ADMINISTRATIVE PROCEEDING
FILE NO. 3-3081

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of

FOX SECURITIES COMPANY, INC.
MORRIS FOX

File No. 8-15868-1

INITIAL DECISION

David J. Markun
Administrative Law Judge

Washington, D. C.
September 8, 1972

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APPEARANCES: Marvin G. Pickholz, Lois S. Yohonn, and Edward J. Levitt (on the reply brief), New York Regional Office, for the Division of Trading and Markets */

Wilfred T. Friedman, Friedman & Hodys, New York, New York, for Respondents

BEFORE: David J. Markun, Administrative Law Judge **/

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*/ Pursuant to a reorganization in August, 1972, investigative and enforcement activities of the Commission are now conducted by the Division of Enforcement.

**/ The position title "Hearing Examiner" was changed to "Administrative Law Judge" effective August 20, 1972.

THE PROCEEDING

This public proceeding was instituted by an order of the Commission dated June 15, 1971, pursuant to Section 15(b) and 15A of the Securities Exchange Act of 1934 ("Exchange Act") to determine whether the Respondents committed various charged violations[1] of the Securities Act of 1933 ("Securities Act") and the Exchange Act and regulations thereunder as alleged by the Division of Trading and Markets ("Division") and the remedial action, if any, that might be appropriate in the public interest.

The evidentiary hearing was held in New York, New York, on March 13 through March 15, 1972, after which the parties submitted proposed findings of fact, conclusions of law, and supporting briefs.

The findings and conclusions herein are based upon the record and upon observation of the various witnesses.[2]

FINDINGS OF FACT AND LAW

The Respondents

Respondent Fox Securities Company, Inc. ("Registrant"[3]),

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1 / An amendment to the order, involving the addition of a new charge and expansion of the time period within which certain charged violations occurred so as to charge Registrant's predecessor with such violations as well, was allowed by the hearing examiner (Hearing Examiner's Ex. 2) during the course of the hearing. See footnote 3 below.

2 / Preponderance of the evidence is the standard of proof applied.

3 / Where the term "Registrant" is used herein with reference to events prior to April 1, 1970, it refers to the predecessor of Fox Securities Company, Inc., i.e. to Morris Fox d/b/a Fox Securities Company, a sole proprietorship, and, where the context so indicates, it refers to both such entities.

with offices at 15 William Street, New York, N. Y., became registered as a broker-dealer under Section 15(b) of the Exchange Act on June 8, 1970, it having earlier that year, on April 1, 1970, taken over the assets and liabilities of its predecessor, Morris Fox d/b/a Fox Securities Company, a sole proprietorship, which had been registered under Section 15(b) of the Exchange Act since June 18, 1969.

Respondent Morris Fox ("Fox") is President and sole shareholder of the Registrant and operated its predecessor as a sole proprietorship. Registrant is a member of the National Association of Securities Dealers, Inc. ("NASD").

Because of financial and record-keeping problems the Registrant on July 6, 1970 suspended its operations except for liquidating transactions and on September 17, 1970 executed an assignment for the benefit of creditors.

Net Capital Violations

The amended order for proceeding charges that during the period from about December 31, 1969, to June 15, 1971, Registrant [4/] wilfully violated the net-capital provisions of Section 15(c)(3) of the Exchange Act and Rule 15c3-1 thereunder [5/] and that Fox wilfully aided and abetted such violations.

4/ See footnotes 1, 3 above.

5/ Section 15(c)(3) of the Exchange Act, insofar as here pertinent, prohibits securities transactions by a broker-dealer in contravention of the Commission's rules prescribed thereunder providing safeguards with respect to the financial responsibility of brokers and dealers. During the times here pertinent, Rule 15c3-1 provided, subject to certain exemptions not applicable here, that no broker or dealer might permit his aggregate indebtedness to all persons to exceed 2,000% of his net capital computed as specified in the rule or have a net capital less than $5,000.

