities of interstate commerce, and of the mails in connection with the purchase or sale of securities, knowingly, willfully or recklessly engaged in acts, practices and courses of business which have operated as a fraud upon the purchasers of such securities, in violation of Section 10(b) of the Exchange Act and Rule 10b-5(c) thereunder [15 U.S.C. § 78j(b) and 17 C.F.R. § 240.10b-5(c)].

143. Defendants Gathright, Shore, Messenbaugh, and Beard aided and abetted violations by SMF and Defendants Gathright, Shore, and Messenbaugh of Section 10(b) of the Exchange Act and Rule 10b-5(c) thereunder; they each, directly or indirectly, had a general awareness that he or she was part of an overall activity that was improper or illegal; and knowingly, or was severely reckless in not knowing, that they each provided substantial assistance to violations of Section 10(b) of the Exchange Act and Rule 10b-5(c) thereunder by SMF and Defendants Gathright, Shore, and Messenbaugh.

144. By reason of the foregoing, Defendants Gathright, Shore, Messenbaugh, and Beard aided and abetted violations by SMF and Defendants Gathright, Shore, and Messenbaugh of Section 10(b) of the Exchange Act and Rule 10b-5(c) thereunder [15 U.S.C. § 78j(b) and 17

C.F.R. § 240.10b-5(c)], and are reasonably likely to again aid and abet violations unless enjoined.

COUNT XX

**AIDING AND ABETTING VIOLATIONS OF
SECTION 13(b)(5) OF THE EXCHANGE ACT
(As to Gathright, Shore, and Messenbaugh)**

145. The Commission repeats and realleges paragraphs 1 through 78 above of this Complaint as if fully set forth herein.

146. SMF and Defendants Gathright, Shore, and Messenbaugh each, in violation of Section 13(b)(5) of the Exchange Act, directly or indirectly, knowingly circumvented or failed to implement a system of internal accounting controls, in violation of Section 13(b)(5) of the Exchange Act [15 U.S.C. § 78m(b)(5)].

147. Defendant Gathright aided and abetted violations by SMF and Defendants Shore and Messenbaugh of Section 13(b)(5) of the Exchange Act based on his knowing or severely reckless substantial participation or assistance in allowing or directing SMF personnel to charge the IA to its Fixed-Price Contract Customers when he had been advised the IA was only allowed to be charged to At-Will Customers.

148. Defendant Shore aided and abetted violations by SMF and Defendants Gathright and Messenbaugh of Section 13(b)(5) of the Exchange Act based on his knowing or severely reckless substantial participation or assistance in allowing or directing SMF personnel to charge the IA to its Fixed-Price Contract Customers when he had been advised the IA was only allowed to be charged to At-Will Customers.

149. Defendant Messenbaugh aided and abetted violations by SMF and Defendants Gathright and Shore of Section 13(b)(5) of the Exchange Act based on her knowing or severely reckless substantial participation or assistance in allowing or directing SMF personnel to charge

the IA to its Fixed-Price Contract Customers when she had been advised the IA was only allowed to be charged to At-Will Customers.

150. By reason of the foregoing, Defendants Gathright, Shore, and Messenbaugh, aided and abetted violations by SMF and each other's respective violations of Section 13(b)(5) of the Exchange Act [15 U.S.C. § 78m(b)(5)], and are reasonably likely to again aid and abet violations unless enjoined.

COUNT XXI

AIDING AND ABETTING VIOLATIONS OF RULE 13b2-1 OF THE EXCHANGE ACT (As to all Defendants)

151. The Commission repeats and realleges paragraphs 1 through 78 above of this Complaint as if fully set forth herein.

152. Defendants Gathright, Shore, Messenbaugh, and Beard, each, in violation of Rule 13b2-1 of the Exchange Act, directly or indirectly, falsified or caused to be falsified books, records or accounts subject to Rule 13(b)(2)(A) of the Exchange Act.

153. Defendant Gathright aided and abetted violations by Defendants Shore and Messenbaugh of Rule 13b2-1 of the Exchange Act, by knowing or severely reckless substantial participation or assistance to Shore and Messenbaugh by, among other things, allowing, directing, and/or supervising SMF personnel to charge the IA to its Fixed-Price Contract Customers when he had been advised that the IA could only be charged to SMF's At-Will Customers.

154. Defendant Shore aided and abetted violations by Defendants Gathright and Messenbaugh of Rule 13b2-1 of the Exchange Act, by knowingly, or acting severely recklessly, providing substantial assistance to Gathright and Messenbaugh by, among other things, allowing, directing, and/or supervising SMF personnel to charge the IA to its Fixed-Price Contract

Customers when he had been advised that the IA could only be charged to SMF's At-Will Customers.

155. Defendant Messenbaugh aided and abetted violations by Defendant Gathright and Shore of Rule 13b2-1 of the Exchange Act, by knowingly, or acting severely recklessly, providing substantial assistance to Gathright and Shore by allowing, directing, and/or supervising SMF personnel to charge the IA to its Fixed-Price Contract Customers when she had been advised that the IA could only be charged to SMF's At-Will Customers.

