

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 100974 / September 9, 2024

ADMINISTRATIVE PROCEEDING
File No. 3-22083

In the Matter of

Smart for Life, Inc.,

Respondent.

**ORDER INSTITUTING CEASE-AND-
DESIST PROCEEDINGS PURSUANT TO
SECTION 21C OF THE SECURITIES
EXCHANGE ACT OF 1934, MAKING
FINDINGS, AND IMPOSING A CEASE-
AND-DESIST ORDER**

I.

The Securities and Exchange Commission (“Commission”) deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 (“Exchange Act”), against Smart for Life, Inc. (“Smart for Life” or “Respondent”).

II.

In anticipation of the institution of these proceedings, Smart for Life has submitted an Offer of Settlement (the “Offer”) which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission’s jurisdiction over it and the subject matter of these proceedings, which are admitted, Smart for Life consents to the entry of this Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order (“Order”), as set forth below.

III.

On the basis of this Order and Smart for Life’s Offer, the Commission finds that:

Respondent

1. **Smart for Life**, a Delaware corporation based in Boca Raton, Florida, manufactures and sells nutritional and wellness products. Smart for Life’s common stock is

registered with the Commission pursuant to Section 12(b) of the Exchange Act and is listed on the Nasdaq Stock Market under the ticker “SMFL.” In each of its periodic reports filed with the Commission since November 14, 2022, Smart for Life has represented that its financial condition raises substantial doubt about its ability to continue as a going concern.

Facts

A. Statutory and Regulatory Framework Protecting Whistleblowers

2. The Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”), enacted on July 21, 2010, amended the Exchange Act by adding Section 21F, “Whistleblower Incentives and Protection.” The congressional purpose underlying these provisions was “to encourage whistleblowers to report possible violations of the securities laws by providing financial incentives, prohibiting employment-related retaliation, and providing various confidentiality guarantees.” *See Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934*, Release No. 34-64545, at p. 197 (Aug. 12, 2011) (the “Adopting Release”).

3. Congress explicitly noted the importance of providing financial incentives to promote whistleblowing to the Commission as it determined that “a critical component of the Whistleblower Program is the minimum payout that any individual could look towards in determining whether to take the enormous risk of blowing the whistle in calling attention to fraud.” *See The Restoring American Financial Stability Act of 2010*, Committee on Banking, Housing, and Urban Affairs (Apr. 30, 2010).

4. To fulfill this congressional purpose, the Commission adopted Rule 21F-17, which provides in relevant part:

(a) No person may take any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement . . . with respect to such communications.

Rule 21F-17 became effective on August 12, 2011.

B. Smart for Life’s Separation Agreements

5. As a regular part of its business, Smart for Life enters into separation agreements with certain employees who leave the company. A separation agreement is a contract between an employer and a departing employee documenting the rights and responsibilities of both parties incidental to the ending of the employment relationship.

6. In May 2022, Smart for Life entered into a separation agreement that required a departing employee to waive his right to recover a monetary award for participating in an investigation by a government agency. Although the agreement expressly permitted participation

in government whistleblower programs, it also required the departing employee to waive his right to a potential award. Specifically, the agreement stated, in relevant part:

It is understood that this release does not serve to waive any rights or claims that, pursuant to law, cannot be waived or subject to a release of this kind, such as: . . . the right to file a charge with an administrative agency or participate in an agency investigation; **provided, however, that [the employee] hereby waives his right to recover any money in connection with such charge or investigation.**

(Emphasis added.)

7. Similarly, in June 2023, Smart for Life entered into another separation agreement that, while expressly permitting the departing employee to participate in government whistleblower programs, required her to waive her right to recover a potential monetary award. This agreement stated:

This General Release also does not prevent you from filing a charge or complaint with, communicating with, or participating in an investigation or proceeding conducted by the Equal Employment Opportunity Commission (EEOC), the Securities and Exchange Commission (SEC), the National Labor Relations Board (NLRB), or any other federal, state, or local governmental agency or commission (“Government Agencies”). **However, to the fullest extent permitted by law, you agree that you are waiving the right to monetary damages or other equitable or monetary relief as a result of any charge, complaint, investigation, or proceeding.**

(Emphasis added.)