The record establishes that during the relevant period Registrant had the following net-capital deficiencies on the dates indicated:

December 31, 1969		$ 4,971.52 [6/]
January 31, 1970		$ 29,682.92
June 30, 1970	--	$157,912.25

Registrant continued to do business on and about the dates on which these net-capital deficiencies existed. Moreover, Registrant continued doing business at times when it was unable to compute its net capital position because of back-office record-keeping problems. Thus, about mid June, the NASD was advised in response to its inquiry concerning the status of Registrant's monthly net-capital computation [7/] that Registrant was having back-office problems and financial difficulties and therefore could not furnish reliable figures either for a trial balance or a net-capital computation. This prompted the NASD to make a special examination of Registrant in July, 1970 as respects its net capital and its books and records. Notwithstanding the net-capital problems that Registrant had been experiencing as far back as the end of December, 1969, Registrant

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6/ At this point there was also a failure to maintain the required $5,000 minimum capital.

7/ The NASD had conducted a routine examination of the Registrant in March of 1970 and because of what that examination disclosed concerning Registrant's net-capital position at the end of December, 1969, and at the end of January, 1970, the NASD required Registrant to furnish monthly computations of its net capital. When no net-capital computation for the end of May had been received by about mid June, the NASD inquired of Registrant as to the reason.

continued its normal operations at least until July 6, 1970, on which date it advised the Commission's New York Regional Office[8] that it had encountered record-keeping discrepancies which made it impossible for it to know its net-capital position and that it was therefore suspending its regular activities until it could resolve the differences.

On September 17, 1970, as mentioned above, Registrant executed an assignment for the benefit of creditors.[9] At the time of the assignment Registrant's cash assets were under $300.00 and the value of its (low-grade) securities was insignificant.[10]

Registrant is still out of net-capital compliance so far as appears from the record.

Bookkeeping Violations

The record establishes that during the period charged in the order for proceeding (June 8, 1970 to date of the Order) the Registrant committed a number of violations of Section 17(a) of the Exchange Act and Rule 17a-3 and 17a-4 thereunder[11] by failing to

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8 / Exhibit 5.

9 / The record is not clear whether the assignment was ever perfected. See discussion beginning at p. 9 below.

10/ During the first week of September Fox had indicated to Commission staff personnel that Registrant had fails-to-deliver in the amount of $91,360, fails-to-receive in the amount of $76,815, and that it owed customers some $50,000.

11/ Section 17(a) of the Exchange Act, as applicable here, requires registered brokers and dealers to keep such books and records as the Commission by rule or regulation may prescribe as necessary or appropriate in the public interest or for the protection of investors. Rule 17a-3 specifies the books and records that must be maintained and kept current. Rule 17a-4 requires that specified records be retained for prescribed periods.

maintain and keep accurate and current certain required books and records and to preserve such for prescribed periods.

During the first half of June, 1970, as already found above, Registrant's books and records were so inaccurate and unreliable that Registrant was unable to give the NASD reliable figures for the purpose of making a net-capital computation, and Registrant so advised the NASD. While Registrant at the time attributed this to problems associated with switching from a manual to a computer system for maintaining certain of its records, there is no satisfactory proof in this record that such was the cause of the unreliable and inadequate state of Registrant's records or that the condition could not have been avoided by ordinary diligence.

When Registrant in July of 1970 furnished the NASD a trial balance for the end of June, 1970 it was found that there was an imbalance between the general ledger and various supporting ledgers such as the fail-to-deliver and fail-to-receive records.

On July 6, 1970, Registrant advised the Commission's Regional Office in New York by letter that it had "encountered record-keeping discrepancies which make it impossible for us to know the exact status of our cash or net capital position[12/] as of this moment," that they were retaining the services of an outside auditor to help

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12/ The record indicates that Registrant had not prepared regular monthly trial balances for a number of months in the early part of 1970, and that it had made no net capital computations during such period. Registrant failed to produce at the hearing any such trial balances or computations or to present any proof as to why they could not be produced.

them bring their records "up to date" and that they were therefore voluntarily suspending all trading except for liquidating transactions until the problems could be resolved.

Two days later, on July 8, 1970, when an investigator from the Commission called at Registrant's offices to determine its net-capital position, Fox told him that Registrant had problems switching from a manual to a computer system of keeping records and that its records and financial data were therefore unreliable. The investigator therefore made no effort to take off a trial balance.

The record contains no showing that these problems were ever resolved or that the books and records were ever reconciled.

