ADMINISTRATIVE PROCEEDING
FILE NO. 3-2246

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	
JOHN B. LICATA & CO. (8-13655) JOHN B. LICATA	

INITIAL DECISION

(Private Proceeding)

Washington, D.C.
March 31, 1971

David J. Markun
Hearing Examiner

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APPEARANCES: Jack Redden, Attorney from the San Francisco Regional Office, for the Division of Trading and Markets.

John B. Licata, pro se, and also for respondent John B. Licata & Co.

BEFORE: David J. Markun, Hearing Examiner

THE PROCEEDING

This private proceeding was instituted by an order of the Commission dated November 26, 1969, pursuant to Sections 15(b) and 15A of the Securities Exchange Act of 1934 ("Exchange Act") to determine whether the respondents committed various charged violations of the Exchange Act and the rules 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. Respondent John B. Licata & Co. had earlier, on October 2, 1969, filed with the Commission an application on Form BDW to withdraw its registraiion as a broker dealer, and the bringing of this proceeding precluded the application's becoming effective.[1/]

The evidentiary hearing was held in San Francisco, California, on October 26th through October 31st, 1970, after which the parties submitted proposed findings and conclusions and supporting briefs.

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

FINDINGS OF FACT AND LAW

The Respondents

Respondent John B. Licata & Co. ("registrant"), a California corporation with offices at Palo Alto, California, was registered as a broker-dealer under Section 15(b) of the Exchange Act on February 23, 1968, succeeding the firm of John Benjamin Licata d/b/a John B. Licata & Co., a sole proprietorship that had been registered as a broker-dealer

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1/ 17 CFR 240.15b6-1.

under Section 15(b) since September 23, 1965.

Respondent John B. Licata ("Licata") has been president, a director, and sole stockholder of the registrant from the time of its formation and registration.

Bookkeeping Violations

The record establishes that during the period from about March 1968 until about March 31, 1969, registrant, as charged in the order for proceeding, committed a number of violations of Section 17(a) of the Exchange Act and Rule 17a-3 thereunder by failing to maintain and keep accurate and current certain required books and records. 2/

First, registrant failed to prepare a proper monthly trial balance on a timely basis during any part of the charging period. Trial balances for January and February of 1969 were not prepared until late March or April and the trial balance for March, 1969, was not prepared until April. For months prior to January 1969 and subsequent to March 1969 no trial balances were ever prepared. While adding-machine tapes utilized in the preparation of net-capital computations were run off for such other months, these tapes by no means constituted proper monthly trial balances and even these were not retained. While Licata directed the (tardy) preparation of trial

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2/ 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.

balances for January, February, and March of 1969, apparently prompted by an audit of the registrant by the certified public accounting firm of Price, Waterhouse which was then underway, he did not require or see to their preparation either prior to January 1969 or subsequent to March 1969.[3/]

A second bookkeeping violation occurred as a result of registrant's failure to keep and to keep current a securities-position record. No record qualifying as such was kept by registrant from March 1968 (the beginning of the charging period) until September 1968. As an incident to their auditing the registrant, Price, Waterhouse set up a securities-position ledger and made entries through December 31, 1968, but registrant thereafter failed to keep this ledger up with the result that, again, no adequate securities-position record was kept by registrant until July or August of 1969.

Respondents concede that registrant did not keep "a formal securities record or ledger as described under Rule 17a-3(a)(5),"[4/]

3/ An accountant for registrant testified he considered the trial balance unnecessary and that he prepared balance sheets, income statements, and computations of net capital and aggregate indebtedness without first preparing a formal trial balance. He was never told to prepare and retain a trial balance for other than the months of January through March, 1969.

