

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 60976 / November 10, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13681

In the Matter of

**MERRIMAN CURHAN FORD
& CO., D. JONATHAN
MERRIMAN, and
CHRISTOPHER AGUILAR,**

Respondents.

**ORDER INSTITUTING ADMINISTRATIVE
AND CEASE-AND-DESIST PROCEEDINGS,
PURSUANT TO SECTIONS 15(b) AND 21C
OF THE SECURITIES EXCHANGE ACT OF
1934, MAKING FINDINGS, AND IMPOSING
REMEDIAL SANCTIONS AND A CEASE-
AND-DESIST ORDER**

I.

The Securities and Exchange Commission (“Commission”) deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934 (“Exchange Act”) against Merriman Curhan Ford & Company (the “Merriman Firm”), D. Jonathan Merriman (“Jon Merriman”) and Christopher Aguilar (“Aguilar”) (collectively, “Respondents”).

II.

In anticipation of the institution of these proceedings, Respondents have submitted Offers of Settlement (the “Offers”) 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 them and the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Sections 15(b) and 21C of the

Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order (“Order”), as set forth below.

III.

On the basis of this Order and Respondents’ Offers, the Commission finds¹ that:

RESPONDENTS

1. **Merriman Curhan Ford & Co. (the “Merriman Firm”)** is a San Francisco, California-based broker-dealer that has been registered with the Commission since April 2003. Merriman is a wholly owned subsidiary of Merriman Curhan Ford Group, Inc., which is a public company that lists its common stock on the NASDAQ Capital Market under the ticker symbol MERR.

2. **D. Jonathan Merriman (“Jon Merriman”)**, age 48, resides in San Francisco, California. At all relevant times, Jon Merriman was the founder and CEO of the Merriman Firm, and held Series 7, 63 and 24 licenses with the Financial Industry Regulatory Authority (“FINRA”). Jon Merriman resigned from his position as CEO of the Merriman Firm on June 30, 2009.

3. **Christopher Aguilar (“Aguilar”)**, age 46, resides in San Francisco, California. At all relevant times, Aguilar was the General Counsel and Chief Compliance Officer for the Merriman firm, and held Series 7, 24, 55 and 63 licenses with FINRA. Beginning in November 2008, Aguilar no longer served as the Chief Compliance Officer of the Merriman Firm, but retained his role as General Counsel. Aguilar resigned from his position as General Counsel of the Merriman Firm on April 1, 2009.

OTHER RELEVANT PERSON

4. **D. Scott Cacchione (“Cacchione”)**, age 43, resides in Woodside, California. From 1989 through June 4, 2008, Cacchione was a registered representative with various registered broker-dealers and was most recently employed at the Merriman Firm. At all relevant times, Cacchione held a Series 7 license with FINRA. Cacchione was the Managing Director of the Merriman Firm’s Client Services Group from December 2005 through June 4, 2008 when his employment was terminated. Cacchione has a disciplinary history.

¹ The findings herein are made pursuant to Respondents’ Offers of Settlement and are not binding on any other person or entity in this or any other proceeding.

FACTS

A. Overview

5. These proceedings arise out of Respondents' failure to supervise reasonably Cacchione, a registered representative who served as the former Managing Director of Client Services at the Merriman Firm. During his employment at the Merriman Firm, Cacchione perpetrated two distinct fraudulent schemes. First, from at least August 2007 through May 2008, Cacchione provided account statements of Merriman Firm customers to his customer and friend, William "Boots" Del Biaggio III ("Del Biaggio"), so that Del Biaggio could fraudulently pledge the securities held in the innocent customers' accounts to obtain more than \$45 million in personal loans. Second, from at least March 2006 through October 2007, Cacchione engaged in fraudulent unauthorized trading in several customer accounts in which he purchased risky microcap securities without his customers' permission, and then was paid the commissions generated from the unauthorized trades.

6. On March 24, 2009, the Commission filed a civil enforcement action against Cacchione, alleging violations of the antifraud provisions of the federal securities laws, related to his two fraudulent schemes. *See SEC v. David Scott Cacchione*, CV-09-01259 CRB (N.D. Cal.). On March 31, 2009, the Court entered a final judgment in which Cacchione, by consent, was permanently enjoined from violating Section 17(a) of the Securities Act of 1933 and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. On April 22, 2009, the Commission instituted and simultaneously settled administrative proceedings against Cacchione, barring him from associating with any broker or dealer, pursuant to Section 15(b)(6) of the Exchange Act. On March 31, 2009, Cacchione also pled guilty to criminal securities fraud charges that arose from his fraudulent pledging scheme. *See US v. David Scott Cacchione*, CR-09-00296 (N.D. Cal.).

