BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of Department of Enforcement, Complainant, vs. Merrimac Corporate Securities, Inc. Altamonte Springs, FL, Respondent.	DECISION Complaint No. 2009017195204 Dated: April 29, 2015

Respondent Merrimac Corporate Securities, Inc. stipulated to a $100,000 fine for its failure to supervise the outside business activities and private securities transactions of two registered representatives and to establish, maintain, and enforce reasonable written supervisory procedures. Held, stipulated findings and sanctions affirmed; the firm failed to show that it lacks the ability to pay the fine.

Appearances

For the Complainant: Leo Orenstein, Esq., Aide Vernon, Esq., David Monachino, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Stephen Pizzuti, Pro Se[1]

[1] Merrimac Corporate Securities, Inc. ("Merrimac" or the "Firm") was represented by attorney Richard M. Nummi throughout these proceedings, including the hearing below and the filing of Merrimac's appellate brief. Stephen Pizzuti, Merrimac's chief executive officer, represented the Firm at oral argument before the subcommittee of the National Adjudicatory Council ("Subcommittee") empaneled to consider the case.

Decision

The case presents the narrow issue of whether Merrimac has the ability to pay a $100,000 fine to which it stipulated as part of a settlement with the Department of Enforcement ("Enforcement"). After a thorough review of the record, we determine that Merrimac fails to carry its burden to show that the Firm lacks the ability to pay and, accordingly, is ordered to pay the fine. The Firm shall pay the fine in a single payment or, at the Firm's election, according to an installment plan, as set forth in this decision.

I. Background

Merrimac is a registered broker-dealer headquartered in Altamonte Springs, Florida. The Firm became a FINRA member in 1993. In 2002, Merrimac was acquired by DEF, Inc., which is 100% owned by the wife of Merrimac's chief executive officer, Stephen Pizzuti. At the time of the hearing in this case, Merrimac stipulated that it had one branch office and 49 registered representatives.

II. Procedural History

Enforcement, in response to investor complaints, conducted an investigation into an investment sold by two former Merrimac registered representatives, Richard Pizzuti (Stephen Pizzuti's brother) and Daniel Voccia ("Voccia"), and the possibility that the investment was a fraud.[2] Enforcement's investigation led to its filing of the complaint in this matter in June 2012. In addition to Merrimac, the complaint named as respondents Stephen Pizzuti and David Matthews ("Matthews") (the Firm's chief compliance officer). Cause one of the complaint alleged that the respondents violated NASD Rules 3010 and 2110 by failing to supervise Richard Pizzuti's and Voccia's outside business activities and private securities transactions. Cause two alleged that Merrimac and Matthews violated NASD Rules 3010 and 2110 and FINRA Rule 2010 as a result of the Firm's deficient supervisory procedures. In August 2013, Stephen Pizzuti and Matthews agreed to a settlement with Enforcement, leaving Merrimac as the remaining respondent.

Merrimac and Enforcement stipulated to certain facts in the complaint, to the liability of Merrimac, and to sanctions consisting of a $100,000 fine and a requirement that Merrimac engage an independent consultant to review and report on the Firm's policies, systems, and procedures related to outside business activities and private securities transactions.[3] The stipulation with respect to the fine was subject to a hearing before a Hearing Panel based on Merrimac's argument that it was financially unable to pay the fine.

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[2] These two representatives have since been barred from the securities industry.

[3] Merrimac does not contest the requirement to retain an independent consultant.

In its written decision, the Hearing Panel found Merrimac liable for the supervisory violations as determined by the parties' stipulations. The Hearing Panel further determined that the stipulated sanctions were appropriate, but established a payment schedule for Merrimac's payment of the $100,000 fine.[4] Merrimac has now appealed its ability to pay the $100,000 fine.

III. Stipulated Facts and Violations

The parties stipulated to the following summary of the facts and violations in this case.

1. During 2006 to April 2009 (the "Relevant Period"), the Firm failed to reasonably supervise outside business activities and private securities transactions of two registered representatives at Merrimac.

2. Richard Pizzuti and his partner, Voccia, operated a company known as WPH and sold investments in WPH away from the Firm. Richard Pizzuti and Voccia solicited approximately 30 individuals to invest in WPH during the Relevant Period. The aggregate amount raised from those investors during that period was over $4 million. Richard Pizzuti and Voccia arranged for investors, many of whom were Firm customers, to hold their WPH investments away from Merrimac's clearing firm with non-broker-dealer custodians ("Outside Custodians").

