ADMINISTRATIVE PROCEEDING
FILE NO. 3-4694

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	:
EXECUTIVE SECURITIES CORP.	:
(8-13526)	:
RICHARD O. BERTOLI ARNOLD L. FREILICH	:
	:

INITIAL DECISION

September 3, 1976
Washington, D.C.

Ralph Hunter Tracy
Administrative Law Judge

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APPEARANCES: Donald N. Malawsky, Franklin D. Ormsten, Harry L. Garmansky and Thomas E. Boccieri, Attorneys of the New York Regional Office of the Commission for the Division of Enforcement.

Richard O. Bertoli, pro se for for Executive Securities Corp.
Arnold L. Freilich, pro se

BEFORE: Ralph Hunter Tracy, Administrative Law Judge

This is a public proceeding instituted by Commission Order (Order) dated June 17, 1975, pursuant to Sections 15(b), 15A and 19(h)(2) of the Securities Exchange Act of 1934 (Exchange Act), and Section 10(b) of the Securities Investor Protection Act of 1970 (SIPA), to determine whether the above-named respondents committed various charged violations of those Acts and the Securities Act of 1933 (Securities Act), and regulations thereunder, as alleged by the Division of Enforcement (Division) and the remedial action, if any, that might be appropriate in the public interest.

The Order alleges, in substance, that Executive Securities Corp., (Executive or Registrant), Richard O. Bertoli (Bertoli) and Arnold L. Freilich (Frielich), singly and in concert, wilfully violated and wilfully aided and abetted violations of Section 17(a) of the Securities Act, Sections 10(a), 10(b) and 17(a) of the Exchange Act and Rules 10a-1(a), 10a-1(b), 10b-5, 17a-3 and 17a-4, respectively, thereunder.

The Order included an allegation that on February 14, 1975, the U.S. District Court for the Southern District of New York had entered a consent decree permanently enjoining Registrant from violating and Bertoli from aiding and abetting violations of Section 17(a) of the Exchange Act and Rules 17a-3 and 17a-4 thereunder. On the same date the Court appointed a trustee for Registrant pursuant to Section 5 of SIPA.

The evidentiary hearings were held at New York, New York, on November 3,4,5,6,7, 10 and 17, 1975. Respondents appeared pro se with Bertoli representing Registrant. Proposed findings of fact, conclusions of law and supporting briefs were filed by all parties.

The findings and conclusions herein are based upon the preponderance of the evidence as determined from the record and upon observation of the witnesses.

FINDINGS OF FACT AND LAW

Respondents

Executive Securities Corp. (Registrant) was incorporated in the State of Florida on September 11, 1967, and has been registered with the Commission as a broker-dealer pursuant to Section 15(b) of the Exchange Act since November 8, 1967. It is a member of the National Association of Securities Dealers (NASD) and has been a member of the Boston Stock Exchange. Registrant has had offices located at 1350 N.E. 125th Street, North Miami, Florida, 25 Broadway and 74 Trinity Place, New York, New York, 53 State Street, Boston, Massachusetts, 2742 E. Oakland Boulevard, Fort Lauderdale, Florida and 1 Exchange Place, Jersey City, New Jersey. During the pertinent period herein the principal place of business has been 1 Exchange Place, Jersey City, New Jersey, with a branch office or division at 25 Broadway and/or 74 Trinity Place, New York, New York. On February 14, 1975, the U.S. District Court for the Southern District of New York, appointed a trustee for the liquidation of Registrant, pursuant to the Securities Investor Protection Act of 1970 (SIPA).

Richard O. Bertoli, has been president, a director and shareholder of Registrant from about March 8, 1973 until the present. He was previously a vice-president with Dopler & Co., Inc., a registered broker-dealer, from October 1971 to March 1973, when Dopler merged with Registrant. Bertoli practiced as a CPA from December 1959 to September 1971, at 1 Van Terrace, Sparkhill, New York. He obtained a B.S. degree in accounting from Seton Hall University in June 1958.