7. In addition to Respondents' failure to supervise Cacchione reasonably, the Merriman Firm also violated Section 15(b)(7) of the Exchange Act and Rule 15b7-1 thereunder, and Jon Merriman and Aguilar aided and abetted the Merriman Firm's violations by allowing Cacchione to supervise other registered representatives when Cacchione did not hold a Series 24 license.

8. The Merriman Firm also violated Rule 10(a) of Regulation S-P, 17 C.F.R. § 248.10(a), based on Cacchione's disclosure of personal customer information, including confidential customer account statements, to parties outside the firm. Cacchione used the Merriman Firm's email system to forward the confidential customer information to third parties.

B. Cacchione Was Subject to Heightened Supervision at the Merriman Firm

9. After being recruited to the Merriman Firm by his friend and former co-worker Jon Merriman, Cacchione was hired in December 2005 as the Managing Director of Merriman's Client Services Group. Cacchione was hired primarily to promote corporate business for the Merriman Firm, but he also brought with him a customer base of over a hundred retail brokerage accounts held by individuals and small institutions. While the Merriman Firm had very limited retail brokerage business when Cacchione joined, which consisted primarily of its employees' personal

brokerage accounts and accounts of corporate officers that were incidental to investment banking business completed by the Merriman Firm, Cacchione's retail brokerage business represented an expansion into that business line for the Merriman Firm. Cacchione's Client Services Group was a newly created department to accommodate both his corporate and retail business.

10. Jon Merriman, the former CEO of the Merriman Firm, was Cacchione's direct supervisor for the relevant portion of Cacchione's employment with the Merriman Firm. Jon Merriman also delegated some supervisory responsibility over Cacchione to Aguilar, who served as the Merriman Firm's General Counsel and Chief Compliance Officer when Cacchione was employed at the firm. Aguilar was responsible for overseeing all of the legal work of the Merriman Firm in addition to his responsibilities as head of the firm's compliance department.

11. Both Jon Merriman and Aguilar knew that Cacchione had a disciplinary history with FINRA before he began his employment at the Merriman Firm. Specifically, in January 2004, Cacchione consented to a thirty day suspension and was fined \$30,000 after the NASD found that he sold unregistered securities to public customers without proper disclosure. In addition, according to his records maintained by FINRA, in 1995 a customer alleged that Cacchione made an unauthorized disbursement from her account to a third party, although FINRA did not discipline Cacchione.

12. Based upon Cacchione's disciplinary history, Aguilar placed Cacchione on a heightened supervisory plan in December 2005, and took responsibility for implementing the plan. As part of the heightened supervisory plan, the compliance department was supposed to review Cacchione's emails and trading activity on a daily basis. In addition, Cacchione was prohibited from signing any documents on the Merriman Firm's behalf.

13. Aguilar delegated the review function of Cacchione's trading and emails to Aguilar's subordinate, who held the title of Compliance Manager. This employee was responsible for most of the day-to-day compliance functions for the Merriman Firm, including random email reviews of more than one hundred registered representatives within the firm. During Cacchione's employment with the firm, the Merriman Firm's compliance department was thinly staffed, employing no more than four compliance personnel some of whom were also responsible for general legal work for the firm. Despite the extra burden of having to review Cacchione's emails and trading, no new staff was added to the Merriman Firm's compliance department to assist with Cacchione's heightened review and the expansion of the retail business line and addition of the Client Services Group to the Merriman Firm.

C. Respondents Allowed Cacchione to Supervise Others While He Lacked the Requisite Qualifications

14. When Cacchione was hired as the Managing Director of the Merriman Firm's newly created Client Services Group, he had not attained his Series 24 license with FINRA. The Series 24 license, or General Securities Principal license, allows registered representatives to supervise and manage broker-dealer branch activities. Jon Merriman informed Cacchione as part of his written offer of employment that Cacchione's "role requires that [Cacchione] successfully complete the NASD Series 24 exam" and it was anticipated that Cacchione would "fulfill this

requirement as a priority within the first 30 days of [his] employment.” Cacchione’s role as Managing Director required that he hold a Series 24 license because he would be in charge of supervising the registered representatives in the Client Services Group some of whom maintained their own retail customer accounts.

15. Cacchione never passed the Series 24 examination during his more than two year tenure at the Merriman Firm. Both Jon Merriman and Aguilar knew that Cacchione repeatedly failed the Series 24 exam, and therefore, never held the required Series 24 licensure.

16. Although he did not hold a Series 24 license, Jon Merriman and Aguilar allowed Cacchione to remain the Managing Director of the Client Services Group. In that role, Cacchione supervised at least five registered representatives during his tenure. Each of Cacchione’s direct reports held a Series 7 license with FINRA, and they had their own customer accounts for which they were the designated registered representative.

17. During the time Cacchione supervised the Client Services Group, the Merriman Firm published Written Supervisory Procedures (“WSP”) that it provided to its registered representatives, which Cacchione attested that he had read. During the relevant period, the WSP stated that “Promissory notes are considered to be securities, and associated persons of the firm are not allowed to sell promissory notes in a private securities transaction, whether compensation is involved or not.”