3. Richard Pizzuti also solicited investments in a second outside business, CMC Properties LLC ("CMC"). Richard Pizzuti was an owner of CMC.

4. The Firm failed to adequately implement the Firm's procedures regarding participation in outside businesses and participation in private securities transactions. The Firm also failed to implement reasonable procedures regarding the use of Outside Custodians.

5. The Firm failed to adequately inquire into Richard Pizzuti's and Voccia's outside business activities and involvement in private securities transactions, despite personal knowledge about both. It further failed to follow up on red flags regarding these activities.

6. The Firm failed to supervise Richard Pizzuti and Voccia, two former registered representatives who have since been barred from the industry.

7. Accordingly, Respondent [Merrimac] violated NASD Rules 3010 and 2110 (Inadequate Supervision) during the Relevant Period. Respondent [Merrimac]

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[4] The Hearing Panel determined that Merrimac shall pay the $100,000 in ten monthly installments of $10,000. Enforcement stated in its appellate brief that it was "not asking the NAC to set aside the Hearing Panel's determination to allow Merrimac to pay the fine in installments."

also violated NASD Rules 3010 and 2110 during 2006 through December 15, 2008, and FINRA Rule 2010 from December 15, 2008, to April 2009 (Deficient Written Supervisory Procedures).

Based on the parties' stipulations, we affirm without further discussion that Merrimac violated NASD Rules 3010 and 2110 by failing to supervise Richard Pizzuti's and Voccia's outside business activities and private securities transactions and NASD Rules 3010 and 2110 and FINRA Rule 2010 by failing to establish, maintain, and enforce written procedures that were reasonably designed to achieve compliance with the applicable securities laws and regulations and FINRA rules.

IV. Stipulated Sanctions and the Firm's Financial Condition

In connection with Merrimac's admission of liability, the Firm stipulated to a sanction that included a $100,000 fine, subject only "to a hearing before a Hearing Panel on Respondent's argument that it is not financially able to pay such fine in an effort to mitigate or eliminate this fine." Nonetheless, before the Hearing Panel, and again on appeal, Merrimac argues that it should receive the minimum fine as a sanction for the two supervisory violations because of its "actual efforts made . . . to supervise" the violative conduct and its "bona fide inability to pay anything but a minimal fine."

After considering the stipulated facts and the FINRA Sanction Guidelines ("Guidelines"), the Hearing Panel found the $100,000 fine was appropriately remedial and that Merrimac had the ability to pay the fine in monthly installments of $10,000. After a complete review of the record and consideration of the parties' oral arguments, we agree with the Hearing Panel's determination that the $100,000 stipulated fine is appropriate and find that Merrimac has failed to establish a bona fide inability to pay the fine. The Firm may pay the fine in installments as set forth in detail below.

A. The Stipulated Fine Is Appropriate

The stipulations establish that serious supervisory failures occurred and take into account the relevant considerations under the Guidelines in arriving at the stipulated fine. The Guidelines for the failure to discharge supervisory obligations recommend a fine of $5,000 to $50,000.[5] In determining the proper remedial sanction, the Guidelines for supervisory violations recommend consideration of whether: (1) the respondent ignored "red flag" warnings that should have resulted in additional supervisory scrutiny; (2) the nature, extent, and character of the underlying misconduct; and (3) the quality and degree of the supervisor's implementation of the firm's supervisory procedures and controls.[6]

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[5] *FINRA Sanction Guidelines* 103 (2013), http://www.finra.org/web/groups/enforcement/documents/enforcement/p011038.pdf [hereinafter *Guidelines*].