When called upon at the hearing to produce its books and records, Registrant and its assignee for the benefit of creditors [13/]

13/ Respondents urge that the testimony of the assignee for the benefit of creditors and of his attorney should be stricken under their claim of the attorney - client privilege. The claim is predicated upon the fact that the assignee's attorney had been Registrant's attorney (indeed, it was he who counseled utilizing an assignment for the benefit of creditors and prepared the instrument used) and upon the fact that the assignee (also an attorney) and the assignee's attorney had adjoining office space, shared clerical and stenographic personnel, and freely discussed their legal cases with one another. While recognizing the attorney - client privilege, the hearing examiner ruled it could not under circumstances presented here have any application to anything the assignee learned or did in the performance of his duties as assignee nor to anything his counsel did in acting as counsel for the assignee, and the testimony of these witnesses was accordingly restricted so as to exclude any information that might have been divulged to them directly or indirectly by Fox or the Registrant that was privileged. Respondents do not specify any of the testimony of these witnesses that was based on privileged information. The books and records of the Registrant are not themselves, of course, subject to

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were unable to produce all of the books and records that would normally be kept by a broker dealer of Registrant's size. While most of Registrant's records were turned over to the attorney for the assignee in about mid September, 1970, others were retained at Registrant's offices, and Registrant's counsel stated on the record that Registrant was unable to account for the whereabouts of the records that were not produced for the hearing.[14/]

The Division appears to question that all records required to be kept were in fact kept by Registrant. However, the testimony of an NASD examiner who visited Registrant's premises in July, 1970, suggests that all, or at least most, of the required books were being kept, though he was not there particularly to check that point. Respondents produced no proof through testimony of any of Registrant's officers or employees that the missing books and

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13/ (continued)
a claim of privilege. Accordingly it is concluded that this contention of the Respondents is without merit.

14/ An SEC investigator testified at the hearing inter alia that trial balances and net capital computations were not available for various months; that he found no confirmations among the records produced; that while he found cancelled checks and check stubs for June and July of 1970, he did not find cancelled checks or check stubs for any other periods of 1970; that he found no order tickets; that the stock record he found bore no entries prior to August 28, 1970, and was apparently commenced only on that date; and that Exhibit 8-H, which was the only record in the nature of a fail-to-deliver record that he could find, was inadequate as such in various particulars. This same investigator testified on cross examination that if a broker-dealer were found to be operating with records no more extensive or complete than those which Registrant and his assignee were able to produce at the hearing such a registrant would not have been allowed to stay in business.

records had been in fact maintained by the Registrant or that would account for the failure of Registrant to have retained them as was required by Rule 17a-4 or for the failure of Respondents to have produced them at the hearing. Respondents arguments that the unavailability of various books and records of the Registrant must be charged to the assignee for the benefit of creditors and his attorney is not accepted in view of the fact that the record indicates that not all of the books and records of Registrant were delivered to the assignee, i.e. some remained at the Registrant's offices.[15/]

Giving Registrant the benefit of any doubt as to whether it in fact maintained all required records, it is clear that Registrant violated Rule 17a-4 by failing to retain all such required records for the prescribed periods.

The Division introduced proof through testimony of an SEC investigator tending to show that certain of the data set forth in the general ledger and other records that were produced at the hearing contained inadequate or insufficient data.[16/] However,

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15/ See also the discussion at p. 9 and following as to whether in fact the assignment for the benefit of creditors was in fact ever perfected and of Fox's role in connection with that issue.

16/ Respondents urge that the testimony of this investigator should be disregarded because he lacks proper qualifications and experience and that such alleged lack prompted him on cross examination to become frustrated and angry and to find inadequacies in the record where none existed. There is no merit to these contentions. The record shows the witness to be

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much of this testimony assumed that Registrant had not kept other particular records, not found among the books that were produced. In view of the inconclusive proof as to what books and records were in fact maintained by Registrant it is concluded that this aspect of the charges of record-keeping violations is not satisfactorily established.[17/]

Failure to File Required Reports

Registrant failed to file annual reports of its financial condition as required by 17 CFR 240.17a-5 for calendar years 1970 and 1971 even though notified by the Commission's New York Regional Office that it was delinquent in that respect. Respondents urge that the blame for this lies not with Fox but with the assignee for the benefit of creditors, on the theory that the duty of filing such reports devolved upon the assignee after the assignment, which occurred, as mentioned above, on or about September 17, 1970. The Division disputes this thesis, pointing out that the attorney for the assignee for the benefit of creditors (who, incidentally, prepared the assignment for Registrant) testified that the assignment, although executed,

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16/ (continued)
well qualified both by training and experience, and observation of his demeanor while testifying indicates conclusively that Respondents' remaining contentions concerning the witness are entirely baseless.