18. Despite the prohibition on the sale of promissory notes, Cacchione recommended that certain of his customers purchase or renew promissory notes that were offered by his friend and customer, William “Boots” Del Biaggio III (“Del Biaggio”), and at least eight of Cacchione’s customers purchased or renewed these notes. Cacchione also directed a registered representative whom he supervised to facilitate the promissory note sales and had this person act as a liaison between his customers and Del Biaggio regarding the note investments.

19. The Commission recently brought a securities fraud action against Del Biaggio for operating a Ponzi scheme with the funds he received as part of the promissory note offering. *See SEC v. William “Boots” Del Biaggio III*, CV-08-5450 CRB (N.D. Cal.). In a related criminal action against Del Biaggio, the criminal authorities are also seeking restitution of the money Del Biaggio earned through his Ponzi scheme, including millions of dollars from Cacchione’s customers. *See US v. William “Boots” Del Biaggio III*, CR-08-874 CRB (N.D. Cal.).

D. Cacchione Used the Merriman Firm’s Systems to Perpetrate His Fraud

i. Cacchione’s Fraudulent Pledging and Regulation S-P Violations

20. As part of the background check process for his employment, the Merriman Firm learned that Cacchione had filed for personal bankruptcy in 2003. His financial difficulties continued during his employment, and he received \$200,000 in personal loans from the Merriman Firm, which Jon Merriman approved. Cacchione also sought more than \$2 million in loans from his friend and customer, Del Biaggio, to save his home from foreclosure and to pay other expenses. Accepting loans from customers was prohibited by the Merriman Firm’s policies and procedures,

but Cacchione solicited and accepted loans from Del Biaggio anyway. Cacchione and Del Biaggio corresponded about these loans by email, using Cacchione's email address at the Merriman Firm.

21. In the Summer of 2007, Del Biaggio was in the midst of negotiating a deal to buy an interest in the Nashville Predators NHL hockey team. Because Del Biaggio did not have the \$25 million in cash he needed for the purchase of the Predators or sufficient collateral to secure a \$25 million loan, Del Biaggio asked Cacchione to help him make it appear that Del Biaggio had ample collateral for the loans he was seeking and to help him inflate his net worth on his NHL application.

22. In August 2007, Del Biaggio and Cacchione hatched a scheme where Cacchione provided Del Biaggio with an account statement from a Merriman Firm institutional customer that reflected nearly \$19 million in assets. Cacchione requested and received the statement via email from another registered representative in the Merriman Firm who serviced the institutional customer. There was no legitimate business reason for Cacchione to have a copy of the account statement. The account statement contained confidential information related to the customer, including the customer's account balance, account number, and personal identifying information. Cacchione emailed a .pdf version of the account statement from his work email address at the Merriman Firm to his personal email account and then forwarded it to Del Biaggio. Del Biaggio then had his name and address pasted over the real customer's name. It was then copied and scanned into a .pdf file. Del Biaggio then forwarded the statement to the NHL to demonstrate his financial wherewithal to purchase the Predators team.

23. In August and September 2007, Cacchione supplied Del Biaggio with account statements belonging to two unknowing individual clients of Cacchione. These statements also contained confidential customer information, such as the customers' account balances, account numbers, and personal identifying information. Cacchione forwarded the statements from his Merriman Firm email address to his home email account, and then forwarded the statements to Del Biaggio. Del Biaggio forged his name and information onto the statements after receiving them from Cacchione. Del Biaggio then emailed at least two sets of the doctored statements back to Cacchione at Cacchione's Merriman Firm email account. From November 2007 through April 2008, Del Biaggio doctored the individuals' statements and the institutional customer's statements and provided them to at least seven banks and private lenders. Del Biaggio obtained roughly \$45 million in loans based upon his and Cacchione's representations that the accounts belonged to Del Biaggio.

24. In addition to providing the doctored account statements to Del Biaggio's lenders, Cacchione and Del Biaggio also signed and provided the lenders with Account Control Agreements in which they pledged the securities contained in the individuals' Merriman Firm accounts as collateral for the loans Del Biaggio obtained. Cacchione signed the agreements without authority on behalf of the Merriman Firm, certifying that the pledged accounts belonged to Del Biaggio. Cacchione sent Del Biaggio a copy of another Merriman Firm customer's Account Control Agreement from his Merriman Firm email account so that Del Biaggio would have a sample by which to model the fake Account Control Agreements for his loans. The agreement sent to Del Biaggio contained confidential account information of the customer, including the customer's contact information and account number. Del Biaggio used the agreement as a sample

to draft the Account Control Agreements for some of his loans. Cacchione received copies of one of the unsigned Account Control Agreements drafted by Del Biaggio by email at his Merriman Firm email address and exchanged numerous emails with Del Biaggio regarding execution of the agreements.