156. Defendant Beard aided and abetted violations by Defendant Gathright, Shore, and Messenbaugh of Rule 13b2-1 of the Exchange Act, by knowingly, or acting severely recklessly, providing substantial assistance to Gathright, Shore, and Messenbaugh by allowing, directing, and/or supervising SMF personnel to charge the IA to its Fixed-Price Contract Customers.

157. By reason of the foregoing, Defendants Gathright, Shore, Messenbaugh, and Beard each aided and abetted the violations of Defendants Gathright, Shore, and Messenbaugh of Rule 13b2-1 of the Exchange Act [17 C.F.R. § 240.13b2-1], and are reasonably likely to again aid and abet violations unless enjoined.

RELIEF REQUESTED

WHEREFORE, the Commission respectfully requests that the Court find the Defendants committed the violations alleged, and:

I.

Permanent Injunctive Relief

Issue a Permanent Injunction, restraining and enjoining:

(1) Defendant Gathright, his officers, agents, servants, employees, attorneys, and all persons in active concert or participation with him, from violating or aiding and abetting the violation of Section 17(a) of the Securities Act [15 U.S.C. § 77q(a)], Sections 10(b), 13(a),

13(b)(2)(A), 13(b)(2)(B), and 13(b)(5) of the Exchange Act [15 U.S.C. §§ 78j(b), 78m(a), 78m(2)(A), 78m(2)(B), and 78m(b)(5)], and Rules 10b-5, 12b-20, 13a-1, 13a-11, 13a-13, 13a-14, 13b2-1, and 13b2-2 thereunder [17 C.F.R. §§ 240.10b-5, 240.12b-20, 240.13a-1, 240.13a-11, 240.13a-13, 240.13a-14, 240.13b2-1, and 240.13b2-2];

(2) Defendant Shore, his officers, agents, servants, employees, attorneys, and all persons in active concert or participation with him, from violating or aiding and abetting the violation of Section 17(a) of the Securities Act [15 U.S.C. § 77q(a)], Sections 10(b), 13(a), 13(b)(2)(A), 13(b)(2)(B), and 13(b)(5) of the Exchange Act [15 U.S.C. §§ 78j(b), 78m(a), 78m(2)(A), 78m(2)(B), and 78m(b)(5)], and Rules 10b-5, 12b-20, 13a-1, 13a-11, 13a-13, 13a-14, 13b2-1, and 13b2-2 thereunder [17 C.F.R. §§ 240.10b-5, 240.12b-20, 240.13a-1, 240.13a-11, 240.13a-13, 240.13a-14, 240.13b2-1, and 240.13b2-2];

(3) Defendant Messenbaugh, her officers, agents, servants, employees, attorneys, and all persons in active concert or participation with her, from violating or aiding and abetting the violation of Section 17(a) of the Securities Act [15 U.S.C. § 77q(a)], Sections 10(b), 13(a), 13(b)(2)(A), 13(b)(2)(B), and 13(b)(5) of the Exchange Act [15 U.S.C. §§ 78j(b), 78m(a), 78m(2)(A), 78m(2)(B), and 78m(b)(5)], and Rules 10b-5, 12b-20, 13a-1, 13a-11, 13a-13, 13b2-1, and 13b2-2 thereunder [17 C.F.R. §§ 240.10b-5, 240.12b-20, 240.13a-1, 240.13a-11, 240.13a-13, 240.13b2-1, and 240.13b2-2]; and

(4) Defendant Beard, his officers, agents, servants, employees, attorneys, and all persons in active concert or participation with him, from violating or aiding and abetting the violation of Sections 17(a) of the Securities Act [15 U.S.C. § 77q(a)], Sections 10(b), 13(b)(2)(A), and 13(b)(2)(B) of the Exchange Act [15 U.S.C. §§ 78j(b), 78m(2)(A), and 78m(2)(B)], and Rules 10b-5, and 13b2-1 thereunder [17 C.F.R. §§ 240.10b-5, and 240.13b2-1].

II.

Disgorgement

Issue an Order directing the Defendants to disgorge all ill-gotten profits or proceeds received as a result of the acts and/or courses of conduct complained of herein, with prejudgment interest thereon.

III.

Civil Money Penalties

Issue an Order directing the Defendants to pay civil money penalties pursuant to Section 20(d) of the Securities Act [15 U.S.C. § 77t(d)] and 21(d) of the Exchange Act [15 U.S.C. § 78u(d)].

IV.

Officer and Director Bars

Issue an order pursuant to Section 20(e) of the Securities Act [15 U.S.C. § 77t(e)] and Section 21(d)(2) of the Exchange Act [15 U.S.C. § 78u(d)(2)] barring the Defendants from serving as an officer or director of any issuer that has a class of securities registered pursuant to Section 12 of the Exchange Act or that is required to file reports pursuant to Section 15(d) of the Exchange Act.

V.

Retention of Jurisdiction

Further, the Commission respectfully requests that the Court retain jurisdiction over this action in order to implement and carry out the terms of all orders and decrees that may be entered, or to entertain any suitable application or motion by the Commission for additional relief within the jurisdiction of this Court.

VI.

Further Relief

Grant such other and further relief as this Court may deem just and proper.

Dated: September 25, 2015

Respectfully submitted,

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