4/ The Rule, 17 CFR 240.17a-3(a)(5), requires broker-dealers to make and keep current:

> "(5) A securities record or ledger reflecting separately for each security as of the clearance dates all 'long' or 'short' positions (including securities in safekeeping) carried by such member, broker, or dealer for his account or for the account of his customers or partners and showing the location of all securities long and the offsetting position to all securities short and in all cases the name or designation of the account in which each position is carried."

but urge that such failure should not be held against them on each of two (somewhat-conflicting) grounds. Respondents urge first that the "securities ledger" that was actually maintained by the registrant was adequate, given the size of the registrant and the number of transactions handled by it. Secondly, respondents argue that the employees charged with keeping the securities ledger failed to keep a proper securities record or ledger in accordance with instructions from the certified public accountant who initially set up the books of the registrant and from Licata. 5/

The "securities ledger" actually kept by registrant failed to meet requirements in a number of respects. First, the record did not show individual securities on separate ledgers, but instead showed multiple securities in "miscellaneous" categories under particular letters of the alphabet. Thus, numerous securities beginning with the letter "A" were listed together on the same page under a "miscellaneous A" category rather than individually. In addition, the securities ledger actually maintained by registrant merely reflected purchases and sales of a stock but didn't reflect the location of the securities. Thus, as an S.E.C. investigator testified, one was unable to tell from the "securities ledger" what securities were being used as collateral for loans held by registrant at the bank. From the foregoing it cannot be concluded that registrant's "securities ledger" met the requirements of Rule 17a-3(a)(5). Neither can respondents avoid the onus of registrant's failure by seeking to lodge responsibility in employees of the

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5/ See p. 16 below.

registrant subordinate to Licata. The failure arose primarily not because of failure properly to keep up a record[6/] but because of the failure to set up a record properly meeting requirements in the first instance. In any event, even if inadequacies on the part of subordinate personnel had caused the violation, registrant would be chargeable therewith under the concept of respondeat superior[7/] and Licata would bear responsibility for failure properly to supervise.[8/]

Yet another failure to keep accurate and proper books and records occurred in the customer's ledger account of Theodore Deuel, which showed 2,000 shares of E.G.&G., Inc. as being held in safekeeping whereas in fact 1,695 of those shares were, during the period 12-31-68 to 2-20-69, pledged as collateral in connection with a $30,000 loan taken out by registrant at the United California Bank.

These violations of the bookkeeping rules by registrant were wilful[9/] within the meaning of Section 17(a) of the Exchange Act and Rule 17a-3 thereunder.[10/]

6/ However, the testimony does show that the record as kept by registrant was regarded by its employees as of such little utility that it was seldom used and sometimes not brought up to date until month's end.

7/ Armstrong, Jones & Co. v. SEC. (C.A. 6, 1970), 421 F.2d 359, 362.

8/ See below at p. 13 a separate portion of this decision discussing Licata's failure properly to supervise.

9/ See footnote 44 below.

10/ Allegations that Licata aided and abetted these violations and other particular violations alleged to have been committed by the registrant are considered below in a portion of this decision that treats of Licata's aiding and abetting and his failure to supervise, commencing at p. 13.

Net Capital Violations

The order for proceeding charges that during the period December 31, 1968, until about March 31, 1969, registrant wilfully violated, and Licata wilfully aided and abetted violations of, 11/ the net-capital provisions of Section 15(c)(3) of the Exchange Act and Rule 15c3-1 thereunder. 12/

The testimony of an investigator for the Commission establishes that during the relevant period the registrant had the following net-capital deficiencies on the dates indicated: 13/

December 31, 1968	-	$60,988
January 31, 1969	-	34,035
February 28, 1969	-	15,482
March 31, 1969		7,471

Registrant continued to do business on and about the dates on which these net-capital deficiencies existed.

Respondents contend that these net-capital violations were not wilful on the ground, among others, that the net-capital deficiencies resulted essentially from certain unlocated securities positions that

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11/ See footnote 10 above.

12/ 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. Rule 15c3-1 provides, subject to certain exemptions not applicable here, that no broker or dealer shall 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.

13/ The existence of a net-capital deficiency came to light in the course of an audit of registrant as at December 31, 1968, by Price, Waterhouse.

were ultimately resolved. This circumstance goes to the question of appropriate sanctions but does not excuse the violations or render them nonwilful.[14/]

Regulation T Violations

The order for proceeding charges that during the period from about April 1968 to March 1969 the registrant extended credit to customers in wilful violation of Section 7 of the Exchange Act and Section 4(c) of Regulation T, 12 CFR 220.4(c), promulgated under said Section 7 by the Board of Governors of the Federal Reserve System[15/] and that Licata aided and abetted such violations.[16/]

The record establishes that during the period March 13, 1968, to March 17, 1969, registrant extended credit to its customers beyond the permitted seven-day period in 27 transactions in amounts ranging from $294 to $12,625.[17/] Nine of the extensions involved excessive credit

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14/ See footnote 44 below.