25. To perpetuate the fraud, from December 2007 through May 2008, Cacchione continued to supply Del Biaggio with electronic copies of the individuals' monthly account statements by email so that Del Biaggio could send the forged statements to some of the lenders on a monthly basis to show that the collateral remained intact. Cacchione sent these statements from his Merriman Firm email address to his home email account and, on at least two occasions, to Del Biaggio directly.

26. On September 14, 2007, early in the scheme, Del Biaggio sent an email to Cacchione's Merriman Firm address in which he stated that he was "worried" that one of the parties he had provided with doctored account statements would send a letter to Cacchione's firm seeking "verification" that the other customers' assets belonged to him. Some of the lenders did, in fact, contact Cacchione who "verified" that the other customers' accounts belonged to Del Biaggio. Del Biaggio and Cacchione continued their fraud until May 2008 when SEC exam staff conducting an examination of the Merriman Firm uncovered the scheme through a review of Cacchione's emails.

ii. Cacchione's Unauthorized Trading

27. Between at least March 2006 and October 2007, Cacchione engaged in a pattern of unauthorized trading in certain of his customers' accounts. As part of the unauthorized trading, Cacchione chose risky, thinly-traded stocks for his customers. Jon Merriman, Cacchione's direct supervisor, encouraged Cacchione to recommend these stocks to his customers.

28. During the relevant time period, Cacchione did not have written agreements with any of his customers allowing him to trade in their accounts without permission. In fact, he acknowledged in writing in his annual compliance reviews with the Merriman Firm that he did not have any customer accounts in which he could trade without permission (i.e., discretionary authority).

29. Despite his lack of discretionary authority, Cacchione traded in certain of his customers' accounts without obtaining their permission. Cacchione made unrealistic promises to his boss, Jon Merriman, about the number of shares he could sell to customers from initial public offerings ("IPOs") that the Merriman Firm handled. In at least four offerings in which the Merriman Firm participated during May through November 2007, Cacchione agreed to take large blocks of shares when he did not have customers to take all of these shares. Cacchione then placed these unwanted and unallocated shares into certain of his customers' accounts where the accounts had excess cash to pay for the shares without first obtaining his customers' permission. One of the registered representatives whom Cacchione supervised assisted him in his unauthorized trading scheme by preparing lists of customers who had excess cash in their accounts to take these unallocated shares. Several customers complained to Cacchione about the unauthorized trading in their accounts in emails that were sent to Cacchione's Merriman Firm email account.

30. In addition, in the late Summer of 2006, one of Cacchione's customers, an elderly widow, discovered unauthorized purchases of a risky, thinly-traded stock in her account, and immediately began contacting Cacchione to determine why the purchases were made and how they could be undone. For months, she unsuccessfully tried to get Cacchione to liquidate these holdings. Ultimately, in December 2006, after she contacted Jon Merriman, the Merriman Firm liquidated her holdings and paid her a settlement for her losses. Jon Merriman spoke to the customer about her complaint, and Aguilar was involved in preparing the settlement papers that resolved her claims.

31. Similarly, from May to October 2007, Cacchione made twenty unauthorized trades in the portfolio of another one of his customers, a local children's charity. Cacchione did not have authority to trade in the charity's account, and all trading decisions were to be made by the charity's investment adviser. Despite his lack of trading authority, Cacchione purchased in the charity's account several risky penny stocks and shares from three IPOs. The charity complained to Cacchione about the trades in the Fall of 2007, and the Merriman Firm agreed to cancel the trades (months after they were placed), but ultimately sold all of the unauthorized stocks held by the charity, and paid the charity a settlement for its losses.

E. Jon Merriman and Aguilar Failed Reasonably to Supervise Cacchione

i. Jon Merriman and Aguilar Unreasonably Delegated Their Supervisory Responsibilities Over Cacchione

32. As the CEO and a principal of the Merriman Firm, Jon Merriman was ultimately responsible for all supervision matters, including the supervision of all of the Merriman Firm's registered representatives, unless and until he reasonably delegated particular functions to another person in the firm, and neither knew, nor had reason to know, that such person's performance was deficient.

33. When Cacchione was hired at the Merriman Firm, he reported directly to Jon Merriman, and the two men who were friends worked closely throughout Cacchione's tenure at the Merriman Firm. Cacchione and Jon Merriman sat back-to-back at desks on the Merriman Firm's trading floor, and Jon Merriman was responsible for overseeing Cacchione's day-to-day business activities. As his direct boss, Jon Merriman was also responsible for providing Cacchione with annual performance evaluations and for recommending the amount of his compensation.