Arnold Freilich has been secretary and treasurer of Registrant during the pertinent period herein. He attended Bronx Community College and

Baruch College in New York City and was with Weinberg, Ost & Hayden, brokers, as a cashier, from May 1967 to July 1969. He was with Dopler & Co. from July 1969 to September 1970; with Wolf & Wolf, a CPA firm from September 1970 to June 1971 when he rejoined Dopler & Co., where he was secretary and treasurer. When Dopler merged with Registrant he joined Registrant.

Injunctions Chargeable to Registrant and Bertoli

Section 15(b)(4)(C) of the Exchange Act provides that one of the bases for revocation or denial of a broker-dealer's registration or the imposition of lesser sanctions is the existence of a described injunction issued by a court of competent jurisdiction.[1/]

The Order alleges, and the record establishes, that on February 14, 1975, and March 18, 1975, the U.S. District Court for the Southern District of New York, entered consent judgments permanently enjoining Registrant and Bertoli, respectively, from directly or indirectly failing

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1/ Section 15(b)(4)(C) provides as follows:

"(4) The Commission, by order, shall censure, place limitations on the activities, functions, or operations of, suspend for a period not exceeding twelve months, or revoke the registration of any broker or dealer if it finds, on the record after notice and opportunity for hearing, that such censure, placing of limitations, suspension, or revocation is in the public interest and that such broker or dealer, whether prior or subsequent to becoming such, or any person associated with such broker or dealer, whether prior or subsequent to becoming so associated —

* * * *

(C) is permanently or temporarily enjoined by order, judgment, or decree of any court of competent jurisdiction from acting as an investment adviser, underwriter, broker, dealer, or municipal securities dealer, or as an affiliated person or employee of any investment company, bank, or insurance company, or from engaging in or continuing any conduct or practice in connection with any such activity, or in connection with the purchase or sale of any security."

to make, keep and preserve accurate and current such accounts, ledgers, papers, books and other records as required by Section 17(a) of the Exchange Act and Rules 17a-3 and 17a-4 thereunder.

Background

On Schedule A of a Form BD filed for Executive on February 8, 1974, Bertoli, his wife Catherine Condosta Bertoli and Paramount Leasing Corp. are each shown as 10 to 25% owners of the common stock of Executive. Bertoli, in turn, is president and secretary of Paramount Leasing Corp. He is, also, president, vice president, treasurer and secretary of Lil Rich Mining, Ltd. (Lilrich), Freelton Investments, Ltd. (Freelton), Vecat, Inc., (Vecat) and is secretary of Hemisphere Investment Services, Ltd. (Hemisphere). These are all companies in which Bertoli has an interest and which he controls and he has used them as principals and nominees in the transactions to be described herein. He has used accounts in his name and his wife's maiden name, Condosta, as well.

When Dopler and Executive were merged in 1973, Executive became the surviving entity with its principal office at 1 Exchange Place, Jersey City, New Jersey, with Dopler becoming the "Dopler Division" at its office, 25 Broadway, New York City. At that time Bertoli emerged as the dominant figure in Executive and has played the leading role in the transactions to be described herein. On or about September 27, 1974, Executive merged with McNell Securities Corporation and its president Thomas McNell, became a vice president and a registered principal of Executive. McNell Securities became the "McNell Division" of Executive and continued doing a retail brokerage business at its address, 74 Trinity Place, New York City.

The allegations set forth in the Order involving Registrant, Bertoli and Freilich arose from their participation in two alleged schemes which resulted in the defrauding of public investors and brokerage firms.

In the first of these schemes large quantities of the stock of Centronics Data Computer Corp. (Centronics) were sold to the public but a large percentage of it, approximately 75,000 shares, was never delivered to customers, nor were their payments for the stock returned to them. In other words, Executive sold Centronics, received payment but did not deliver. The record shows that the respondents then went to considerable lengths to make it appear that Executive's trading account had acquired the stock to deliver to customers when, as a matter of fact it had not. The result was customers received no stock while Executive kept approximately $600,000 which customers had paid for it.

In the second scheme Bertoli, through various accounts controlled by him, simply sold the stock of International Business Machines Corp. (IBM) short through a number of New York Stock Exchange member firms by representing to these firms that the sales were long. He never delivered on these sales and the firms were forced to "buy-in" at the market which resulted in their suffering an aggregate loss in the neighborhood of one million dollars.