17/ While the record does contain evidence respecting various other record-keeping deficiencies, they are of so minor a nature when compared with the several major violations found herein to have been committed as not to warrant separate findings.

and acknowledged before a notary public, and filed with the county clerk of New York County, was never "perfected," because Fox refused to give the attorney the $1,500 he required as a retainer fee. Neither the testimony of the attorney for the assignee or other evidence in the record develops any particular respect in which there was a failure to "perfect" the assignment,[18] and Respondents in their brief argue that under New York law there was an effective assignment, the argument being, in part, that there was constructive delivery to the assignee of the records that were not in fact delivered to him. In any event, it is concluded that for the purpose material here there was no effective transfer from Registrant and Fox to the assignee of the responsibility for making the 17a-5 reports inasmuch as the assignee did not file with the Commission the required report under the Commission's regulation 15b1-4, issued under the Exchange Act.[19]

18/ The record does show that not all of Registrant's records were delivered to the assignee, but it is not at all clear that the assignee's attorney had this in mind when he testified to a failure to "perfect" the assignment.

19/ The Rule provides as follows:

Rule 15b1-4. Registration of Fiduciaries.

The registration of a broker or dealer shall be deemed to be the registration of any executor, administrator, guardian, conservator, assignee for the benefit of creditors, receiver, trustee in insolvency or bankruptcy, or other fiduciary, appointed or qualified by order, judgment, or decree of a court of competent jurisdiction to continue the business of such registered broker or dealer: Provided, that such fiduciary files with

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Registrant never notified the Commission formally of the assignment for the benefit of creditors nor did it file a copy of the assignment with the Commission.[20/]

Moreover, irrespective of whose duty it was to file for the Registrant, the fact is that Registrant failed to file the reports although aware of the need for doing so.[21/] Fox cannot wash his hands of his obligation by attempting to place responsibility with the assignee, particularly where it was his failure to arrange payment of the required retainer fee that caused the assignee's attorney to, in effect, drag his feet insofar as "perfecting" the assignment and having the assignee carry out his required functions were concerned.

19/ (continued)
the Commission, within 30 days after entering upon the performance of his duties, a statement setting forth as to such fiduciary substantially the information required by Form BD.

20/ However, in October, 1970, the attorney for the assignee did advise Commission staff members of the assignment and they thereafter from time to time had meetings and consultations regarding Registrant's status and problems. It is concluded that the attorney's testimony that he notified the Commission in writing of the assignment was mistaken, inasmuch as the Commission's files contained no evidence of such.

21/ As the Commission has recently reaffirmed, a registrant has a duty to file a financial report so long as it remains registered, even if it has suspended operations and the Commission's staff is aware of the cessation of business. First Denver Securities Corporation, Securities Exchange Act Release No. 9709, August 7, 1972.

Failure to Return Customers' Escrow Funds

The order for proceeding, as amended, [22] includes a charge that during the period April through July, 1970, Registrant wilfully violated and Fox wilfully aided and abetted the antifraud provisions of Section 15(c) of the Exchange Act and Rule 15c2-4 thereunder (set forth in the margin [23]) in that the Registrant, while participating in a (proposed) distribution of Lektramatic Compu-Sciences, Inc. ("Lektramatic") securities, accepted moneys from customers as part of the sale price of such securities, being distributed on a "50% or none" basis, and failed (a) to promptly transmit such monies to the bank which had agreed in writing to hold such funds in escrow for the persons who had a beneficial

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22/ An amendment to the order for proceeding, allowed by the hearing examiner during the course of the hearing (Hearing Examiner's Ex. 2), added this new charge.

23/ Rule 15c2-4. Transmission or Maintenance of Payments Received in Connection with Underwritings.