15/ Section 7, in effect, prohibits extension of credit to customers in violation of regulations prescribed by the Federal Reserve Board under Section 7 of the Exchange Act. Section 4(c)(2) of Regulation T (12 CFR 220), promulgated by the Board of Governors of the Federal Reserve System, requires that a broker or dealer promptly cancel or otherwise liquidate a transaction where a customer purchases a security in a cash account and does not make full cash payment within seven full business days. If exceptional circumstances prevent full cash payment within the required time, a broker or dealer may apply to any national securities exchange, or to the NASD, for non-exchange members, for a limited extension of time to obtain payment from the customer.

16/ See footnote 10 above.

17/ Exhibit 25. No findings respecting Regulation T violations are predicated upon the testimony of witness Jeffrey Baus, a representative of Price, Waterhouse. His testimony, involving four customer accounts, the status of one of which accounts is in dispute as being cash or margin (Edith Christensen), is in part duplicative and esentially cumulative.

extensions of 1 to 2 days; eight of 3 to 5 days; seven of 6 to 8 days; and three of 19 to 55 days.

Respondents concede that Regulation T violations did occur but seek to minimize their impact by urging that in most instances the period of violation was short and that most violations occurred in the accounts of a particular newly-associated registered representative. Neither of these circumstances can serve to avoid a finding of the violations although they are of course both relevant on the question of sanctions. These violations were wilful.[18/]

Failure to File Financial Report

The order for proceeding includes an allegation that registrant, aided and abetted by Licata,[19/] wilfully violated Section 17(a) of the Exchange Act and Rule 17a-5 promulgated thereunder by failing to file for its fiscal year ending in 1969[20/] a report of its financial condition meeting the requirements of Rule 17a-5.[21/]

Registrant's X-17A-5 report was due February 15, 1969, forty-five (45) days after the date of the financial statement (December 13, 1968). A 45-day extension of the due date, the maximum permitted under Rule 17A-5(d), extended the due date to March 31, 1969.

18/ J.A. Hogle & Co., et al., 36 SEC 460, 465 (1955).

19/ See footnote 10 above.

20/ The report involved is for the date December 31, 1968.

21/ 17 CFR 240.17a-5. Paragraph (b)(1) of the Rule provides that the report of financial condition required of broker-dealers subject thereto ". . . shall be certified by a certified public accountant or a public accountant who shall be in fact independent . . . ."

Because of certain unlocated short security positions existing as of December 31, 1968, Price, Waterhouse was unable to render an opinion and had to qualify its report, transmitted by respondents to the Commission on March 31, 1969, in the following terms:

> "The reserve for unlocated short security positions as of December 31, 1968, enters materially into the determination of financial position; therefore, we are unable at this date to express an opinion on the accompanying Financial Questionnaire taken as a whole."

Although respondents contend that all or substantially all of the unlocated securities position have subsequently been located and cleared up, respondents have not attempted to have prepared or to file with the Commission an unqualified statement of registrant's financial condition as of December 31, 1968.[22/]

The Form X-17A-5 submitted by registrant fails to meet the requirements of Rule 17a-5 since it was not certified.[23/] The filing of financial reports is essential for the protection of investors and as a source of information vital to the regulatory functions of the Commission.[24/] The violation was wilful.[25/]

Alleged Hypothecation Violations

The order for proceeding charges that during the period December 31, 1968, to about March 31, 1969, registrant wilfully violated, and Licata wilfully aided and abetted violations of, Sections 8(c) and

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22/ Registrant's request for further time extension was denied.

23/ Thomas Lee Jarvis, 40 SEC 692, 693 (Note 2).

24/ Scientific Investors Corporation, 41 SEC 618 (1963).

25/ Thomas Lee Jarvis, footnote 23 above, at p. 694.