34. Although Cacchione reported to Jon Merriman regarding his daily business activities, Jon Merriman delegated some of his supervisory responsibilities over Cacchione to Aguilar, who was the Merriman Firm's Chief Compliance Officer and General Counsel during the relevant time period. Jon Merriman's delegation of responsibility to Aguilar was unreasonable, however, because he never followed up to ensure that Aguilar was supervising Cacchione. As discussed below, Jon Merriman did not follow up with Aguilar regarding his supervision of Cacchione even after Jon Merriman became aware of a customer complaint and other red flags related to Cacchione's work. In fact, Jon Merriman was unaware that Aguilar had placed Cacchione on a heightened supervisory plan, although he knew that Cacchione had a disciplinary history when he joined the Merriman Firm.

35. While Aguilar placed Cacchione on a heightened supervisory plan that entailed a daily review of his emails and trading, he delegated the day-to-day review of Cacchione's emails to his subordinate who held the title Compliance Manager. This employee already had responsibility for the bulk of the daily compliance functions at the firm, including random email reviews of more than one hundred registered representatives within the Merriman Firm. During the period that Cacchione was subject to heightened supervision from December 2005 through at least April 2007, Aguilar did not follow up to ensure that the daily email and trading review was being conducted. In fact, numerous suspicious emails were missed.

36. In May 2007, after employee turnover in the compliance department, Aguilar did not inform his newly hired Compliance Manager about the heightened review of Cacchione's emails and trading. Even though Cacchione had a disciplinary history when he joined the Merriman Firm, and the firm received a new customer complaint in December 2006, Cacchione's heightened supervision was discontinued when Aguilar failed to tell the new employee to perform daily reviews of Cacchione's emails and trading. By May 2007, Cacchione and Aguilar had developed a friendship in addition to their working relationship.

ii. Jon Merriman and Aguilar Failed to Act On "Red Flags" Relating to Cacchione's Unauthorized Trading

37. As noted in Paragraph 30, above, in the Fall of 2006, both Jon Merriman and Aguilar were aware that one of Cacchione's customers, an elderly widow, had complained about Cacchione purchasing risky, thinly traded stocks for her account. To resolve the claim, Aguilar prepared settlement papers and Jon Merriman signed a settlement check that was provided to the customer. Jon Merriman also counseled Cacchione about refraining from engaging in the same trading activity in the future.

38. Throughout his tenure at the Merriman Firm, Cacchione's unauthorized trading created significant operational problems some of which were brought to the attention of Aguilar and Jon Merriman. For instance, during 2007, Cacchione represented to Jon Merriman that he had customers who were interested in buying large blocks of shares in four separate offerings in which the Merriman Firm was acting as underwriter. In reality, Cacchione did not have customers to take all of the shares he requested so many of the share blocks remained unallocated for days or weeks while Cacchione determined which of his customer accounts had sufficient cash to take the unwanted (and unauthorized) shares. The allocation issues were elevated to Aguilar's attention by the Merriman Firm's operations department because the Merriman Firm was ultimately going to be responsible to pay for the shares if Cacchione's customers did not pay for them. Cacchione provided various excuses to Aguilar regarding why the shares were unallocated, including that customers had changed their minds about taking the stock. Aguilar failed to follow up on these issues beyond speaking with Cacchione.

39. From May 2007 through October 2007, Cacchione also made twenty unauthorized trades in the account of a local children's charity. Cacchione did not have discretionary authority to trade without permission in the account. When the charity discovered the trades in the Fall of 2007, it sought to have all of the trades canceled and the commissions generated from the trades reimbursed. Cacchione had to inform Aguilar about the charity's request to obtain approval to

cancel the twenty trades, many of which had been executed months before. Despite this unusual request, Aguilar approved the cancellations and agreed to reimburse the charity the commissions it paid on the trades without following up with the charity to determine why it sought cancellation of the transactions. Aguilar accepted at face value Cacchione's story that the charity had business reasons for canceling the trades. In addition, in November 2007, Jon Merriman received a Daily Error Report reflecting the twenty canceled trades in the charity's account. Jon Merriman did not follow up with either Cacchione or the charity to determine why the trades were canceled.

40. Cacchione continued to place unauthorized trades in some of his customers' accounts in 2008 until his fraud came to light as part of an SEC examination of the Merriman Firm. Cacchione's suspicious trading activity included frequent unallocated trades, canceled trades, and numerous extensions before trades were allocated to customer accounts, clear "red flags" as set forth in the Merriman Firm's WSP. ("Unusual account activity, such as cancels and re-bills, sellouts, or numerous extensions can be a sign of unauthorized trading.") The WSP also noted that trading activity would be monitored on a daily basis to detect any unusual account activity. Jon Merriman and Aguilar did not discharge their supervisory duties adequately and failed to investigate the "red flags" presented by Cacchione's unauthorized trading.