(a) It shall constitute a "fraudulent, deceptive or manipulative act or practice"as used in Section 15(c)(2) of the Act, for any broker or dealer participating in any distribution of securities, other than a firm commitment underwriting, to accept any part of the sale price of any security being distributed unless:

(1) the money or other consideration received is promptly transmitted to the persons entitled thereto; or

(2) if the distribution is being made on an "all-or-none" basis, or on any other basis which contemplates that payment is not to be made to the person on whose behalf the distribution is being made until some further event or contingency occurs, (A) the money or other consideration received is promptly deposited in a separate bank account, as agent or

(Continued)

interest therein and (b) to transfer or return such funds promptly to the persons entitled thereto when the issue was not sold.

During the period charged, Registrant undertook to underwrite a public offering of Lektramatic securities on a "50% or none" basis; funds received during the offering were to be escrowed with the Franklin National Bank at 95 Wall Street, New York, N. Y., until (a) the terms of the offering were satisfied or (b) the requisite number of shares were not subscribed within the prescribed time, in which latter event the funds collected were to be returned by the bank to the individual subscribers.

The evidence establishes that funds received by the Registrant from three subscribers for the proposed Lektramatic underwriting were never sent to the Franklin National Bank for deposit in the escrow account but instead found their way into Registrant's account.[24/] The Registrant abandoned the proposed offering after

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23/ (continued)
trustee for the persons who have the beneficial interests therein, until the appropriate event or contingency has occurred, and then the funds are promptly transmitted or returned to the persons entitled thereto, or (B) all such funds are promptly transmitted to a bank which has agreed in writing to hold all such funds in escrow for the persons who have the beneficial interests therein and to transmit or return such funds directly to the persons entitled thereto when the appropriate event or contingency has occurred.

24/ There were some 115 tentative subscribers in all, and the amounts deposited in escrow by them totaled about $87,350, less the sums of the three intending purchasers which Registrant failed to put into the escrow account. The funds of these three subscribers totaled $1,600.

failing to obtain the requisite subscriptions within the prescribed period, but the three subscribers, though they made demand for return of their funds, never got their money back from the Registrant. The Registrant's resources had become so depleted by this time that there were insufficient funds remaining with which to reimburse the three subscribers. It is evident, therefore, that Registrant had converted the funds received from the three subscribers to its own use and purposes.

Respondents contended that the funds of the three subscribers failed to find their way into the escrow account through mere inadvertence and that their violations were therefore not wilful. They urge this conclusion on the basis of the logical argument that had Registrant desired to convert funds required to be escrowed, it would not have limited itself to such small amounts ($1,600 in all) from only 3 of the some 115 (potential) subscribers.[25/]

While there is nothing in the record to suggest that Registrant deliberately converted the funds of the three subscribers, such a finding is not necessary to support a finding of wilful violations.[26/]

25/ See footnote 24.

26/ It is well established that a finding of wilfulness under Section 15(b) of the Exchange Act does not require an intent to violate the law and that it is sufficient that a respondent intentionally engaged in conduct which constitutes a violation. Tager v. Securities and Exchange Commission, 344 F. 2d 5, 8 (C.A. 2, 1965); Dunhill Securities Corporation, Sec. Exch. Act Rel. 9066, p. 4 (Jan. 26, 1971).

Respondents introduced no evidence to indicate how the conversion of funds in fact occurred or how it could have occurred or remained undiscovered and uncorrected without great carelessness on the part of Respondents.

It is concluded that these violations by Respondents were wilful.

Alleged Violations of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 Thereunder

The Division contends that Registrant's conducting business at a time when it was out of net-capital ratio and at times when its books and records were so unreliable that it could not ascertain its net-capital position without telling its customers of those conditions constituted fraud under Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. The Division further urges that those same provisions were violated by the fact that Registrant failed to advise its customers that in various other respects its records were not accurate or reliable.

While the conditions complained of did in fact exist and customers were not notified thereof, it is concluded, under all the facts and circumstances here present, that the claimed violations of the mentioned antifraud provisions were not wilful.