15(c)(2) of the Exchange Act and Rule 8c-1(a) and 15c2-1 thereunder by hypothecating and permitting the continued hypothecation of customers' securities subjected to lien in excess of the aggregate indebtedness of the customers in respect of the securities.

The record establishes that from June 27, 1968, until some time following February 20, 1969, registrant had a $30,000 bank loan at the United California Bank. When registrant got the loan it put up as collateral securities of various margin-account customers valued at $178,130. By letter dated October 21, 1968, registrant withdrew some of the existing securities pledged as collateral and substituted 1,695 shares of E.G.&.G. stock belonging to another margin-account customer, Theodore Deuel.

At this point the collateral for the $30,000 loan consisted of Deuel's 1,695 shares of E.G.&.G. and securities of other customers valued at approximately $31,000. The Bank required a collateral-to-loan ratio of 140%.

The testimony does not establish what the aggregate indebtedness of all customers to the registrant was during the period the $30,000 loan was outstanding, and the Division does not urge that the amount borrowed exceeded the aggregate indebtedness of all customers to the registrant. Accordingly, this charge is not established by the proof.

The Division does urge, however, that a violation of the Commission's Rule 15c2-1 occurred because the securities of customer Deuel that were pledged were fully-paid-for securities and there was no debit balance in the account, although the account was a margin account. The Division

points to no specific-language of Rule 15c2-1 that forecloses the hypothecation that was made of Deuel's stock nor, for that matter, does the order for proceeding charge the unlawful hypothecation of fully-paid-for securities.[26/]

Failure Promptly to Transmit Proceeds to Issuers

The order for proceeding includes a charge that the registrant wilfully violated, and that Licata wilfully aided and abetted violations of,[27/] Section 15(c) of the Exchange Act and Rule 15c2-4 thereunder in that registrant, during the period December 31, 1968 to March 31, 1969, while participating in the distribution of the securities of Golden Gate Fund[28/] on other than a firm-commitment basis, failed to transmit promptly to the Fund monies received by registrant from sales of the Fund's securities.[29/]

26/ The Division urges that the registrant's pledging of Deuel's securities contravened Rule 20b of the NASD prohibiting hypothecation of customers' securities for amounts in excess of the customer's indebtedness to the broker-dealer. Since no charge of such violation was included in the order for proceeding no finding is made herein on this contention. Though there was some testimony regarding Rule 20b it would be unfair to conclude that respondent agreed to litigating such an issue inasmuch as he appeared pro se.

27/ See footnote 10 above.

28/ Licata is president, treasurer, and a director of Golden Gate Fund.

29/ Rule 15c2-4, promulgated by the Commission in 1962, requires that brokers participating in underwritings promptly transmit funds to the persons entitled thereto. By its terms this rule applies to all underwritings except firm commitments.

> ". . . Moreover, the term 'promptly' envisions that, giving effect to the necessary time for checks to clear, no more than a maximum of four days will elapse between the receipt of funds and their transmittal.
>
> The requirement for prompt transmittal, moreover, applies to principal underwriters and retail dealers who sell mutual fund securities since such securities are continuously the subject of distribution."

Weiss, Registration and Regulation of Brokers and Dealers, BNA, Inc., Wash., D.C. 1965, p. 119.

The record establishes that in numerous instances, as detailed in Exhibit 12, funds were held about a month before being turned over and in several cases funds were held by registrant for over two months beyond the point when they should have been turned over. As of December 31, 1968, registrant owed the Fund $42,740 for shares purchased as principal distributor for sale to customers and some of the funds from the sales had been received by registrant as early as November 25, 1968. These violations were wilful.[30/]

Failure to Supervise; Aiding and Abetting

The order for proceeding alleges under Section 15(b)(5)(E) of the Exchange Act both that Licata 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 the registrant.[31/]

The record discloses that Licata is not only president, a director, and sole stockholder of the registrant but that he is and was its "chief executive officer", sole "principal" in the firm, and the only person authorized to exercise direction of the firm and supervision over its personnel.[32/] There was, in fact, no other person having or exercising

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30/ See footnote 44 below.

31/ 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." The order also alleges that registrant failed reasonably 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 (see footnote 7 above).