[6] *Id.*

The Guidelines for deficient written supervisory procedures provide for fines ranging from $1,000 to $25,000.[7] The Guidelines for deficient supervisory procedures provide two considerations to determine the appropriate sanctions: (1) whether the deficiencies allowed violative conduct to occur or to escape detection; and (2) whether the deficiencies made it difficult to determine the individual or individuals responsible for specific areas of supervision or compliance.[8]

Merrimac stipulated that it failed to supervise Richard Pizzuti and Voccia, two of its representatives, who raised more than $4 million from investors, many of whom were Firm customers, while engaged in outside business activities over a three-year period. The Firm stipulated that it failed to adequately enforce its procedures related to outside business activities and private securities transactions. The Firm also stipulated that it ignored red flag warnings of its representatives' outside business activities and selling away. Merrimac, for example, failed to investigate after it learned of allegations on a website that one of the outside businesses was a Ponzi scheme and was suffering serious financial difficulties. Merrimac also stipulated that it failed to follow its own procedures. Despite having procedures that required its brokers to notify the Firm in writing and obtain its written approval of both outside business activities and private securities transactions, Merrimac failed to obtain these written disclosures from Richard Pizzuti and Voccia. Merrimac also failed to take other steps to determine the nature of its representatives' outside business activities and to review the activities. For example, Merrimac stipulated that it failed to make appropriate and reasonable inquiries into Richard Pizzuti's and Voccia's involvement in WPH.

The Firm also stipulated that it had inadequate supervisory procedures for supervising its representatives' use of Outside Custodians. Specifically, Merrimac lacked written supervisory procedures requiring representatives to notify the Firm if they were acting as agents of investors who held assets with Outside Custodians not sold through the Firm. Merrimac also had no procedures in place to require representatives to provide documentation of customer assets held with Outside Custodians. The stipulations acknowledged that such procedures were important in order to detect financial and operational issues, fraud, and suitability concerns as well as comply with regulatory requirements.

Merrimac also has a disciplinary history, which is relevant to the level of sanctions.[9] *See Dep't of Enforcement v. N. Woodward Fin. Corp.*, Complaint No. E8A2005014902, 2008

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[7] *Id.* at 104. In cases of egregious failures to supervise, the Guidelines recommend imposing a suspension or expulsion or limiting firm activities. *Id.* at 103-04. Neither the stipulations nor the Hearing Panel found Merrimac's violations egregious.

[8] *Id.*

[9] *See id.* at 2 (General Principles Applicable to All Sanction Determinations, No. 2), 6 (Principal Considerations in Determining Sanctions, No. 1).

FINRA Discip. LEXIS 47, at *28-29 (FINRA NAC Dec. 10, 2008) (applying disciplinary history as an aggravating factor when determining appropriate sanctions), *aff'd*, Exchange Act Release No. 60505, 2009 SEC LEXIS 2796, at *23 (Aug. 14, 2009). In 2012, the FINRA Board of Governors found that Merrimac violated FINRA rules by selling securities not permitted under the Firm's membership agreement, failing to maintain adequate supervisory procedures with respect to the sale of certain securities, willfully failing to preserve e-mails, and failing to maintain and keep purchase and sale blotters for certain business lines. *Dep't of Enforcement v. Merrimac Corporate Sec., Inc.*, Complaint No. 2007007151101, 2012 FINRA Discip. LEXIS 43, at *54-55 (FINRA Bd. of Governors May 2, 2012). The $100,000 stipulated fine is consistent with the Guidelines' emphasis that sanctions should more severe for recidivists.[10]

Merrimac argues that mitigating factors specific to the findings of violations "warrant the lowest fine." For example, Merrimac asserts that the Firm's "supervisors exhibited a high quality and degree of implementing Merrimac's supervisory procedures," that Merrimac inquired into the brokers' outside business activities but the brokers concealed their activities, and that the Firm's written supervisory procedures did not make it difficult to determine the individuals responsible for specific areas of supervision. We reject these arguments as mitigating of a fine amount to which Merrimac stipulated. As discussed, the stipulations set forth numerous facts that aggravate Merrimac's misconduct for purposes of sanctions, and Merrimac's disciplinary history serves to exacerbate sanctions in this case.