8. Although the Commission is unaware of any instances in which Smart for Life took action to enforce the award-waiver provisions or in which the affected employees declined to speak with the Commission staff about potential violations of securities laws due to these provisions, these provisions created impediments to participation in the Commission’s whistleblower program by having the former employees forego the critically important financial incentives that are intended to encourage persons to communicate directly with the Commission staff about possible securities law violations. Such restrictions on accepting financial awards for providing information regarding possible securities law violations to the Commission undermine the purpose of Section 21F and Rule 21F-17(a), which is to “encourag[e] individuals to report to the Commission,” *Adopting Release* at p. 201, and violate Rule 21F-17(a) by impeding individuals from communicating directly with the Commission staff about possible securities law violations.

9. Through the conduct described above, Smart for Life violated Exchange Act Rule 21F-17(a), which prohibits any person from taking any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation.

Remedial Actions, Cooperation, and Financial Condition

10. After being contacted by the Commission staff in connection with this matter, Smart for Life revised its internal agreement templates, adding language affirmatively advising employees that they are not prohibited from disclosing information to any governmental or regulatory authority, or collecting any related incentive awards. Smart for Life also used reasonable efforts to notify the affected employees that their employment and severance agreements do not in any way limit their ability to contact the Commission staff or to obtain an award in connection with information they provide.

11. In determining to accept the Offer, the Commission considered remedial acts promptly undertaken by Smart for Life, cooperation afforded to the Commission staff, and Smart for Life's apparent financial condition.

12. In its most recent Form 10-Q for the period ended September 30, 2023, Smart for Life asserted that it had cash of \$8,890 and has sustained recurring losses and has a deficiency in working capital of approximately \$11.4 million and a net loss for the nine months ended September 30, 2023 of \$12.8 million, which it stated raises substantial doubt about its ability to continue as a going concern.

IV.

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in Smart for Life's Offer.

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 21C of the Exchange Act, Smart for Life cease and desist from committing or causing any violations and any future violations of Exchange Act Rule 21F-17(a).

B. Based upon Smart for Life's representations in its Form 10-Q for the period ended September 30, 2023, the Commission is not imposing a penalty greater than \$19,500 against Smart for Life. Smart for Life shall pay a civil money penalty in the amount of \$19,500 to the Securities and Exchange Commission for transfer to the general fund of the United States Treasury, subject to Exchange Act Section 21F(g)(3). Payment shall be made in the following installments: the first \$5,000 within 10 days of the date of this Order, the second \$5,000 within 180 days of the Order, the third \$5,000 within 270 days of the Order, the fourth \$4,500, plus all accrued interest, within 360 days of the Order. Payments shall be applied first to post-order interest, which accrues pursuant to 31 U.S.C. § 3717. Prior to making the final payment set forth herein, Smart for Life shall contact the staff of the Commission for the amount due. If Smart for Life fails to make any payment by the date agreed or in the amount agreed according to the schedule set forth above, all outstanding payments under this Order, including post-order interest, minus any payments made, shall become due and payable immediately at the discretion of the staff of the Commission without further application to the Commission.

Payment must be made in one of the following ways:

- (1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;
- (2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or
- (3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Smart for Life as a respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Nicholas P. Heinke, Associate Regional Director, Division of Enforcement, United States Securities and Exchange Commission, 1961 Stout Street, Suite 1700, Denver, CO 80294.

C. The Division of Enforcement ("Division") may, at any time following the entry of this Order, petition the Commission to: (1) reopen this matter to consider whether Smart for Life provided accurate and complete financial information at the time representations in its Form 10-Q for the quarter ended September 30, 2023 were made; and (2) seek an order directing payment of the maximum civil penalty allowable under the law. No other issue shall be considered in connection with this petition other than whether the financial information disclosed by Smart for Life was fraudulent, misleading, inaccurate, or incomplete in any material respect. Smart for Life may not, by way of defense to any such petition: (1) contest the findings in this Order; (2) assert that payment of a penalty should not be ordered; (3) contest the imposition of the maximum penalty allowable under the law; or (4) assert any defense to liability or remedy, including, but not limited to, any statute of limitations defense.

D. Amounts ordered to be paid as civil money penalties pursuant to this Order shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Respondent agrees that in any Related Investor Action, it shall not argue that it is entitled to, nor shall it benefit by, offset or reduction of any award of compensatory damages by the amount of any part of Respondent's payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Respondent agrees that it shall, within thirty days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the Securities and Exchange Commission. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this proceeding. For purposes of this paragraph, a "Related Investor Action" means a private damages action brought against Respondent by or on behalf of one or more investors based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

By the Commission.

Vanessa A. Countryman
Secretary