32/ As such, Licata cannot avoid responsibility for registrant's violations. (Cont'd.)

supervisory responsibilities in the firm or directing its affairs.[33] Within the relevant periods the registrant had from two to eight employees, had from one or two to four or five registered representatives, and varied from a half dozen to 30 to 40 transactions a day.[34]

Licata seeks to avoid personal responsibility for the violations committed by the registrant on a number of grounds but the most strongly and persistently urged defenses are that the violations occurred as a result of personnel who were variously inexperienced, inadequately trained,

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32/ (Cont'd.) Empire Securities Corporation, 40 SEC 1104, 1105-6 (1962); Madison Management Corp., Securities Exchange Act Release No. 7453, October 30, 1964, p. 3. This is so even where the officer-director-substantial owner is not actively engaged in management or supervision, Aldrich Scott & Co., Inc., 40 SEC 775, 778 (1961); Luckhurst & Company, 40 SEC 539, 540 (1961).

33/ Licata's argument that registrant's books and records and adherence to proper net-capital position were the responsibility of his secretary-typists because they were (at different times) nominally treasurer of the registrant and because the registrant's form-book by laws called for the treasurer to "keep and maintain, or cause to be kept and maintained, adequate and correct accounts of the properties and business transactions of the corporation, including accounts of its assets, liabilities, receipts, disbursements, gains, losses, capital, surplus, and shares . . .", is frivolous. The record contains no indication that such functions were in fact ever carried out by either of these employees or given to them by Licata. That he would make such an argument reflects adversely on his own understanding of the responsibilities of supervision.

34/ Personnel of the registrant also performed record-keeping functions on behalf of Golden Gate Fund but the record does not indicate how much time was spent in that task.

"negligent", careless, unwilling to follow his directions or instructions, or lazy. While certain of registrant's personnel lacked the desired quantum or type of experience for the positions they occupied, there is no real support for Licata's arguments that registrant's difficulties stemmed essentially from the acts or omissions of subordinate personnel or any of the other (outside) factors urged by Licata. To the contrary, the record discloses all too clearly that the problems registrant encountered and the violations of law and regulations it committed, as found above, resulted essentially and primarily from a monumental failure on Licata's part properly to manage the firm and to supervise its personnel.[35/] To elaborate the basis for this conclusion it will be necessary briefly to examine the effects of failure properly to manage and to supervise as respects each of the categories of violations found herein.

Timely and proper trial balances were not prepared and retained by the registrant simply because Licata never insisted they be.[36/] The adding-machine tapes that the firm's accountant ran off each month did not meet the requirement and Licata should have known that. Even after Licata belatedly directed his accountant to prepare trial balances for the months of January through March, 1969, he for some unexplained reason failed thereafter to require their timely and proper preparation and retention for any month after March 1969.

35/ In any event, if the violations had been the result of careless or negligent actions of registrant's employees, registrant would be responsible therefor under the concept of respondeat superior. Armstrong, Jones & Co. v. SEC, cited above (footnote 7).

36/ See footnote 3 above.

A proper securities-position record was not maintained in part because Licata failed to insist that his personnel maintain a separate ledger page for each security instead of lumping various securities beginning with the same letter of the alphabet together in a "miscellaneous" category, but more importantly, the violation occurred simply because the right kind of record had never been set up., i.e. one that would show not only transactions, but also the location of securities. As to this, Licata emphasizes that the securities record kept by the firm was initially set up by a certified public accountant whom Licata engaged to set up his books when Licata commenced business as a sole proprietor in 1965. The C.P.A. testified that he considered the book adequate in conjunction with use of other books of the registrant, considering the relatively small size of the registrant and the low volume of its transactions, though he conceeded that the location of securities could not be ascertained by reference solely to registrant's securities record. In addition, the C.P.A. testified that he never intended that various securities be lumped into "miscellaneous" ledger sheets. That Licata acted on the advice of a C.P.A. does not excuse registrant's failure to maintain a proper record, but it is of course a factor that will be taken into account in assessing appropriate sanctions.