Moreover, the record is clear that Merrimac, through Stephen Pizzuti, knowingly and voluntarily entered into the stipulations, which included the $100,000 fine subject only to the Firm's ability to pay. The Hearing Officer addressed this point during the hearing when it appeared that Stephen Pizzuti was trying to back away from the stipulations. Merrimac's counsel at the hearing stated definitively: "At the end of the day we have signed a stipulation. We are abiding by the stipulation. We agree with *all* the terms of the stipulation." (Emphasis added.) Stephen Pizzuti testified, "[p]art of my decision to do what I did here is based on other issues that I have in order to defend myself. . . . That's why I signed the stip, because I don't have the money to defend all of the problems that I have got." Merrimac, in its appellate brief, concedes that it stipulated to the $100,000 fine to "economically and efficiently advance this case to the singular issue – What can the [F]irm afford to pay?" Finally, during oral argument before the NAC Subcommittee, Pizzuti stated that the Firm stipulated to the $100,000 fine to avoid further legal fees associated with the FINRA proceedings. Pizzuti stated, "I had no choice but to make the decision to sign off that Merrimac did bad things, and that's not the case." Absent evidence that the parties' stipulations were entered into unknowingly or involuntarily, of which there is none here, the NAC is well within its authority to accept and apply the stipulations put forth by the parties. *See United States v. Mezzanatto*, 513 U.S. 196, 210 (1995); *see also* FINRA Rule 9235(a) (outlining an adjudicator's broad authority to regulate the course of a hearing, which includes accepting stipulations); *James F. Glaza*, 57 S.E.C. 907, 914 (2004) ("[S]tipulated facts serve important policy interests in the adjudicative process, including playing

[10] *See Guidelines*, at 2, 6.

a key role in promoting timely and efficient litigation; such agreements should not be set aside without a showing of compelling circumstances.").[11]

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[11] Merrimac makes other arguments in favor of mitigation that are without merit. Merrimac contends that it "fully cooperated with FINRA upon learning of [the] selling away of its rogue brokers." *See Guidelines*, at 7 (Principal Considerations in Determining Sanctions, No. 12 (considering whether the respondent provided substantial assistance to FINRA in its investigation of the underlying misconduct)). Merrimac's cooperation with FINRA's investigation merely satisfies its obligations as a FINRA member and does not amount to "substantial assistance" within the meaning of the Guidelines. *See Dep't of Enforcement v. Neaton*, Complaint No. 2007009082902, 2011 FINRA Discip. LEXIS 13, at *31 n.33 (FINRA NAC Jan. 7, 2011), *aff'd*, Exchange Act Release No. 65863, 2011 SEC LEXIS 4232, at *1 (Dec. 1, 2011); *see also Philippe N. Keyes*, Exchange Act Release No. 54723, 2006 SEC LEXIS 2631, at *23 & n.22 (Nov. 8, 2006) (explaining that respondent's cooperation in the investigation was consistent with the responsibilities to which he agreed when he became an associated person and does not constitute substantial assistance). The Firm also contends that because it was never aware of the "rogue behavior that was occurring with two of its brokers," it never had a reason to maintain policies about Outside Custodians. Thus, the Firm argues that its misconduct was not the result of "any intentional, reckless, or negligen[t] conduct." *See Guidelines*, at 7 (Principal Considerations in Determining Sanctions, No. 13). We disagree, given that Merrimac stipulated that

> [a]lthough the Firm permitted brokers to arrange for customers to hold Firm-approved illiquid investments with Outside Custodians, the Firm did not have a system in place reasonably designed to prevent brokers from using Outside Custodians to engage in selling away from the Firm . . . .
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> The Firm permitted its brokers to utilize Outside Custodians to maintain custody of nontradeable assets of customers, but had an inadequate system for supervising the brokers' use of Outside Custodians. In particular, the Firm lacked written supervisory procedures requiring brokers to notify the Firm if they were acting as agents of investors, including Merrimac customers, who held assets with the Outside Custodians not sold through the Firm and provide the Firm with duplicate account statements and confirmations for such assets. It was important for the Firm to have such written supervisory procedures relating to use of Outside Custodians in order to monitor for financial and operational, anti-fraud and suitability issues, and to comply with the regulatory requirements applicable to those areas.

As these stipulations show, Merrimac was aware of, and permitted, its brokers' use of Outside Custodians but yet did nothing to supervise these activities. Merrimac acted at least negligently here.

Accordingly, we determine that the $100,000 fine, to which Merrimac stipulated, is appropriate. We turn now to the discussion raised by Merrimac's appeal of its ability to pay the stipulated fine.

