

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

**SECURITIES AND EXCHANGE
COMMISSION,**

Plaintiff,

v.

ROBERT F.X. SILLERMAN

Defendant.

No. 1:19-cv-6052

COMPLAINT

Plaintiff Securities and Exchange Commission (the “Commission” or “SEC”) alleges as follows:

SUMMARY OF ALLEGATIONS

1. Between March and May 2017, Function(x) Inc. CEO Robert F. X. Sillerman (“Sillerman”) engaged in a scheme whereby he fraudulently raised money from investors and diverted offering proceeds for his own use.
2. By 2017, Function(x), an online publishing and entertainment business, depended on investor financing and loans from Sillerman to fund its continued operations. Sillerman engaged in deceptive conduct to keep Function(x) viable and to recoup loans he had made to the company.
3. In early March 2017, just days after the company had raised \$4.8 million in a public securities offering (the “February Offering”), Sillerman directed the transfer of \$500,000 of the offering proceeds from the company’s bank account to his personal bank account and gave several conflicting reasons to Function(x)’s finance department for the transfer.

4. In late March 2017, Sillerman attempted to conceal the fact that Function(x) had a negative cash balance and avert questions about how the proceeds of the February Offering had been used. On the last day of the quarter, Sillerman wired \$250,000 from his personal bank account to the company, yet he instructed the finance department to wire it back to him the next business day.

5. Then, in late April and May 2017, Sillerman led efforts to raise additional money for the company through a private securities offering (the “May Offering”). In an early May press release, Function(x) – at Sillerman’s direction – stated that the offering proceeds would be used for working capital and corporate expansion. Instead, Sillerman diverted all the proceeds to his own accounts and repaid loans he had made to Function(x) under a line of credit.

6. Moreover, in connection with the May Offering, Sillerman created the false appearance that the offering raised \$10 million, when in fact it raised only half that amount. Sillerman instructed Function(x) to publicly announce that it had subscription agreements for \$10 million of investments, including a \$2.2 million investment by Sillerman. In actuality, the May Offering raised only \$4.8 million. To create the false appearance that the offering raised more money, after Sillerman wired to his personal accounts the entire \$4.8 million actually raised, he wired \$4 million back to the corporate account and falsely mischaracterized the \$4 million as investments from him and two well-known celebrities.

7. In addition, to induce investments in the May Offering, Sillerman falsely claimed that the two celebrities had also agreed to invest. Sillerman created phony subscription documents with forged signatures purportedly from the two celebrities.

8. Later, inconsistent with Sillerman’s public statements about the use of the May Offering proceeds, Sillerman withdrew an additional \$1.3 million from the company’s account

without authorization. At least \$550,000 of that withdrawal exceeded any loan balance that Function(x) owed to Sillerman. Throughout his fraudulent scheme, Sillerman completely ignored Function(x)'s internal accounting controls.

JURISDICTION AND VENUE

9. The SEC brings this action pursuant to the authority conferred by Section 20(b) of the Securities Act of 1933 ("Securities Act") [15 U.S.C. § 77t(b)] and Section 21(d) of the Securities Exchange Act of 1934 ("Exchange Act") [15 U.S.C. § 78u(d)].

10. This Court has jurisdiction over this action pursuant to Section 22(a) of the Securities Act [15 U.S.C. § 77v(a)], and Section 27 of the Exchange Act [15 U.S.C. § 78aa]. Defendant has indirectly made use of the means or instrumentalities of interstate commerce, or the mails, in connection with the transactions, acts, practices and courses of business alleged herein.

11. Venue lies in this district pursuant to Section 22(a) of the Securities Act [15 U.S.C. § 77v(a)] and Section 27 of the Exchange Act [15 U.S.C. § 78aa] because Sillerman resides and transacts business in this district and because certain of the acts, practices, transactions, and courses of business constituting the violations alleged in the Complaint occurred in the District. Specifically, Function(x)'s primary office is located in Manhattan.

DEFENDANT

12. Robert F.X. Sillerman, age 71, is a resident of Hinsdale, New Hampshire. Sillerman was the founder of Function(x), and its chairman and CEO until April 30, 2018. Sillerman had ultimate authority over the content and timing of Function(s)'s public disclosures. Currently Sillerman is an adviser to the company.

13. Sillerman had access to Function(x)'s corporate bank accounts and was able to transfer money between his private bank accounts and the corporate bank accounts. He repeatedly engaged in such transfers, bypassing the company's controls.