As to the failure of the account of customer Deuel to reflect that various securities had been removed from safekeeping and sent to the bank as substitute collateral on a loan registrant held with the bank, proper supervision should have discovered the error within the period October 21, 1968 to February 10, 1969, that the securities were

so pledged, even assuming, as Licata contends, that the securities were sent to the bank as collateral in error. Licata cannot avoid responsibility for the foregoing bookkeeping violations on the theory he delegated compliance to others and that he was ignorant of the fact that violations were occurring.[37/]

As to the net-capital violations Licata can not escape responsibility. He knew that proper and timely monthly trial balances had not been prepared during the relevant period. He claims that the firm's net-capital was properly computed at the end of each month. If this is so, then he was clearly aware of the net-capital deficiencies that existed and should not have allowed registrant to continue operations until the deficiency had been rectified. That the net-capital deficiencies primarily resulted from unlocated security positions (most of which were eventually cleared up) does not excuse the violations, though it is appropriately a factor to be considered in determining sanctions. Licata further urges that the net-capital deficiency of the firm on December 31, 1968, could have been rectified by taking certain steps to decrease the aggregate indebtedness but he gives no explanation whatever as to why he didn't require that to be done at the time, after he knew or should have known that there was a net-capital deficiency. Licata claims he was unaware of the deficiencies for January, February and March of 1969 and that he would gladly have contributed cash or securities to make up any deficiencies had he been apprised of them. In taking this position Licata completely overlooks the preeminent fact

37/ Madison Management Corp., Sec. Ex. Act Rel. 7453 (1964) p. 3 (principle particularly applicable where broker-dealer firm is staffed by inexperienced personnel); Empire Securities Corp., 40 SEC 1104, 1106 (1962); Cf. Midland Securities, Inc., 40 SEC 635, 639-40 (1961).

that it was his duty to ensure both that net-capital was properly computed each month and that he personally see the computations to know what it was. These were responsibilities he could not delegate to subordinates, even had they been more fully trained and broadly experienced than were the registrant's personnel.

As to the Regulation T violations, Licata urges that they occurred through the "negligence" of his subordinates, and he observes that he "never failed to sign letters requesting extensions of credit whenever such letters were placed before him. . . ." This last observation indicates Licata's mistaken concept of what his duties as the firm's only supervisor were.

The registrant's failure to file a proper and timely X-17a-5 report is also traceable to Licata's supervisory and managerial derelictions in that he allowed registrant over a period of time to develop an unlocated securities situation that made it impossible for Price, Waterhouse to render an unqualified opinion.

Likewise, it is clear that proper supervision and management by Licata would have precluded registrant's failure promptly to transmit moneys to the Golden Gate Fund.

Licata lays great stress on various memorandums (e.g. Licata exhibits EE and GG) whereby he assigned or delegated various functions to subordinate personnel. But the sorry record of the registrant as disclosed by this record confirms an evaluation of Licata's supervisory

performance made by a former employee, [38] who testified:

> Q. "Did it appear to you that Mr. Licata was very conscientious about writing memorandums and procedures in the office?"
>
> A. "He wrote a lot of memos. He did not follow up on those memos. . . ." [T., p. 763]
>
> Q. "Did he express this in memoranda form? You said he wrote a lot of memorandums."
>
> A. "Yes, impossible to carry out." [T., p. 764-5]

What the evidence shows is that Licata completely failed to understand that it is not enough merely to assign or delegate responsibility. The essence of supervision is seeing to it that things do get done by those who are supposed to do them. [39] Moreover, the record shows that Licata lacked appreciation of the fact that personnel to whom duties are assigned should be qualified by training and experience to perform those duties and that sufficient personnel should be available to do the required work. [40]

38/ The witness, Lucy Peters Rahn, formerly typist and personal secretary to Licata and the firm, and nominally also secretary and treasurer of the firm, was called by the Division. The testimony quoted was given under examination by Licata. Based on observation of the witness and in light of all the testimony, it is concluded that there is no basis for Licata's argument that her testimony was motivated by hostility to him or fear that she would herself be charged with violations.