B. Merrimac's Ability to Pay

The central issue presented by this appeal is whether Merrimac's financial condition warrants reducing the stipulated fine. Under FINRA's Guidelines, "[a]djudicators are required to consider a respondent's *bona fide* inability to pay when imposing a fine."[12] "It is well settled that a respondent bears the burden of demonstrating an inability to pay." *William J. Murphy*, Exchange Act Release No. 69923, 2013 SEC LEXIS 1933, at *109 (July 2, 2013) (internal quotation marks omitted); *see also ACAP Fin., Inc.*, 2013 SEC LEXIS 2156, at *75 & n.156 (July 26, 2013) (citing cases and explaining that the party claiming an inability to pay has the burden of demonstrating that inability by providing evidence thereof), *aff'd*, 2015 U.S. App. LEXIS 5384 (10th Cir. Apr. 3, 2015); *Guang Lu*, 58 S.E.C. 43, 62 (2005) (same), *aff'd without opinion*, 179 F. App'x 702 (D.C. Cir. May 9, 2006).

1. Applicable Legal Standards

We hold a respondent asserting an inability to pay to "a very high standard of proof." *Dist. Bus. Conduct Comm. v. Escalator Sec., Inc.*, Complaint No. C07930034, 1998 NASD Discip. LEXIS 21, at *12 (NASD NBCC Feb. 19, 1998). In rejecting Merrimac's contention of an inability to pay a fine in the prior disciplinary action against the Firm, the FINRA Board of Governors held that "[a] respondent claiming an inability to pay must show that - in seeking to pay a fine - it is unable to obtain the needed funds by, among other things, reducing expenses and salaries, raising capital, or borrowing money." *Merrimac*, 2012 FINRA Discip. LEXIS 43, at *44. The Board further explained that:

> [A] fine that otherwise appropriately sanctions a firm's violative conduct . . . may not be limited by claims that the payment will cause the firm to be in noncompliance with its net capital requirement, or to close its doors. Because of the overriding public interest, member firms should be appropriately sanctioned based on their violative conduct, and not merely on the projected effect of the monetary sanction on the firm's balance sheet.

Id. at *44-45 (internal quotation marks omitted). With these standards in sharp focus, we turn to the evidence presented of Merrimac's financial condition and whether the Firm has met its burden of proving an inability to pay the $100,000 fine.

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[12] *Guidelines*, at 5 (General Principles Applicable to All Sanction Determinations, No. 8).

2. Evidence of Merrimac's Financial Condition

Merrimac submitted its annual audited financial statements for the period ending September 30, 2012. The Firm's revenues for the year totaled $3,265,155, with total expenses of $3,272,220, equaling a net loss for the year of $7,065. The balance sheet for this period reflects that Merrimac had $71,272 in cash and a $52,610 deposit with its clearing firm. It ended the year with excess net capital of $28,814. Merrimac did not offer any other audited financial statements into evidence before the Hearing Panel or seek to adduce any before the Subcommittee. Instead, the Firm submitted a spreadsheet representing that, during the period June 2011 through May 2013, the Firm's total income was $7,050,837.84 and that its total expenses were $7,145,254.36, resulting in negative net income for the period of $94,416.52. Salaries and commissions were shown to have accounted for $6,276,182.89, or 89%, of total expenses. Merrimac, however, offered no evidence to show how the spreadsheet was prepared, where the data in it came from, or any other documentary evidence to support the representations and from which we can assess reliability.[13]

Merrimac provided its tax returns for fiscal years 2009, 2010, and 2011, which reported gross sales of $1,887,239; $4,741,683; and $3,265,155 respectively. Thomes testified that the Firm's revenue and excess net capital declined in the four months preceding the hearing. Thomes attributed the decline in revenues to problems with Merrimac's clearing firm and economic factors, including the departure of two strong revenue producers for the Firm. Thomes stated that net capital declined from $55,000 to $13,000 during this four-month period.

Stephen Pizzuti testified that Merrimac could stay in business if it were fined $10,000, but that it could not stay in business if fined $100,000. As the FINRA Board made clear, however, in the prior action against Merrimac, we do not limit an otherwise appropriate fine based on claims that the payment will cause a firm to close its doors. *Merrimac*, 2012 FINRA Discip. LEXIS 43, at *44-45. In addition, Merrimac provided no evidence that it tried to raise capital or borrow money. Stephen Pizzuti and Thomes testified that it is unlikely that the Firm can raise capital because of other pending FINRA matters (i.e., pending arbitrations against the Firm and another FINRA disciplinary action). As to whether Merrimac could get a loan, Stephen Pizzuti acknowledged that he had not actually attempted to get a bank loan for the Firm or tried to obtain other sources of financing.