In order to carry out and conceal these schemes respondents failed to accurately make and keep certain records and falsified or destroyed others.

Anti-Fraud Provisions

The Order charges that during the period from October 1, 1974 to June 17, 1975, Registrant, Bertoli and Freilich wilfully violated and wilfully aided and abetted violations of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder[2/] in that they sold and effected transactions in the common stock of Centronics by employing directly and indirectly devices, schemes and artifices to defraud and by means of untrue statements of material facts and omissions to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading. As part of the aforesaid conduct and activities, Registrant, Bertoli and Freilich would and did, among other things:

1. Accept and cause to be accepted orders for the purchase and sale of securities of Centronics on behalf of Registrant's customers at a time when Registrant was incapable of consummating said transactions;

2. Fail to deliver promptly to customers of Registrant Centronics securities fully paid for by such customers;

3. Cause false and fraudulent accounting entries to be made on the books and records of Executive with respect to transactions in Centronics stock.

4. Make and/or cause to be made false and fraudulent representations and statements and omit to state material facts to customers of Registrant and others regarding the use of funds and securities of customers concerning, among other things, the activities set forth in sub-paragraphs 1 through 3 above.

2/ Section 10(b) as here pertinent makes it unlawful for any person to use or employ in connection with the purchase or sale of a security any manipulative device or contrivance in contravention of rules and regulations of the Commission prescribed thereunder. Rule 10b-5 defines manipulative or deceptive devices by making it unlawful for any person in such connection "(1) to employ any device, scheme, or artifice to defraud, (2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (3) to engage in any act, practice, or course of business which operates or would operate as a (cont'd.)

Prior to the merger of McNell Securities and Executive in September 1974, Thomas McNell, president of McNell Securities had been recommending the purchase of Centronics to his customers. Following the merger, when McNell Securities had become the McNell Division of Executive, he prepared a research report which continued such recommendation. This report was reviewed by Bertoli who authorized its mailing to McNell Division customers, although Bertoli was bearish on Centronics and thought it should be sold, as opposed to being bought.

During the period of October 1974 through January 1975, Executive customers, particularly those of its McNell Division, purchased large amounts of Centronics whose stock was listed on the New York Stock Exchange in mid-November 1974, having previously traded on the over-the-counter market. During this period Executive was making a market in Centronics and Bertoli and Freilich were representing to the McNell Division's registered representatives and to its president, Thomas McNell, that Centronics shares were being purchased by Executive from other broker-dealers in order to supply stock to the customers who were purchasing it. As a matter of fact, the Centronics shares purchased by the McNell Division customers were sold short to them by Executive as reflected in Executive's trading account C, known as the TC account.[3/] The effect of this was that

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2/ (Continued)
fraud or deceit upon any person . . ." Section 17(a) contains analogous antifraud provisions.

3/ Transactions in Centronics were executed in more than one trading account at Executive but for convenience they have been aggregated and treated as one.

while the individual customers' accounts were shown to be long the stock, the Executive TC account was short the aggregate amount. Although Executive was actively trading in Centronics, it simply was not buying enough stock to cover all of the customer purchases so that before long the TC account was short in excess of 100,000 shares of Centronics.

In order to reduce the short position in the TC account, a series of bookkeeping entries were made reflecting fictitious short sales of Centronics to the TC account by the Bertoli controlled accounts of Hemisphere and Vecat. The effect of these short sales was to reduce significantly the Executive TC account short position in Centronics, while at the same time significantly increasing the short positions in Hemisphere and Vecat. The following table shows the effect of these transactions.

Fictitious Short Sales by the Account of	# of Centronics Shares Sold Short	Price	Date Reflected In Executive Daily Stock Take Off	Total Aggregate Reduction in Executive's Trading Account Short Position of Centronics Stock
Hemisphere	60,000	$ 9-1/2	10/30/74	60,000
Vecat	15,000	9-7/8	11/13/74	75,000
Vecat	25,000	10-3/8	11/18/74	100,000
Vecat	12,000	11	11/25/74	112,500
Vecat	2,175	11-3/4	11/26/74	114,675

The total purported effect of the bookkeeping entries reflecting the

fictitious short sales of Centronics by Vecat and Hemisphere to Executive's TC account was to virtually eliminate the TC account short position in Centronics and to build-up the short position in Centronics in the Hemisphere and Vecat accounts. By November 26, 1974, Hemisphere was short 60,000 shares of Centronics and Vecat was short 54,675 shares. Four of the five order tickets which initiated the short sales of Centronics by Vecat and Hemisphere to Executive's TC account, as shown in the foregoing table, were written by Bertoli; the remaining ticket was never located.