F. The Merriman Firm and Jon Merriman Failed Reasonably to Supervise Cacchione

41. During the relevant time period, the Merriman Firm's WSP described the firm as "a publicly-traded securities broker-dealer and investment bank focused on fast growing companies and institutional investors." The WSP also stated that the Merriman Firm provides "investment research, brokerage and trading services primarily to institutions." When Cacchione joined the Merriman Firm in December 2005, he brought over a hundred individual customer accounts with him to the firm. As a result, the Merriman Firm expanded its retail brokerage business beyond services mainly offered to officers of existing corporate business clients. Although this was a new area for the Merriman Firm, it did not add any additional compliance personnel or provide training to its supervisors relating to the supervision of this newly expanded line of business. During the relevant time, the Merriman Firm had a thinly staffed compliance department with a Chief Compliance Officer, who also handled all of the day-to-day legal work of the Merriman Firm as general counsel, a Director of Compliance who handled nearly all of the daily compliance responsibilities for the firm, and an assistant who performed administrative functions. In addition, the Chief Compliance Officer, Aguilar, was inexperienced with supervising retail brokerage activities, as the Merriman Firm was his first employment in the brokerage industry.

APPLICABLE LAW

The Merriman Firm, Jon Merriman and Aguilar Failed Reasonably to Supervise Cacchione

42. Section 15(b)(4)(E) of the Exchange Act requires broker-dealers reasonably to supervise persons subject to their supervision, with a view toward preventing violations of the federal securities laws. *See, e.g., Dean Witter Reynolds, Inc.*, Exchange Act Rel. No. 46578 (October 1, 2002). The Commission has emphasized that the "responsibility of broker-dealers to

supervise their employees by means of effective, established procedures is a critical component in the federal investor protection scheme regulating the securities markets.” *Id.* Section 15(b)(4)(E) of the Exchange Act provides for the imposition of a sanction against a broker or dealer who “has failed reasonably to supervise, with a view to preventing violations of the securities laws, another person who commits such a violation, if such other person is subject to his supervision.” Section 15(b)(6)(A)(i) incorporates by reference Section 15(b)(4)(E).

43. As a result of the conduct described above, the Merriman Firm, Jon Merriman and Aguilar failed reasonably to supervise Cacchione with a view to detecting and preventing his violations of the federal securities laws. Jon Merriman and Aguilar unreasonably delegated their supervisory responsibility over Cacchione, and then failed to follow up to ensure that Cacchione was adequately supervised. Both Jon Merriman and Aguilar also failed to act on red flags that came to their attention regarding Cacchione’s unauthorized trading. Had they adequately supervised Cacchione, it is more likely that Cacchione’s fraudulent pledging scheme and his unauthorized trading in his customers’ accounts could have been discovered.

44. The Merriman Firm and Jon Merriman also failed reasonably to supervise Cacchione by failing to provide adequate resources to implement the firm’s supervisory procedures. Had they provided adequate resources to manage the Merriman Firm’s newly added retail brokerage business, including sufficient personnel to implement Cacchione’s heightened supervisory plan, it is more likely that they could have detected and prevented Cacchione’s misconduct.

The Merriman Firm Violated Section 15(b)(7) of the Exchange Act and Rule 15b7-1 Thereunder, and Jon Merriman and Aguilar Aided and Abetted and Caused the Violations

45. Rule 15b7-1, promulgated under Section 15(b)(7) of the Exchange Act, provides in pertinent part that “[n]o registered broker or dealer shall effect any transaction in, or induce the purchase or sale of, any security unless any natural person associated with such broker or dealer who effects or is involved in effecting such transaction is registered or approved in accordance with the standards of training, experience, competence and other qualification standards . . . established by the rules of any national securities exchange or national securities association of which such broker or dealer is a member.”

46. For more than two years, the Merriman Firm, Jon Merriman and Aguilar delegated the supervision of the registered representatives in the Merriman Firm’s Client Services Group to Cacchione, an individual who did not pass the required supervisory examination and was not registered as a supervisor under NASD Rules 1021 and 1022. Jon Merriman and Aguilar knew, or were reckless in not knowing, that the individual to whom they delegated supervisory authority was not registered as a supervisory principal.

47. As a result of the conduct described above, the Merriman Firm willfully violated Section 15(b)(7) of the Exchange Act and Rule 15b7-1 thereunder, and Jon Merriman and Aguilar willfully aided and abetted and caused the Merriman Firm’s violations.

The Merriman Firm Violated Rule 10(a) of Regulation S-P as a Result of Cacchione's Conduct

48. Rule 10(a) under Regulation S-P provides, in part, that broker-dealers may not “directly or through any affiliate, disclose any nonpublic personal information about a consumer to a nonaffiliated third party unless: . . . (iii) [y]ou have given the consumer a reasonable opportunity, before you disclose the information to the nonaffiliated third party, to opt out of the disclosure; and (iv) [t]he consumer does not opt out.”