Stephen Pizzuti's testimony at the hearing was devoted largely to his personal financial circumstances rather than the Firm's. For example, he testified that he attempted to obtain a $10,000 personal loan from the bank where he has his personal accounts and was declined the

[13] When counsel for Enforcement cross-examined Stephen Pizzuti about the entries on the spreadsheet, Pizzuti testified that he had "never seen these before" and to question the Firm's FINOP, Mark Thomes ("Thomes") about them. Thomes provided no testimony about the spreadsheet entries.

day before the hearing in this matter.[14] In addition, Merrimac has represented throughout these proceedings that Stephen Pizzuti's house is in foreclosure. During cross-examination at the hearing, however, Enforcement identified an entry in Pizzuti's bank statement for the month preceding the hearing reflecting a preauthorized withdrawal in the amount of $6,174.42 for "ASC MORTG PYMT." Pizzuti ultimately clarified that his primary residence is not in foreclosure. Rather, it is another house that he owns that is next door to his residence and occupied by his mother that is in foreclosure.[15]

Enforcement offered Stephen Pizzuti's IRS Forms W-2 and 1099 for 2010, 2011, and 2012, which show that his gross income in those years was $180,769.37; $424,142.07; and $226,118.71 respectively. Enforcement also presented evidence that, during the period July 2012 through June 2013, Merrimac made payments to Stephen Pizzuti and his wife totaling $332,089.35.

The evidence shows that Merrimac has the ability to reduce expenses to pay the fine. The Firm has approximately six employees, including Thomes. Their salaries range from $18,000 to $120,000 per year. Stephen Pizzuti stated that the Firm could reduce Thomes's salary in the short term. Pizzuti testified that he "could always work harder and reduce staff." Pizzuti identified at least one staff position that could be eliminated. The Firm also pays $4,000 to $5,500 monthly to an outside consultant who largely responds to regulatory requests. Thomes stated that the Firm gave the outside consultant notice that his services are no longer needed.

With respect to commission payouts to the Firm's representatives, Merrimac pays its representatives an average of 78%. Pizzuti testified that the Firm raised its brokerage fees and reduced payouts. Nonetheless, the Firm pays Stephen Pizzuti 100% of his commissions. During the first half of 2013, Merrimac paid Stephen Pizzuti commissions totaling $125,221.36.

We conclude that, based on the evidence presented, Merrimac has failed to meet the "very high standard of proof" it must satisfy to establish a *bona fide* inability to pay. We determine that the evidence submitted by the Firm illustrates that no reduction in the fine amount is required. At a minimum, Merrimac has the ability to reduce expenses, including the 100% commission payout rate to Stephen Pizzuti, in order to pay the fine. The Hearing Panel determined to allow Merrimac to pay the fine over time pursuant to an installment payment plan.[16] On a case by case basis, FINRA has allowed for such plans, which are generally limited

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[14] Pizzuti testified that he did not fill out a loan application or complete any other documents in an effort to obtain this loan. He merely asked a bank officer for a loan.

[15] Pizzuti testified at the hearing that he was subject to a $100,000 tax lien. At oral argument before the Subcommittee, Pizutti stated, without elaboration, that the "IRS took the lien off me."

[16] Even when a respondent proves an inability to pay, however, such proof "need not result in a reduction or waiver of a fine, restitution or disgorgement order, but could instead result in the imposition of an installment payment plan or another alternate payment option." *Guidelines*, at 5 (General Principles Applicable to All Sanction Determinations, No. 8).

to two years and require execution of a promissory note to track the installment payment plan.[17] We determine that the payment schedule set forth by the Hearing Panel is appropriate. Accordingly, the $100,000 fine is payable in ten installments of $10,000. The first payment shall be due 60 days after FINRA's decision in this matter becomes final. The second payment of $10,000 shall be due on the first business day of the next month, but not less than 30 days after the initial payment. The Firm shall pay $10,000 on the first business day of each subsequent month until it has paid a total fine of $100,000.

