

1 MARC J. FAGEL (Cal. Bar No. 154425)
2 MICHAEL S. DICKE (Cal. Bar No. 158187)
3 MARK P. FICKES (Cal. Bar No. 178570)
4 (fickesm@sec.gov)
5 JINA L. CHOI (New York Bar No. 2699718)
6 (choij@sec.gov)
7 KRISTIN A. SNYDER (Cal. Bar No. 187175)
8 (snyderk@sec.gov)

9 Attorneys for Plaintiff
10 SECURITIES AND EXCHANGE COMMISSION
11 44 Montgomery Street, Suite 2600
12 San Francisco, California 94104
13 Telephone: (415) 705-2500
14 Facsimile: (415) 705-2501

15 UNITED STATES DISTRICT COURT
16 NORTHERN DISTRICT OF CALIFORNIA
17 SAN FRANCISCO DIVISION

18 SECURITIES AND EXCHANGE COMMISSION,
19 Plaintiff,
20 vs.
21 DAVID SCOTT CACCHIONE,
22 Defendant.

23 **CV 09 1259**
Case No. _____

24 COMPLAINT

JL

25 Plaintiff Securities and Exchange Commission ("Commission") alleges:

26 **SUMMARY OF THE ACTION**

27 1. This matter involves two distinct fraudulent schemes perpetrated by Defendant David
28 Scott Cacchione, a former Managing Director of San Francisco based brokerage firm Merriman
Curhan Ford & Co. ("Merriman") from at least March 2006 through May 2008. In one scheme,
Cacchione provided account statements of Merriman customers to his customer and friend, William J.
"Boots" Del Biaggio III ("Del Biaggio"), so that Del Biaggio could fraudulently pledge the securities
held in the customers' accounts to obtain more than \$45 million in personal loans. In the second
scheme, Cacchione engaged in unauthorized trading in several customer accounts in which he

1 purchased risky, thinly-traded stocks without his customers' permission. Cacchione netted more than
2 \$32,000 in unlawful commissions generated from the unauthorized trades.

3 2. In August 2007, Cacchione began emailing account statements of several unknowing
4 Merriman customers to Del Biaggio so that Del Biaggio could forge the statements to make it look
5 like Del Biaggio owned the assets in the accounts. Using the forged statements, Del Biaggio was
6 able to obtain \$45 million in personal loans from banks and private lenders (part of which he used to
7 purchase an interest in a professional hockey team) based on his and Cacchione's oral and written
8 misrepresentations that the accounts belonged to Del Biaggio. In addition to supplying account
9 statements, Cacchione also signed agreements with Del Biaggio's lenders falsely confirming that Del
10 Biaggio owned the assets in the innocent customers' accounts.

11 3. In addition, from at least March 2006 through October 2007, Cacchione traded
12 without permission in several of his customers' accounts. For example, with one of his customers, a
13 children's charitable organization, Cacchione made twenty unauthorized trades over a six month
14 period in 2007, purchasing risky penny stocks (i.e., generally speculative securities of very small
15 companies trading at less than \$5). Cacchione knew these stocks were inconsistent with the charity's
16 conservative investment objectives. Cacchione engaged in similar misconduct in 2006 with an
17 elderly customer where he liquidated more conservative investments in her brokerage account to
18 purchase risky, thinly-traded securities.

19 4. Cacchione violated the federal securities laws, including the antifraud statutes, through
20 his role in the fraudulent pledging of his customers' securities, and his unauthorized trading in his
21 customers' accounts. The Commission seeks to enjoin Cacchione from further conduct that violates
22 the securities laws and seeks disgorgement of ill-gotten gains and civil money penalties from him.

23 **JURISDICTION, VENUE, AND INTRADISTRICT ASSIGNMENT**

24 5. The Commission brings this action pursuant to Sections 20(b) and 20(d) of the
25 Securities Act of 1933 ("Securities Act") [15 U.S.C. §§ 77t(b) and 77t(d)], and Sections 21(d) and
26 21(e) of the Securities Exchange Act of 1934 ("Exchange Act") [15 U.S.C. §§ 78u(d) and 78u(e)].
27 This Court has jurisdiction over this action pursuant to Sections 20(d)(1) and 22(a) of the Securities
28

1 Act [15 U.S.C. §§ 77t(d)(1) and 77v(a)], and Sections 21(d)(3), 21(e), and 27 of the Exchange Act
2 [15 U.S.C. §§ 78u(d)(3), 78u(e), and 78aa].