39/ His own testimony suggests that Licata was simply too busy with other matters to do a satisfactory job of supervising:

> "I exercised the greatest amount of personal supervision that I possibly could, and at the same time operate as the president of the mutual fund, as portfolio manager of that mutual fund, and operated as the security analyst and advising my customers with respect to the stock market and acting as economist, and acting in general as a well-rounded securities professional." R. p. 818-9

40/ One of the firm's "accountants" was admittedly inexperienced. Several former employees testified that from time to time there was simply too much work to do. How much of this may have been due to activities of the Golden Gate Fund is not clear from the record.

Conclusions 41/

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

(1) During the period from about March, 1968, until about March 31, 1969, registrant wilfully violated the books-and-records requirements of Section 17(a) of the Exchange Act and Rule 17a-3 thereunder in the particular respects found above.

(2) During the period from about December 31, 1968, until about March 31, 1969 registrant wilfully violated the net-capital requirements of Section 15(c)(3) of the Exchange Act and Rule 15c3-1 thereunder, as found more particularly above.

(3) During the period from about April 1968 to March 1969 registrant wilfully violated the extension-of-credit provisions of Section 7 of the Exchange Act and Section 4(c) of Regulation T, 12 CFR 220.4(c), promulgated thereunder by the Board of Governors of the Federal Reserve System.

(4) Registrant wilfully violated Section 17(a) of the Exchange Act and Rule 17a-5 thereunder by failing to file, as more particularly found above, a report of its financial condition meeting the requirements of Rule 17a-5.

(5) Registrant wilfully violated Section 15(c) of the Exchange Act and Rule 15c2-4 thereunder in that registrant, while participating in the distribution of the securities of Golden Gate Fund as more

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41/ Use of the mails and instrumentalities of interstate commerce in connection with the violations found herein is conceeded by respondents. However, since registrant is a registered broker-dealer and Licata was acting on behalf of registrant, a registered broker-dealer, in all respects mentioned in these conclusions, use of the mails or any means or instrumentalities of interstate commerce is not a prerequisite to a finding or conclusion that prohibited activity was violative of the Securities Exchange Act of 1934, as amended, and the rules adopted thereunder, in view of the provisions of Section 15(b)(4) of that Act.

particularly found above, failed to transmit promptly to the Fund monies received by registrant from sales of the Fund's securities.

(6) Within the meaning of Section 15(b)(5)(E) of the Exchange Act respondent Licata wilfully aided and abetted each of the violations found above to have been committed by the registrant. Within the meaning of said Section 15(b)(5)(E) respondent Licata failed reasonably to supervise registrant (through failing to supervise registrant's employees, all of whom were subject to Licata's supervision) with a view to preventing the violations of law and regulation found above to have been committed by the registrant.

PUBLIC INTEREST

The violations disclosed by this record are numerous and serious.[42/] Some of them persisted over relatively long periods of time.[43/] Because of failure to locate shares of Sunshine Mining registrant continued to have net-capital deficiencies from April through August of 1969, well beyond the 12-31-68 to 3-31-69 period for which violations were charged in the order for proceedings.

42/ As the Commission has stressed repeatedly, the requirement that books and records be kept current and in proper form is at the heart of the regulatory scheme since it bears significantly on ability to determine whether other types of violations have occurred. 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). The net capital rule is "one of the most important weapons in the Commission's arsenal to protect investors." Blaise D'Antoni & Associates, Inc. v. SEC, 289 F.2d 276 (C.A. 5, 1961).

43/ Apart from the violations found and discussed above, the record herein indicates that from time to time during the relevant periods registrant's books were "behind" in posting and that on occasion the firm delivered fully-paid for securities of customers out of safekeeping in settlement of open broker's transactions.

Respondents emphasize strongly in mitigation that customers sustained no losses. While this is a factor here taken into account in assessing sanctions, it is nevertheless true that during the prolonged periods that registrant operated while in net-capital violation customers did run a risk of loss. As stated in Blaise D'Antoni & Associates, Inc. v. SEC, 289 F.2d 276, 290 F.2d 688 (C.A. 5, 1961), cert. den. 368 U.S. 899 (1961):

> "The net capital rule is one of the most important weapons in the Commission's arsenal to protect investors. By limiting the ratio of a broker's indebtedness to his capital, the rule operates to assure confidence and safety to the investing public. The question is not whether actual injuries were suffered by anyone."