RELATED ENTITY

14. Function(x), Inc., formerly an online publishing and entertainment business, is a Delaware company located in New York, New York. At all relevant times, its common stock was registered with the Commission pursuant to Exchange Act Section 12(g). From June 10, 2016, until September 11, 2017, Function(x) stock was listed and traded on NASDAQ under the ticker symbol FNCX. Subsequently, it was quoted on OTC Link (previously known as the "Pink Sheets"), operated by OTC Markets Group Inc. In June 2018, the company ceased operating. On November 15, 2018, the Commission revoked the registration of Function(x) securities, pursuant to Exchange Act Section 12(j), based on its failure to file required periodic reports after the period ending December 31, 2016.

15. Function(x)'s internal accounting controls required the approval of the company's CFO and in-house counsel for disbursements over \$10,000 to Sillerman. Function(x)'s controls also required the approval of the Board of Directors for related party transactions, which included reimbursements to Sillerman for loans he had made to the company.

FACTS

A. Sillerman's Fraud In March 2017

16. In March 2017, Sillerman fraudulently diverted offering proceeds after a public securities offering and then he attempted to deceive the market about Function(x)'s true financial position at quarter-end.

17. During the quarter ending March 31, 2017, Function(x) had significant net losses. To raise capital, Function(x) completed a public securities offering in February of 2017 (the “February Offering”), which brought in \$4.8 million from investors.

18. Sillerman directed the transfer of \$500,000 of the offering proceeds from Function(x)’s bank account to his personal bank account on March 3, 2017.

19. When the CFO questioned the transaction, Sillerman gave several conflicting reasons for the transfer, including that the \$500,000 was to reimburse him for payments he had made on behalf of the company. However, Sillerman failed to provide supporting documentation and failed to obtain the required approval of the Board of Directors.

20. On March 30, 2017, Function(x)’s CFO informed Sillerman that the company would have to report a negative cash balance of \$25,000 in its quarterly report for the period ending March 31, 2017. The CFO expressed concern that disclosing a negative cash balance shortly after the February Offering would raise serious questions.

21. To avoid reporting a negative cash balance in Function(x)’s public disclosures, Sillerman wired \$250,000 from his personal account to a company account on Friday, March 31, 2017. Sillerman, however, also instructed the company to wire the \$250,000 back to him the following Monday, April 3.

22. As described below, Sillerman’s fraud and circumvention of internal accounting controls came to light and Function(x) did not file a quarterly report for this quarter.

B. Sillerman’s Fraud in Connection with the May 2017 Offering

23. In late April and early May 2017, Function(x) continued to incur operating losses and was in a precarious financial state. If Function(x) failed, Sillerman would not be able to recoup his loans to the company. Sillerman thus engaged in a variety of deceptive acts and

misrepresentations in connection with efforts to raise up to \$10 million from investors for Function(x) (the “May Offering”).

24. Sillerman’s fraud created the false impression that Function(x) had completed a successful private offering and, at the same time, concealed that Sillerman was diverting money from the company directly to his personal accounts.

Sillerman Used Sham Subscription Agreements to Solicit Investors

25. In connection with the May Offering, Sillerman personally solicited a group of investors. To entice this group to invest, Sillerman falsely claimed that two famous celebrities (“Sports Celebrity” and “Entertainment Celebrity”) had agreed to invest.

26. For example, on May 5, 2017, Sillerman sent an email to potential investors and a Function(x) officer stating, “We’ll have [Entertainment Celebrity]’s and [Sports Celebrity]’s fully filled out [investment] materials tomorrow.” Although Sillerman had contacted Sports Celebrity and Entertainment Celebrity, neither agreed to invest in the offering. Sillerman nevertheless created false subscription agreements from Sports Celebrity and Entertainment Celebrity and forged their signatures. He then circulated both sham agreements to Function(x) staff to further perpetuate the lie that the two celebrities had agreed to invest.

Sillerman Directs Function(x) to File False and Misleading Press Release and Forms 8-K and Then Engages in Additional Deceptive Conduct to Conceal the Truth

27. On May 8, 2017, Sillerman and Function(x) issued a false and misleading press release and filed two Forms 8-K announcing that the company had accepted subscriptions for \$10 million from investors in the May Offering.

28. Sillerman decided to issue the press release, directed the content of the press release and his quote, and had final approval of its language before issuing it. Sillerman also provided details about the offering to the Function(x) officers preparing the public filings.

29. The press release, incorporated into one of the company's Forms 8-K, stated that Function(x) "has accepted subscriptions for the issuance of \$10,000,000 in . . . Preferred Equity. . . . The gross proceeds to Function(x) from this offering are expected to be approximately \$10,000,000 before deducting expenses associated with the transaction."

30. The press release continued: "The proceeds of this transaction will be used for working capital and to execute on the Company's expansion plan, which is an integral part of the Company's long-term mission to become the preeminent 21st century digital media platform."