3 6. Venue in this district is proper pursuant to Section 22(a) of the Securities Act
4 [15 U.S.C. § 77v(a)], and Section 27 of the Exchange Act [15 U.S.C. § 78aa] because defendant
5 Cacchione resides in, and a substantial portion of the conduct alleged in this complaint occurred
6 within, the Northern District of California.

7 7. Assignment to the San Francisco Division of this Court is proper because a substantial
8 part of the events or omissions that give rise to claims alleged in this Complaint occurred in San
9 Francisco County.

10 DEFENDANT

11 8. Defendant David Scott Cacchione (“Cacchione”), age 44, resides in Woodside,
12 California. Since 1989, Cacchione has been a registered representative with the Financial Industry
13 Regulatory Authority (“FINRA”), formerly the National Association of Securities Dealers
14 (“NASD”). Cacchione has also been employed with various registered broker-dealers since 1989 and
15 was most recently employed at Merriman Curhan Ford & Co. (“Merriman”). Cacchione was the
16 Managing Director of Merriman’s Client Services Group from December 2005 through June 4, 2008,
17 when his employment was terminated. Cacchione has a disciplinary history with the NASD. In
18 January 2004, he consented to a thirty day suspension and was fined \$30,000 after the NASD found
19 that he sold unregistered securities to public customers without proper disclosure.

20 OTHER RELEVANT PARTIES

21 9. William “Boots” Del Biaggio, III, age 41, resides in San Jose, California. Del Biaggio
22 is the co-founder and former CEO of a private venture firm, Sand Hill Capital L.P. (“Sand Hill”),
23 which was formed in 1996 and has provided seed capital to companies. Del Biaggio resigned from
24 Sand Hill in May 2008. The Commission sued Del Biaggio in December 2008 in an action titled
25 *Securities & Exchange Commission v. Del Biaggio*, CV-08-5450 CRB (N.D. Cal. Dec. 4, 2008).

26 10. Merriman Curhan Ford & Co. is a broker dealer based in San Francisco that has been
27 registered with the Commission since April 2003. Merriman is a wholly owned subsidiary of
28

1 Merriman Curhan Ford Group, Inc., which is a public company that lists its common stock on the
2 NASDAQ Global Market under the ticker symbol MERR.

3 **FACTUAL ALLEGATIONS**

4 **A. Cacchione Helped Del Biaggio Fraudulently Pledge Securities Accounts of Merriman**
5 **Customers as Collateral for \$45 Million in Personal Loans for Del Biaggio.**

6 11. Since 2003, Cacchione repeatedly had difficulty making mortgage payments on his
7 multi-million dollar home and was otherwise in financial trouble. From 2003 through 2008, Del
8 Biaggio, Cacchione's friend and customer, helped Cacchione financially by lending him more than
9 \$2 million to save his home from foreclosure and to pay other expenses, most of which Cacchione
10 has not repaid. Cacchione knew that accepting loans from customers was prohibited by Merriman's
11 policies and procedures, but he solicited and accepted loans from Del Biaggio anyway.

12 12. In the summer of 2007, Del Biaggio was in the midst of negotiating a deal to buy an
13 interest in the Nashville Predators NHL hockey team. Because he did not have the \$25 million in
14 cash he needed for the purchase of the Predators, Del Biaggio approached several banks and private
15 lenders to obtain loans. During this time, he also needed loans to pay business and personal
16 expenses.

17 13. Del Biaggio did not have sufficient collateral of his own to secure the necessary loans.
18 So, in approximately August 2007 Del Biaggio asked Cacchione to help him make it appear that Del
19 Biaggio had ample collateral for the loans he was seeking and to help him inflate his net worth on his
20 NHL application.

21 14. In August 2007, Del Biaggio and Cacchione hatched a scheme where Cacchione
22 provided Del Biaggio with an account statement from a Merriman institutional customer that
23 reflected nearly \$19 million in assets. Cacchione emailed a .pdf version of the account statement to
24 his personal email account and forwarded it to Del Biaggio. Del Biaggio then had his name and
25 address pasted over the real customer's name. It was then copied and scanned into a .pdf file. Del
26 Biaggio then forwarded the statement to the NHL to demonstrate his financial wherewithal to
27 purchase the Predators team.