Failure to Supervise; Aiding and Abetting

The order for proceeding, as amended, alleges under Section

15(b)(5)(E)[27] of the Exchange Act both that Fox[28] wilfully aided and abetted the violations committed by the Registrant and that he failed reasonably to supervise persons subject to his supervision with a view to preventing the violations committed by such persons.[29]

Registrant is a small firm both in terms of its financing and scope of operations and in terms of the number of employees it had. Fox, together with his controller, Donald Cleary, essentially ran the firm. Fox, as President, sole owner, and operating head of the firm, knew or should have known of the net-capital and book-keeping problems.[30] There is no suggestion in the record that

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27 / Section 15(b)(5)(E) of the Exchange Act, as added by the 1964 amendments, provides an independent ground for the imposition of a sanction against a broker or dealer or a person associated with a broker or dealer who ". . . has failed reasonably to supervise, with a view to preventing violations of such statutes, rules, and regulations, another person who commits such a violation, if such other person is subject to his supervision."

28 / The order also alleges that Registrant failed reasonable to supervise persons subject to its supervision with a view to preventing the violations, (by the Registrant), but the statute would by its terms seem to be inapplicable to this situation. Moreover, Registrant is responsible for its employees' dereliction under the concept of respondeat superior. Armstrong, Jones & Co. v. SEC (C.A. 6, 1960), 421 F. 2d 359, 362.

29 / The violations found were committed by Registrant, which of course can only act through its officers and employees.

30 / Registrant's broker-dealer file indicates that Fox had three years' experience as a registered representative with other broker-dealers before commencing his sole-proprietorship broker-dealer firm and that his prior experience also included four years' experience as an auditor in internal auditing of hotels.

he was not aware of the problems.[31] Thus, Fox, as president, owner, and principal, was either the cause of or fully aware of the violations by Registrant, and thus must be held to have aided and abetted such violations, and, to have been guilty of a failure reasonably to supervise, to the extent that the violations by the Registrant were caused by Fox's failure to have reasonably supervised personnel of the Registrant. While the record does not satisfactorily spell out the precise cause or causes of the various difficulties Registrant found itself in, the fact that such violations did in fact occur with no satisfactory explanation for them[32] establishes a res ipsa loquitur situation compelling the conclusion that such violations occurred thru Fox's failure to properly manage, or to supervise, or both.

Use of Mails; Wilfulness

The mails were utilized in the course of the Commission of the violations found herein[33] and the violations were wilful.[34]

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31 / Neither Fox nor Cleary testified at the hearing. Cleary was not called by any party and Fox invoked his privilege under the 5th Amendment to the U. S. Constitution when called by the Division.

32 / See first full paragraph on p. 5 and footnote 31 above.

33 / Since Registrant is a registered broker-dealer and Fox was acting on its behalf, use of the mails or any means of interstate commerce is not a jurisdictional requisite to a finding or conclusion as to violation of the Exchange Act or rules thereunder, in view of the provisions of Section 15(b)(4) of that Act.

34 / See footnote 26 above respecting the test of wilfulness under the securities laws and regulations.

Conclusions

In general summary of the foregoing the following conclusions of law are reached:

(1) During the period from about December 31, 1969 to about June 30, 1970, Registrant wilfully violated the net-capital requirements of Section 15(c)(3) of the Exchange Act and Rule 15c3-1 thereunder on three occasions, as found more particularly above.

(2) During the period from June 8, 1970, to June 15, 1971, Registrant wilfully violated the books-and-records requirements of Section 17(a) of the Exchange Act and Rules 17a-3 and 17a-4 thereunder in the particular respects found above.

(3) Registrant wilfully violated Section 17(a) of the Exchange Act and Rule 17a-5 thereunder by failing to file during 1970 and 1971, as more particularly found above, reports of its financial condition as required by the Rule.

(4) During the period April, 1970 to July, 1970, as more particularly found above, Registrant wilfully violated Section 15(c) of the Exchange Act and Rule 15c2-4 thereunder in that, while it was participating in an intended distribution of the securities of Lektramatic on a "50% or none" basis, it failed to transmit the moneys of three intending subscribers to the bank maintaining the escrow account and thereafter failed to remit or return such funds to the intending subscribers after the intended distribution was discontinued because sufficient subscriptions were not obtained.

(5) Within the meaning of Section 15(b)(5)(E) of the Exchange

Act Respondent Fox wilfully aided and abetted each of the violations found above to have been committed by the Registrant and in addition failed reasonably to supervise Registrant (through failing to supervise its employees, who were subject to his supervision) with a view to preventing such violations, as more particularly found above.