31. The press release and Form 8-K included a quote from Sillerman, stating, in part, that the May Offering "enables us to expand and grow the business with the objective of creating the leading digital media platform."

32. The other Form 8-K falsely represented that the company had entered into binding agreements for the sale of \$10 million of convertible preferred stock pursuant to subscription agreements, these agreements were material definitive agreements, and Sillerman had committed to invest \$2.2 million of the \$10 million.

33. In fact, Function(x) had secured only \$4.8 million from outside investors in the May Offering. Sillerman engaged in deceptive conduct to support the false claims that the amount raised was more than double that.

34. Specifically, on or about May 4 and 5, 2017, as the \$4.8 million in investor funds were deposited in the company's bank account, Sillerman transferred the entire amount from the company to his personal bank accounts. Sillerman then immediately transferred \$4 million back to the company.

35. Sillerman did not clear these transactions with anyone at the company or inform anyone about these transactions. On the afternoon of May 8, 2017, Function(x)'s CFO sent an

email to Sillerman and copying Function(x)'s controller and general counsel, stating that "we noticed that \$4M was moved to your account and \$4M was transferred to us from a [bank] account we don't recognize. Is the \$4M moved to your account a reduction of your [Line of Credit]? I am assuming the \$2M that came in is from an investor, but I am not sure who. Can you please advise?"

36. In response, Sillerman falsely claimed the \$4 million transfer to Function(x) was comprised of \$1 million each from Sports Celebrity and Entertainment Celebrity, along with \$2 million of Sillerman's purported \$2.2 million investment.

37. Sillerman also explained that the money he withdrew – all of the money from outside investors – was to repay himself for prior loans he made to Function(x). Contrary to the public statements that Function(x) made at Sillerman's direction, the offering proceeds were not used for company expansion or working capital.

38. On May 8, 2017, Sillerman, having made a series of misrepresentations and engaged in other deceptive conduct in connection with the May Offering, transferred another \$1.3 million from a Function(x) bank account to his personal bank accounts. Sillerman again made this transfer without company approval. At least \$550,000 of this withdrawal exceeded any prior loan balance from Function(x) to Sillerman.

Sillerman's Scheme Unravels and Function(x)'s Auditor Resigns

39. On May 9, 2017, Function(x)'s CFO and in-house counsel notified the company's auditor about Sillerman's withdrawals. After the company discovered that Sillerman took more money than the balance on his loans to the company, the company reduced the number of offering shares issued to Sillerman.

40. The auditor questioned how the transactions would be disclosed in the company's quarterly report for the quarter ending March 31, 2017, and whether the withdrawals violated legal requirements.

41. After the auditor raised these questions, Function(x) never filed the quarterly report. Instead, at the request of the auditor, Function(x)'s audit committee retained a law firm to conduct an investigation.

42. On June 21, 2017, the auditor resigned and issued a letter describing illegal acts committed by Sillerman (i.e., Sillerman's misrepresentations to investors in connection with the May Offering).

43. The auditor's resignation letter also described the following material weaknesses in internal control over financial reporting:

- funds totaling \$6.1 million were released from a Company bank account into an account held by Sillerman without required approvals;
- in March 2017, Sillerman withdrew \$500,000 from the Company's bank account without supporting documentation;
- withdrawals used to repay Sillerman for loans to the Company were done without Board approval, which was required for related party transactions; and
- the Company's Form 8-K filings dated May 8, 2017, overstated the amount of funds raised in the May Offering, failed to accurately disclose the use of proceeds, and inaccurately described the transactions related to the investment made by Sillerman in the May Offering.

44. On June 27, 2017, Function(x) filed a Form 8-K summarizing the auditor's findings.

FIRST CLAIM FOR RELIEF

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

45. The Commission re-alleges and incorporates paragraphs 1 through 44 as if fully set forth herein.

46. By engaging in the conduct described above, Sillerman, with scienter, by use of the means or instrumentalities of interstate commerce, in connection with the purchase or sale of a security: (a) employed devices, schemes, or artifices to defraud; (b) made untrue statements of material fact or omitted to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; and/or (c) engaged in acts, practices or courses of conduct which operated or would operate as a fraud or deceit.

47. By reason of the actions alleged herein, Sillerman violated Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5] and unless restrained and enjoined will continue to do so.

SECOND CLAIM FOR RELIEF
Violations of Securities Act Section 17(a)

48. The Commission re-alleges and incorporates paragraphs 1 through 44 as if fully set forth herein.

49. By engaging in the conduct described above, Sillerman, by the use of the means and instruments of transportation or communication in interstate commerce, and in connection with the offer or sale of securities, has: (a) with scienter, employed devices, schemes or artifices to defraud; (b) obtained money or property by means of an untrue statement of a material fact or an omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or (c) engaged in one or more

transactions, acts, practices or courses of business which operated or would operate as a fraud or deceit upon purchasers.