Respondents also urge that their violations were not wilful. This contention is mistaken. 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.[44/]

Registrant's failure to file the required financial report on Form X-17A-5 was a serious matter.[45/] The unfounded effort of respondents to attribute this failure to an alleged refusal of the C.P.A. firm auditing the registrant to give an unqualified opinion because of a

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44/ 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).

45/ As the Commission said in W.E. Leonard & Co., Inc., 39 SEC 726, 727 (1960):

> "The requirement that annual financial reports be filed on time and in proper form is a keystone of the surveillance of registered broker-dealers with which we are charged in the interest of affording protection to investors and full compliance with it is essential."

fee dispute with respondents does respondents little credit.[46/]

Respondents also urge in mitigation that registrant has already sustained financial losses as a result of its having voluntarily ceased doing business during April and a part of May, 1969.

The record shows no prior violations of any securities laws or regulations by respondents.[47/] Respondents were cooperative with the Commission investigator in the investigation preceeding the bringing of this proceeding.

While mitigating circumstances existed as respects certain of the violations, and notwithstanding the various mitigating factors discussed above and others urged by respondents, it is concluded that the number and character of the violations is such that the public interest requires revocation of the registrant's registration as a broker-dealer. While losses to customers did not result from the violations found here, there is no assurance to be gleaned from this record that losses might not result in the future if registrant's registration were not revoked. Moreover, the present financial condition of the registrant[48/] is not

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46/ Though respondents disputed the fees submitted by Price, Waterhouse and refused to pay them, there is no evidence in the record that this dispute prompted Price, Waterhouse to withhold giving an unqualified opinion. To the contrary, the evidence supports fully the reason stated by Price, Waterhouse as to why they had to qualify their opinion See p. 10 above. During the hearing Licata even attributed his bookkeeping problems in part to Price, Waterhouse, urging that the "inexperienced" employees of the C.P.A. asked his accountant-bookkeeper so many questions he couldn't attend to his regular duties! This unsupported argument has apparently been abandoned in the brief.

47/ Licata has been in the brokerage business since 1960.

48/ The registrant ceased operating as a regular broker-dealer on September 30, 1969. As of December 31, 1969 it had current assets of $6361.42 and current liabilities of $44,080.87. On October 2, 1969, registrant filed an application to withdraw its broker-dealer registration with the Commission. However, the registrant continues to act as investment adviser to the Golden Gate Fund, of which Licata is President, Treasurer (Cont'd.)

such as would support retention of its registration.

As respects respondent John B. Licata, the record in this proceeding and evaluation of the testimony and demeanor of all the witnesses brings forth quite forcefully the conclusion that the public interest requires that he be subject to adequate supervision if he is to continue in the securities industry. It is concluded that the appropriate sanction is to bar respondent Licata with the provision that after 30 days he may become employed by a broker-dealer in a supervised capacity. 49/

ORDER

Accordingly, IT IS ORDERED that the registration as a broker-dealer of John B. Licata, Inc. is revoked, and the company is expelled from membership in the National Association of Securities Dealers, Inc; 50/ and that John B. Licata is barred from association with a

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48/ (Cont'd) and a Director. Licata intends to continue in the securities industry as an investment adviser. His application on behalf of Atherton Capital Corporation for registration as an investment adviser was withdrawn after the staff of the Commission informed other intended principals of that firm that a denial proceeding would be recommended if the application were not withdrawn.

49/ The requirement of supervised association in any future employment would not necessarily be permanent. See Melvyn Hiller, Securities Exchange Act Release No. 8476, p. 6 (December 24, 1968), aff'd sub nom; Gross v. SEC, 418 F.2d 103 (C.A. 2, 1969).

50/ Licata testified that registrant had withdrawn from membership in the NASD in October or November of 1969 and that such resignation was accepted. If this is so, then the portion of this order calling for expulsion from the NASD will be surplusage.

broker-dealer, except that after a period of thirty days from the effective date of this order, he may become associated with a registered broker-dealer upon an appropriate showing to the staff of the Commission that he will be adequately supervised.

This order shall become effective in accordance with and 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. 51/

David J. Markun
Hearing Examiner

Washington, D.C.
March 31, 1971

51/ 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.