1 15. In furtherance of the scheme, in August and September 2007, Cacchione supplied Del
2 Biaggio with account statements belonging to two additional, unknowing individual clients of
3 Cacchione. Each account held roughly \$4 million in securities. Cacchione chose these customer
4 accounts because they had low margin debt and remained relatively stable from month to month,
5 ensuring that the account value would remain steady and minimize the risk that the lenders would
6 detect the fraud.

7 16. From September 2007 through April 2008, Del Biaggio doctored the individuals'
8 statements and the institutional customer's statements and provided them by U.S. mail and email to at
9 least seven banks and private lenders throughout the United States. Del Biaggio obtained roughly
10 \$45 million in loans based upon his and Cacchione's representations that the accounts belonged to
11 Del Biaggio. Del Biaggio used \$25 million to purchase an interest in the Nashville Predators NHL
12 team and the remaining \$20 million to pay personal expenses, including gambling debts, home
13 mortgage expenses and to repay pre-existing personal loans.

14 17. In addition to providing the falsified account statements, each of the lenders required
15 that Cacchione and Del Biaggio sign Account Control Agreements pledging the securities contained
16 in the individuals' Merriman accounts as collateral for the loans Del Biaggio obtained. Cacchione
17 signed the agreements on behalf of Merriman, certifying that the pledged accounts belonged to Del
18 Biaggio. The signed Account Control Agreements were sent back to the lenders via email and the
19 U.S. mails.

20 18. To continue the fraud, from December 2007 through April 2008, Cacchione continued
21 to supply Del Biaggio with electronic copies of the individuals' monthly account statements by email.
22 Del Biaggio had his name cut and pasted onto each of these statements, and then sent the forged
23 statements to some of his lenders on a monthly basis to show that the collateral remained intact.

24 19. In September 2007, early in the scheme, Del Biaggio expressed concerns to Cacchione
25 about getting caught. Despite these concerns, they continued the fraud until May 2008, when the
26 Commission's examination staff conducted an examination of the Merriman firm and uncovered the
27 scheme.

1 20. Cacchione knew, or was reckless in not knowing, that his representations regarding
2 Del Biaggio's ownership of the securities Del Biaggio had pledged were false and misleading.

3 **B. Cacchione Engaged in Unauthorized Trading in His Customers' Accounts From At**
4 **Least March 2006 Through October 2007.**

5 21. Wholly apart from the fraudulent pledging scheme described above, between at least
6 March 2006 and October 2007, Cacchione engaged in a pattern of unauthorized trading in his
7 customers' accounts, pocketing \$32,900 in commissions generated from these trades. As part of the
8 unauthorized trading, Cacchione chose risky, thinly-traded stocks for his customers that were
9 recommended by either Cacchione's direct supervisor or one of his other customers, a Los Angeles-
10 based hedge fund.

11 22. During the relevant time period, Cacchione did not have written agreements with any
12 of his customers allowing him to trade in their accounts without permission. In fact, he
13 acknowledged in writing in his annual compliance reviews with the Merriman firm that he did not
14 have any customer accounts where he could trade without permission.

15 23. In March 2006, Cacchione purchased 50,000 shares of a risky penny stock for one of
16 his clients, an elderly widow. Cacchione collected \$2,500 in commissions from this trade. To
17 accomplish the trade, Cacchione liquidated mutual funds held by the client. When Cacchione's
18 customer noticed the stock in her account through a review of her monthly account statement, she
19 questioned Cacchione about the trade. While she ultimately agreed to keep the stock in her account
20 because Cacchione convinced her that it was a good investment, the client informed Cacchione that
21 she did not want any more risky stocks in her account. She then gave Cacchione authority to make
22 two conservative investments on her behalf. Rather than following her instructions, Cacchione
23 liquidated nearly all of the investments in her account and purchased 260,000 additional shares of the
24 same penny stock in May and June 2006. Cacchione earned an additional \$7,800 in commissions on
25 these trades.

26 24. In the late summer of 2006, Cacchione's customer discovered the additional
27 unauthorized purchases of the same stock in her account, and immediately began contacting
28 Cacchione to determine why the purchases were made and how they could be undone. For months,

1 she unsuccessfully tried to get Cacchione to liquidate these holdings. Ultimately, in December 2006,
2 after she made repeated complaints, the Merriman firm finally liquidated her holdings and paid her a
3 settlement for her losses.