The next step in respondents' scheme was to eliminate the short positions from the Vecat and Hemisphere accounts. To accomplish this a number of bookkeeping transactions were necessary. Executive kept its records by means of a computerized system which used disks to store information and to enter daily transactions. From these disks a printout of a daily stock record, a customer ledger, or any other record, could be made whenever desired. Executive recorded its own customer transactions, including those of the McNell Division, in an account series identified by a numerical prefix of a double zero (00). Prior to December 13, 1974, the McNell Division and other Executive customers were recorded in this 00 office code account on an integrated basis. However, on December 13, 1974, Paul Coraggio (Coraggio) Executive's data processing manager, was directed by Freilich to establish a separate office code to be designated as 15 to be used for McNell Division customer accounts only.

Following Freilich's instructions Coraggio prepared a computer program which closed out all stock positions and/or money balances in the individual customer accounts of the McNell Division 00 code and transferred

them into a single Omnibus or Control Account in the 00 code which did not itemize the stock position and/or money balance of each individual McNell Division customer. At the same time, pursuant to Freilich's instructions, Coraggio prepared another computer program, resetting only the McNell Division individual customer accounts in the newly created 15 code, and simultaneously, created another Omnibus or Control Account in the 15 series which was short the same number of shares the 00 series was long. After these transactions were recorded the Centronics stock position in the 00 Omnibus account equalled the aggregate Centronics stock positions in all of the individual McNell Division customer accounts set up in the 15 series. The net effect of those bookkeeping transactions was to remove the individual McNell Division customer accounts from the 00 series.

As a result of the foregoing fictitious transactions on December 13, 1974, the Centronics stock position in the 00 Omnibus account purported to reflect a long position. The McNell Division 15 Omnibus was short while the individual customer accounts in the 15 series appeared to be long. However, on December 16, 1974, pursuant to Freilich's written instructions, Coraggio, by journal entries, transferred from the 00 Omnibus account 60,000 shares to Hemisphere and 54,675 to Vecat, respectively. These journal entries were reflected only in the 00 code and not in the 15 code so that when they were posted only in the 00 code an imbalance was created between the two accounts. The net result was that 114,675 shares of Centronics belonging to McNell Division customers were transferred from the 00 Omnibus account to the Hemisphere and Vecat accounts, thereby relieving those accounts of their short positions in Centronics.

In other words, the 00 Omnibus account which was supposed to reflect the total of all the individual McNell Division customer positions in Centronics, actually had, on December 16, 1976, only 4,750 shares, while

the individual McNell Division customer accounts in the 15 code reflected a long position of approximately 117,000 shares of Centronics. The McNell Omnibus 15 account was still short.

The net effect of the foregoing machinations was to transfer the positions of the individual McNell Division customers into one 00 Omnibus account and from there into the Hemisphere and Vecat accounts, controlled by Bertoli. The cumulative effect was to remove all liability of Vecat and Hemisphere concerning their delivery of Centronics stock, and indirectly, to remove the liability of Executive for Centronics stock held for the benefit of McNell Division customers. 4/

Although Executive continued to make a market in Centronics and McNell continued to buy and sell Centronics for customers, Executive failed to purchase enough Centronics so that delivery could be made to customers. As of February 10, 1975, McNell customers, many of whom had purchased Centronics during October 1974, were entitled to delivery of approximately 75,600 shares but the McNell Omnibus account 00 was long only about 4,100 shares, indicating a short position of Executive of some 71,500 Centronics shares.