49. As a result of the conduct described above in which Cacchione used the Merriman Firm's computer system to disseminate confidential customer information to third parties, the Merriman Firm willfully violated Rule 10(a) of Regulation S-P (17 C.F.R. § 248.10(a)).

THE RESPONDENTS' REMEDIAL EFFORTS

50. In determining to accept the Offer, the Commission considered remedial acts promptly undertaken by the Merriman Firm and cooperation afforded the Commission staff by Respondents. This included undertaking an internal investigation, reviewing hundreds of thousands of electronic and paper documents and interviewing witnesses; cooperating with the SEC staff; promptly suspending and then firing Scott Cacchione; making comprehensive management and structural changes such as: reorganizing the firm's management structure, separating the role of the Chief Compliance Officer from the role of the General Counsel, hiring a former FINRA examiner as the Chief Compliance Officer, vastly scaling back the firm's retail accounts and related business activities, reviewing the firm's compliance procedures; agreeing to hire an Outside Compliance Consultant and Monitor who will provide reports to the Board of Directors (and the SEC), and refocusing the firm's business into its core fields of sales and trading for institutions, research and investment banking.

UNDERTAKINGS

51. The Merriman Firm has undertaken to:

a. Devise and implement, within 30 days after the issuance of this Order: a policy and a set of procedures for communicating and documenting supervisory relationships for all registered representatives; and a plan for allocating adequate resources to regulatory supervision.

b. Retain, within ten (10) days of the date of entry of this Order, the services of an Independent Consultant not unacceptable to the staff of the Commission for the period of one year. The Merriman Firm shall exclusively bear all costs, including compensation and expenses, associated with the retention of the Independent Consultant. The Merriman Firm shall retain the Independent Consultant to: (i) review the Merriman Firm's written policies and procedures relating to the supervision of registered representatives; (ii) make recommendations concerning these policies and procedures with a view to assuring compliance with supervisory responsibilities and dedication of sufficient resources to supervision of its registered

representatives; and (iii) to ensure that the Merriman Firm and Jon Merriman are complying with all remedies ordered in Section IV below.

c. No later than ten (10) days following the date of the Independent Consultant's engagement, provide to the Commission staff a copy of an engagement letter detailing the Independent Consultant's responsibilities pursuant to paragraph 51.b. above.

d. Arrange for the Independent Consultant to issue its report within 90 days after the date of the engagement. Within ten (10) days after the issuance of the report, the Merriman Firm shall require the Independent Consultant to submit a copy of the Independent Consultant's report to Michael Dicke, Associate Regional Director, Division of Enforcement, Securities and Exchange Commission, 44 Montgomery Street, Suite 2600, San Francisco, California, 94104. The Independent Consultant's report shall describe the review performed and the conclusions reached and shall include any recommendations deemed necessary for changes in or improvements to the Merriman Firm's written policies and procedures and a procedure for implementing the recommended changes or improvements.

e. Within 30 days of receipt of the Independent Consultant's Report, adopt all recommendations contained in the Report and remedy any deficiencies in its written policies and procedures; provided, however, that as to any recommendation that the Merriman Firm believes is unnecessary or inappropriate, the Merriman Firm may, within fifteen (15) days of receipt of the Report, advise the Independent Consultant and the Commission's staff in writing of any recommendations that it considers to be unnecessary or inappropriate. With respect to any recommendation that the Merriman Firm considers unnecessary or inappropriate, the Merriman Firm shall propose in writing an alternative policy or procedure designed to achieve the same objective or purpose.

f. With respect to any recommendation with which the Merriman Firm and the Independent Consultant do not agree, attempt in good faith to reach an agreement with the Independent Consultant within 30 days of receipt of the Report. In the event that the Merriman Firm and the Independent Consultant are unable to agree on an alternative proposal acceptable to the Commission's staff, the Merriman Firm will abide by the original recommendation of the Independent Consultant.

g. Within 180 days of the entry of this Order, submit an affidavit to the Commission's staff stating that it has implemented any and all recommendations of the Independent Consultant, or explaining the circumstances under which it has not implemented such recommendations.

h. Cooperate fully with the Independent Consultant and provide the Independent Consultant with access to its files, books, records and personnel as reasonably requested for the Independent Consultant's review.

i. The Merriman Firm shall require the Independent Consultant to enter into an agreement that provides that for the period of engagement and for a period of two years from

completion of the engagement, the Independent Consultant shall not enter into any employment, consultant, attorney-client, auditing or other professional relationship with the Merriman Firm, or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity. The agreement will also provide that the Independent Consultant will require that any firm with which he is affiliated or of which he is a member, and any person engaged to assist the Independent Consultant in performance of his duties under this Order shall not, without prior written consent of the Commission's staff in the San Francisco Regional Office, enter into any employment, consultant, attorney-client, auditing or other professional relationship with the Merriman Firm, or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity as such for the period of the engagement and for a period of two years after the engagement.

j. For good cause shown, and upon timely application from the Merriman Firm or the Independent Consultant, the Commission's staff may extend any of the procedural dates set forth above.