4 25. Similarly, from May to October 2007, Cacchione made twenty unauthorized trades in
5 the portfolio of another one of his customers, a local children's charity. Cacchione did not have
6 authority to trade in the charity's account, and all trading decisions were to be made by the charity's
7 investment adviser. Despite his lack of trading authority, Cacchione purchased in the charity's
8 account several risky penny stocks and shares from three IPOs in which Merriman was an
9 underwriter. Cacchione, who was a member of the board of directors of the children's charity, knew
10 that investing in thinly-traded penny stocks and IPOs was inconsistent with the charity's conservative
11 investment objectives. Cacchione received commissions and markups of \$22,100 for these
12 transactions.

13 26. Finally, Cacchione engaged in similar behavior with a third individual customer, in
14 July 2007. Cacchione purchased 1,000 shares of another risky, thinly-traded stock in the customer's
15 account without her permission, and collected \$500 in commissions for the trade. When her husband,
16 a friend of Cacchione's, noticed the trade, he immediately contacted Cacchione to demand that the
17 trade be reversed. Cacchione did not immediately reverse the trade, and the stock declined
18 substantially in value from the time it was purchased to the time it was ultimately sold.

19 27. Cacchione knew, or was reckless in not knowing, that his unauthorized trading in his
20 customers' accounts was deceptive.

21 **FIRST CLAIM FOR RELIEF**

22 **(Violations of Section 17(a) of the Securities Act)**

23 28. The Commission realleges and incorporates by reference paragraphs 1 through 27.

24 29. By engaging in the acts and conduct alleged above, Cacchione, directly or indirectly,
25 in the offer or sale of securities, by use of the means or instruments of transportation or
26 communication in interstate commerce or by use of the mails: (a) with scienter employed devices,
27 schemes, or artifices to defraud; (b) obtained money or property by means of untrue statements of
28 material fact or by omitting to state a material fact necessary in order to make statements made, in the

1 light of the circumstances under which they were made, not misleading; and (c) engaged in
2 transactions, practices, or courses of business which operated or would operate as a fraud or deceit
3 upon the purchasers.

4 30. By reason of the foregoing, Cacchione has violated and, unless restrained and
5 enjoined, will continue to violate Section 17(a) of the Securities Act [15 U.S.C. § 77q(a)].

6 **SECOND CLAIM FOR RELIEF**

7 **(Violations of Section 10(b) of the Exchange Act and Rule 10b-5 Thereunder)**

8 31. The Commission realleges and incorporates by reference Paragraphs 1 through 27.

9 32. By engaging in the acts and conduct alleged above, Cacchione, directly or indirectly,
10 in connection with the purchase or sale of securities, by the use of means or instrumentalities of
11 interstate commerce, or of the mails, or of a facility of a national security exchange, with scienter:
12 (a) employed devices, schemes, or artifices to defraud; (b) made untrue statements of material fact or
13 omitted to state material facts necessary in order to make the statements made, in light of the
14 circumstances under which they were made, not misleading; and (c) engaged in acts, practices, or
15 courses of business which operated or would operate as a fraud or deceit upon other persons,
16 including purchasers and sellers of securities.

17 33. By reason of the foregoing, Cacchione has violated and, unless restrained and
18 enjoined, will continue to violate Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and Rule
19 10b-5 [17 C.F.R. §§ 240.10b-5] thereunder.

20 **PRAYER FOR RELIEF**

21 WHEREFORE, the Commission respectfully requests that the Court:

22 I.

23 Permanently enjoin defendant Cacchione from directly or indirectly violating Section 17(a) of
24 the Securities Act [15 U.S.C. § 77q(a)], and Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)]
25 and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5].

26 II.

27 Order defendant Cacchione to pay civil money penalties pursuant to Section 20(d)(1) of the
28 Securities Act [15 U.S.C. § 77t(d)(1)], and Section 21A of the Exchange Act [15 U.S.C. § 78u-1].

1 III.

2 Order defendant Cacchione to disgorge all ill-gotten gains according to proof, plus
3 prejudgment interest.

4 IV.

5 Retain jurisdiction of this action in accordance with the principles of equity and the Federal
6 Rules of Civil Procedure in order to implement and carry out the terms of all orders and decrees that
7 may be entered, or to entertain any suitable application or motion for additional relief within the
8 jurisdiction of this Court.

9 V.

10 Grant such other and further relief as this Court may deem just, equitable, and necessary.

11
12 Dated: March 24, 2009

13 Respectfully submitted:

14
15
16 By: Kristin A. Snyder
Kristin A. Snyder

17 Attorney for Plaintiff
18 SECURITIES AND EXCHANGE COMMISSION
19
20
21
22
23
24
25
26
27
28