Executive's audit for the year and for the preparation of its Form X-17a-5, was commenced on December 31, 1975 by Peter W. Justini (Justini), a CPA who had been conducting Executive's annual audits and filing its Forms X-17a-5's since September 30, 1971. During the course of his audit the principal person with whom Justini dealt was Freilich. While conducting the audit Justini requested Executive's accounting and computing records and was provided with certain of those documents, including the December 31, 1974, customer ledger. He was not, however, given any documents or records containing evidence of the McNell Division customer accounts in the 15 series, nor did he know of the existence of the individual McNell Division customer accounts. Consequently, when accounting confirmations to Executive customers listed

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4/ The McNell stock records could not be located for the period of December 13, 1974, to February 14, 1975, and, therefore, were reconstructed for that period from the daily bookkeeping records.

in the December 31, 1974 customer ledger were mailed out none was sent to the McNell Division accounts thus preventing confirmation of the true stock position and/or money balances in those accounts.

The liquidation of Executive was begun on February 21, 1975, by Control Associates, a company which specializes in the liquidation of brokerage firms for the SIPA Trustee. Its examination of Executive's books and records and customer claims disclosed that 77 customers were owed 75,135 shares of Centronics stock. These 75,135 shares could not be found although 1,840 shares were found on the premises and another 6,164 were pledged on a bank loan in Miami, Florida. The net distribution by SIPC to the 77 Centronics customers after elimination of margin debit balances in their accounts, was $596,087.50. 5/ The price per share used by the Trustee was $12.50 which was the price on the NYSE on February 14, 1975, the filing date of the order appointing the trustee. This is the date which SIPA requires be used. Centronics subsequently reached a high of $25 in July 1975, thus depriving investors of further benefits because of Executive's failure to deliver the stock which they had purchased.

Respondents argue that Registrant was a principal market maker in Centronics stock and as such was expected to take sizeable positions, both long and short, in order to maintain an orderly market; that sales of Centronics to customers were clearly disclosed as sales from Executive as a principal and from Executive's Trading Account and that Executive may be short Centronics; that all securities, including Centronics, were delivered promptly to customers upon proper request.

The argument that Executive was a market maker in Centronics and engaged in short sales as part of its market making activities is irrelevant. The

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5/ It is clear from the record that respondents' failure to deliver Centronics stock to customers after accepting payment constituted a fraud through conversion by Executive of its customers' funds. This misappropriation of customer's funds also violates the anti-fraud provisions.

question is whether Executive fulfilled its obligation to purchase and deliver securities for which its customers had paid. This it clearly did not do. In Lewis H. Ankeny, 29 S.E.C. 514 at p. 516, the Commission stated:

> "Inherent in the relationship between a dealer and his customer is the vital representation that the customer will be dealt with fairly, and in accordance with the standards of the profession. Duker & Duker, 6 S.E.C. 388 (1939). At a minimum, he represents that he will act in accordance with reasonable trade custom. Trade custom requires a dealer to consummate transactions with customers promptly, and in every transaction an implied representation to this is made, unless there is a clear understanding to the contrary. If a dealer intends not to consummate a transaction promptly, and fails to disclose this intention to his customer, he omits to state to that customer a material fact necessary to make the above representation not misleading, in violation of the anti-fraud provisions of the Securities Act and the Exchange Act."

The misrepresentation inherent in the above situation is aggravated when the dealer recommends the security and sells it to the customer in a short-sale, but delays effecting the covering transaction to acquire the security. Under these circumstances it is not unreasonable to assume that the dealer delayed the execution of his covering transaction because he believed that by postponing such transaction he would be able to acquire it at a cheaper price; and the failure to disclose this material fact compounds the violation.[6/]

It is found that Registrant, Bertoli and Freilich wilfully violated and wilfully aided and abetted violations of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

6/ Securities Exchange Act Release No. 6778/April 16, 1962. See, also, Carl J. Bliedung, 38 S.E.C. 518 (1958); Batkin & Co., 38 S.E.C. 436 (1958).

Illegal Short Sales

The Order alleges that during the period from October 1, 1974 to June 17, 1975, Registrant, Bertoli and Freilich, singly and in concert, wilfully violated and wilfully aided and abetted violations of Section 10(a) of the Exchange Act and Rules 10a-1(b) and 10a-1(c) [7/] thereunder in effecting short sales [8/] of securities, specifically International Business Machine (IBM) stock, on a national securities exchange for their own account and for the accounts of others by, among other things, causing members of those national securities exchanges, by the use of the facilities of such exchanges, to effect sell orders of Registrant and others marked "long" when in fact such sell orders were "short."