V. Conclusion

We affirm the Hearing Panel's findings that, based on the parties' stipulations, Merrimac violated NASD Rules 3010 and 2110, by failing to supervise the outside business activities and private securities transactions of two registered representatives and violated NASD Rules 3010 and 2110, and FINRA Rule 2010, by failing to establish, maintain, and enforce written supervisory procedures that were reasonably designed to supervise the activities of Merrimac's registered representatives. As the parties stipulated, Merrimac is fined $100,000 and required to retain an independent consultant to review its written supervisory procedures. Merrimac shall pay the fine in full or pursuant to the payment schedule we set forth in Part IV.B.2 of this decision. We also affirm the Hearing Panel's order that Merrimac pay $2,599.21 in hearing costs.[18]

The terms to which the parties stipulated related to the retention of a consultant are set forth below.

1. Merrimac shall:

> a. Retain, within 30 days of the date of the conclusion of the hearing in this Disciplinary Proceeding,[19] an Independent Consultant, not unacceptable to FINRA staff, to conduct a comprehensive review of the adequacy of the Firm's policies, systems and procedures (written and otherwise), and training relating to outside business activity and private securities transactions;

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[17] *See id.* at 11.

[18] Pursuant to FINRA Rule 8320, any member that fails to pay any fine or costs imposed in this decision, after seven days' notice in writing, will summarily be suspended or expelled from membership for non-payment.

[19] The stipulation does not define "conclusion of the hearing in this Disciplinary Proceeding." If Merrimac has not yet implemented the independent consultant undertakings required by the stipulation, we order Merrimac to implement them within 30 days after FINRA's decision in this matter becomes final, unless extended by FINRA staff pursuant to the terms of the parties' stipulation.

b. Exclusively bear all costs, including compensation and expenses, associated with the retention of the Independent Consultant;

c. Cooperate with the Independent Consultant in all respects, including by providing staff support. Merrimac shall place no restrictions on the Independent Consultant's communications with FINRA staff and, upon request, shall make available to FINRA staff any and all communications between the Independent Consultant and the Firm and documents reviewed by the Independent Consultant in connection with his or her engagement. Once retained, Merrimac shall not terminate the relationship with the Independent Consultant without FINRA staff's written approval; Merrimac shall not be in and shall not have an attorney-client relationship with the Independent Consultant and shall not seek to invoke the attorney-client privilege or other doctrine or privilege to prevent the Independent Consultant from transmitting any information, reports, or documents to FINRA;

d. At the conclusion of the review, which shall be no more than 90 days after the date of the conclusion of the hearing in this Disciplinary Proceeding, require the Independent Consultant to submit to the Firm and FINRA staff a Written Report. The Written Report shall address, at a minimum: (i) the adequacy of the Firm's policies, systems, procedures, and training relating to outside business activities and private securities transactions; (ii) a description of the review performed and the conclusions reached; and (iii) the Independent Consultant's recommendations for modifications and additions to the Firm's policies, systems, procedures and training; and

e. Require the Independent Consultant to enter into a written agreement that provides 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 other employment, consultant, attorney-client, auditing or other professional relationship with Merrimac, or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity as such. Any firm with which the Independent Consultant is affiliated in performing his or her duties pursuant to the undertaking shall not, without prior written consent of FINRA staff, enter into any employment, consultant, attorney-client, auditing or other professional relationship with Merrimac 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.

2. Within 30 days after delivery of the Written Report, Merrimac shall adopt and implement the recommendations of the Independent Consultant or, if it determines that a recommendation is unduly burdensome or impractical, propose an alternative procedure to the Independent Consultant designed to achieve the same objective. The Firm shall submit such proposed alternatives in writing simultaneously to the Independent Consultant and FINRA staff. Within 30 days of receipt of any proposed alternative procedure, the Independent Consultant shall: (i) reasonably evaluate the alternative procedure and determine whether it will achieve the same objective as the Independent Consultant's original recommendation; and (ii) provide the Firm with a written decision reflecting his or her determination. The Firm will abide by the Independent Consultant's ultimate determination with respect to any proposed alternative

procedure and must adopt and implement all recommendations deemed appropriate by the Independent Consultant.

3. Within 30 days after the issuance of the later of the Independent Consultant's Written Report or written determination regarding alternative procedures (if any), Merrimac shall provide FINRA staff with a written implementation report, certified by an officer of Merrimac, attesting to, containing documentation of, and setting forth the details of the Firm's implementation of the Independent Consultant's recommendations.

4. Upon written request showing good cause, FINRA staff may extend any of the procedural dates set forth above.

On Behalf of the National Adjudicatory Council,

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Marcia E. Asquith
Senior Vice President and Corporate Secretary