52. Respondent Jon Merriman shall provide to the Commission, within thirty (30) days after the end of the ordered twelve month suspension period, an affidavit that he has complied fully with this sanction. Such affidavit shall be submitted under cover letter that identifies Jon Merriman as a Respondent and the file number of these proceedings, and hand-delivered or mailed to Michael Dicke, Associate Regional Director, Division of Enforcement, Securities and Exchange Commission, 44 Montgomery Street, Suite 2600, San Francisco, California, 94104.

53. Respondent Aguilar shall provide to the Commission, within thirty (30) days after the end of the ordered twelve month suspension period, an affidavit that he has complied fully with this sanction. Such affidavit shall be submitted under cover letter that identifies Aguilar as a Respondent and the file number of these proceedings, and hand-delivered or mailed to Michael Dicke, Associate Regional Director, Division of Enforcement, Securities and Exchange Commission, 44 Montgomery Street, Suite 2600, San Francisco, California, 94104.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondents' Offers.

Accordingly, pursuant to Sections 15(b) and 21C of the Exchange Act, it is hereby ORDERED that:

- A. Pursuant to Section 15(b)(4) of the Exchange Act, the Merriman Firm is hereby censured.
- B. Pursuant to Section 21C of the Exchange Act, the Merriman Firm shall cease and desist from committing or causing any violations and any future violations of Section 15(b)(7) of the Exchange Act and Rule 15b7-1 thereunder, and Rule 10(a) of Regulation S-P (17 C.F.R. § 248.10(a)).

- C. The Merriman Firm shall pay civil penalties of \$100,000 to the United States Treasury. Payment shall be made in the following installments: (1) \$50,000 within 15 days of entry of this Order; and (2) \$50,000 within 180 days of this Order. If any payment is not made by the date the payment is required by this Order, the entire outstanding balance of civil penalties, plus any additional interest accrued pursuant 31 U.S.C. § 3717, shall be due and payable immediately, without further application. Payments shall be: (A) made by United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (D) submitted under cover letter that identifies the Merriman Firm as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Michael S. Dicke, Associate Regional Director, Division of Enforcement, Securities and Exchange Commission, 44 Montgomery Street, Suite 2600, San Francisco, California 94104.
- D. Pursuant to Section 21C of the Exchange Act, Jon Merriman shall cease and desist from causing any violations and any future violations of Section 15(b)(7) of the Exchange Act and Rule 15b7-1 thereunder.
- E. Pursuant to Section 15(b)(6) of the Exchange Act, Jon Merriman be, and hereby is, suspended from acting in a supervisory capacity for any broker or dealer for a period of twelve (12) months, effective beginning the second Monday following the issuance of this Order.
- F. Jon Merriman shall comply with his undertaking enumerated in Section III, paragraph 52, above.
- G. Jon Merriman shall, within ten (10) days of the entry of this Order, pay civil penalties of \$75,000 to the United States Treasury. Such payment shall be: (A) made by United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (D) submitted under cover letter that identifies Jon Merriman as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Michael S. Dicke, Associate Regional Director, Division of Enforcement, Securities and Exchange Commission, 44 Montgomery Street, Suite 2600, San Francisco, California 94104.
- H. Pursuant to Section 21C of the Exchange Act, Aguilar shall cease and desist from causing any violations and any future violations of Section 15(b)(7) of the Exchange Act and Rule 15b7-1 thereunder.

- I. Pursuant to Section 15(b)(6) of the Exchange Act, Aguilar be, and hereby is, suspended from acting in a supervisory capacity for any broker or dealer for a period of twelve (12) months, effective beginning the second Monday following the issuance of this Order.
- J. Aguilar shall comply with his undertaking enumerated in Section III, paragraph 53, above.
- K. Aguilar shall pay civil penalties of \$40,000 to the United States Treasury. Payment shall be made in the following installments: (1) \$20,000 within fifteen (15) days of entry of this Order; and (2) \$20,000 within 180 days of this Order. If any payment is not made by the date the payment is required by this Order, the entire outstanding balance of civil penalties, plus any additional interest accrued pursuant 31 U.S.C. § 3717, shall be due and payable immediately, without further application. Payments shall be: (A) made by United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (D) submitted under cover letter that identifies Aguilar as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Michael S. Dicke, Associate Regional Director, Division of Enforcement, Securities and Exchange Commission, 44 Montgomery Street, Suite 2600, San Francisco, California 94104.
- L. The Merriman Firm shall comply with the undertakings enumerated in Section III, paragraph 51, above.

By the Commission.

Elizabeth M. Murphy
Secretary