50. By reasons of the actions alleged herein, Sillerman violated Section 17(a) of the Securities Act [15 U.S.C. § 77q(a)] and unless restrained and enjoined will continue to do so.

THIRD CLAIM FOR RELIEF

Aiding and Abetting Violations of Exchange Act Section 13(a) and Rules 12b-20 and 13a-11 Thereunder

51. The Commission re-alleges and incorporates paragraphs 1 through 44 as if fully set forth herein.

52. Section 13(a) of the Exchange Act [15 U.S.C. § 78m(a)] and Rules 12b-20 and 13a-11 thereunder [17 C.F.R. §§ 240.12b-20 and 240.13a-11] require issuers of registered securities to file with the Commission factually accurate current reports.

53. Function(x) filed two current reports on Form 8-K that were not factually accurate.

54. By engaging in the conduct alleged above, Defendant Sillerman knowingly and substantially assisted Function(x)'s factually inaccurate filings, and aided and abetted Function(x)'s violations of Section 13(a) of the Exchange Act [15 U.S.C. § 78m(a)] and Rules 12b-20 and 13a-11 thereunder [17 C.F.R. §§ 240.12b-20 and 240.13a-11].

FOURTH CLAIM FOR RELIEF

Violations of Exchange Act Section 13(b)(5) and Rule 13b2-1 Thereunder

55. The Commission re-alleges and incorporates paragraphs 1 through 44 as if fully set forth herein.

56. Rule 13b2-1 under the Exchange Act [17 C.F.R. § 240.13b2-1] prohibits any person from, directly or indirectly, falsifying or causing to be falsified any book, record, or account required to be kept pursuant to Section 13(b)(2)(A) [15 U.S.C. § 78m(b)(2)(A)]. Section

13(b)(2)(A) [15 U.S.C. § 78m(b)(2)(A)] requires issuers to make and keep books, records, and accounts which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of its assets.

57. Section 13(b)(5) of the Exchange Act [15 U.S.C. § 78m(b)(5)] prohibits any person from knowingly circumventing or knowingly failing to implement a system of internal accounting controls, or knowingly falsifying any book, record, or account required to be made and kept by Section 13(b)(2) [15 U.S.C. § 78m(b)(2)].

58. Sillerman caused Function(x)'s books and records to be falsified. Sillerman submitted sham subscription agreements and told the CFO and others that some of the money he transferred to Function(x) accounts was from celebrity investors when in fact the money was simply recycled proceeds from other investors.

59. Sillerman also circumvented a system of internal accounting controls. First, he made wire transfers from and to the company without the knowledge of the company's finance department. Second, Sillerman failed to obtain the approval of other senior executives, which was required for company disbursements over \$10,000. Third, Sillerman used investor proceeds to repay his loans to the company without obtaining Board approval, which was required for related party transactions such as these. Fourth, after all the transfers between the company and Sillerman, Sillerman took about \$550,000 in excess of what he had loaned the company.

60. By engaging in the conduct alleged above, Sillerman violated Exchange Act Rule 13b2-1 [17 C.F.R. § 240.13b2-1] and knowingly violated Exchange Act Section 13(b)(5) [15 U.S.C. § 78m(b)(5)].

PRAYER FOR RELIEF

WHEREFORE, the Commission respectfully requests that the Court enter a judgment:

- (i) finding that Sillerman violated the provisions of the federal securities laws as alleged herein;
- (ii) permanently restraining and enjoining Sillerman from violating Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, Section 17(a) of the Securities Act, Section 13(b)(5) of the Exchange Act and Rule 13b2-1 thereunder, and Section 13(a) of the Exchange Act and Rules 12b-20 and 13a-11 thereunder;
- (iii) ordering Sillerman to pay a civil monetary penalty of \$179,000 pursuant to Section 21A of the Exchange Act [15 U.S.C. § 78u-1]; and
- (iv) issuing an order, pursuant to Section 21(d)(2) of the Exchange Act [15 U.S.C. § 78u(d)], prohibiting Sillerman from serving as an officer or director of a public company.

Dated: June 28, 2019.

Respectfully submitted,

/s/ Jennie Krasner
Jennie Krasner
U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549
(202) 551-4708
krasnerj@sec.gov

Of Counsel:

Daniel J. Maher
maherd@sec.gov
Lisa Deitch
DeitchL@sec.gov
U.S. Securities and Exchange Commission
100 F. Street, N.E.
Washington, D.C. 20549