PUBLIC INTEREST

The violations disclosed by this record are serious and numerous. The net-capital rule is "one of the most important weapons in the Commission's arsenal to protect investors."[35/] As the Commission has stressed repeatedly, the requirement that required books and records be kept properly is at the heart of the regulatory scheme since it bears significantly on the ability to determine whether other types of violations have occurred.[36/] As already noted above, annual financial reports of a registrant are considered so essential an element of the Commission's responsibilities for oversight of broker-dealers that suspension of a broker-dealer's regular business activity does not relieve

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35/ Blaise D'Antoni & Associates, Inc. v. SEC, 289 F. 2d 276 (C.A. 5, 1961).

36/ Pennaluna & Company, Inc., et al., Securities Exchange Act Release No. 8063, April 27, 1967; Palombi Securities Co., Inc., et al., 41 SEC 266, 276 (1962); Midland Securities, Inc., et al., 40 SEC 333, 339-340 (1960); Olds & Company, 37 SEC 23, 26-27 (1956).

him of the necessity for filing the annual financial report.[37] Customer losses have been sustained here and there is no indication that Fox has been exerting any significant efforts to make customers whole, even the three who had every right to expect that their funds would have been held safely in an escrow account. Fox's efforts to shift the onus for the apparent loss of some of Registrant's records does him little credit in light of the fact that he in fact never delivered to the assignee for the benefit of creditors (or his attorney) the full set of Registrant's books and records and in light of the additional fact that Fox's failure to pay the assignee's attorney the required retainer fee resulted in a failure to carry out the terms of the assignment. In these circumstances Fox cannot soundly claim that his execution of the unfulfilled assignment for the benefit of creditors fulfilled his fiduciary responsibilities to customers.[38]

Respondents urge strongly in mitigation the fact that Registrant voluntarily suspended regular operations in the light of its financial problems, but the mitigative effect of that fact is considerably lessened by the fact that such action was taken

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37/ First Denver Securities Corporation, Securities Exchange Act Release No. 9709, August 7, 1972; Daniel M. Sheehan, Jr., 38 SEC 627, 628 (1958).

38/ Repeated suggestions of the staff that Respondents initiate bankruptcy proceedings went unheeded and they elected, instead, to utilize the assignment-for-the-benefit-of-creditors procedure. However, as found above, they never properly followed up on the assignment.

only after it had become clear that the NASD would find Registrant out of compliance with the net-capital rule.

While the record does not indicate prior violations by Respondents,[39] the number and character of the violations here-found is such that the public interest requires revocation of the Registrant's registration as a broker dealer. As to Respondent Fox, the public interest requires that he be barred with the provision that after two years he may apply to become employed by a broker-dealer in a supervised capacity.

ORDER

Accordingly, IT IS ORDERED that the registration as a broker-dealer of Fox Securities Company, Inc. is revoked, and the Company is expelled from membership in the National Association of Securities Dealers, Inc; and that Morris Fox is barred from association with a broker-dealer, except that after a period of two years from the effective date of this order he may become associated with a registered broker-dealer upon a satisfactory showing to the staff of the Commission that he will be adequately supervised.

This order shall become effective in accordance with and

39/ In a decision dated March 3, 1971 the NASD (Exhibits 4 and F) did expel Registrant from membership and bar Fox from association with any other member, but this action was taken on the basis of charges analogous to those involved in the instant proceeding and involving comparable time periods.

subject to Rule 17(f) of the Commission's Rules of Practice.

Pursuant to Rule 17(f), this initial decision shall become the final decision of the Commission as to each party who has not, within fifteen days after service of this initial decision upon him, filed a petition for review of this initial decision pursuant to Rule 17(b), unless the Commission, pursuant to Rule 17(c), determines on its own initiative to review this initial decision as to him. If a party timely files a petition for review, or the Commission takes action to review as to a party, the initial decision shall not become final with respect to that party. 40/

David J. Markun
Administrative Law Judge

Washington, D. C.
September 8, 1972

40/ To the extent that the proposed findings and conclusions submitted by the parties, and the arguments made by them, are in accordance with the views herein they are accepted, and to the extent they are inconsistent therewith they are rejected. Certain proposed findings and conclusions have been omitted as not relevant or as not necessary to a proper determination of the issues presented.