The Order alleges, also, that in connection with the short sales of IBM stock the respondents violated the antifraud provisions of the securities laws by causing various broker-dealers to be misled and deceived concerning sales by Registrant and various accounts in which Bertoli had a beneficial interest by, among other things, not informing broker-dealers that such sales of IBM stock were short sales; that Registrant, Bertoli and others could not deposit the required margin to carry the short sales of IBM; and

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7/ Section 10(a) as here pertinent makes it unlawful to effect any short sale in connection with the purchase or sale, of any security registered on a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors. Rules 10a-1(b) and 10a-1(c) provide:

(b) no member of a national securities exchange shall, by the use of any facility of such exchange, execute any sell order unless such order is marked either "long" or "short";

(c) no member of a national securities exchange shall mark a sell order "long" unless (1) the security to be delivered after sale is carried in the account for which the sale is to be effected, or (2) such member is informed that the seller owns the security ordered to be sold and, as soon as is possible without undue inconvenience or expense, will deliver the security owned to the account for which the sale is to be effected.

8/ Rule 3b-3 under the Exchange Act defines a "short sale" as any sale of a security which the seller does not own.

that Registrant, Bertoli and others could not deliver the IBM stock.

Beginning about January 20, 1975 and continuing through February 13, 1975, the Bertoli controlled accounts of Vecat, Freelton, Condosta and Lilrich sold short a total of 32,900 shares of IBM. All of these accounts were cash accounts in which short sales are not permitted. Accordingly, the sales were made to appear as long sales, i.e., sales wherein the seller owns the stock, by not marking any of the order tickets reflecting such sales at Executive as short sales, and by telling the registered representatives at the various broker-dealers that the sales were long sales. Of the 32,900 shares 16,100 were sold through Executive and the balance of 16,800 shares were sold directly through other broker-dealers.

A former order clerk and registered representative with Executive testified that he executed sales of IBM through various brokers at Bertoli's direction and that the sales tickets, many of which were in Bertoli's handwriting, were marked to indicate that the sales were long. Representatives from the brokerage firms of Reynolds Securities, Dominick & Dominick, L.F. Rothschild & Co., and Shearson, Hayden, Stone, testified that these firms all executed sales of IBM for Bertoli, Freelton and Lilrich on the assurances of Bertoli and his representative, Robert Jordan, that such sales were long and that the stock would be delivered. However, the stock was never delivered.

The result of the failure of Executive and Bertoli's controlled accounts to have the IBM stock delivered to the various broker-dealers to whom and through whom it was sold was that those broker-dealers were forced to "buy-in" the selling accounts of Bertoli, that is, make replacement purchases of IBM

shares in the open market. Inasmuch as the price of IBM had risen approximately 40 points between the time of the initial sales by Bertoli and the buy-in by the various broker-dealers after he failed to deliver they sustained losses totalling $914,699.06, as shown in the following table:

Account	Date of Sale	Broker-Dealers to Whom Shares Not Delivered	Number of Shares Bought-in	Cost of Buy-ins (Loss)
Freelton	Jan/Feb	Bache & Co.	2100	$ 58,899.91
Freelton	Jan/Feb	Dominick & Dominick	3000	67,033.42
Freelton	Jan/Feb	Edward & Hanley	2000	45,933.30
Freelton	Jan/Feb	L.F. Rothschild	2000	45,836.96
Freelton	Jan/Feb	Shearson Hayden	2300	96,215.57
Freelton	Jan/Feb	E. F. Hutton	1100	50,747.33
Executive**	Jan/Feb	Josephthal Co.	3100	68,411.31
Executive**	Jan/Feb	H.N. Whitney	1000	31,189.69
Executive**	Jan/Feb	Thomson McKinnon	8000	154,388.00
Executive**	Jan/Feb	Shearson Hayden	2000	61,995.05
Executive**	Jan/Feb	Bache & Co.	2000	44,537.00
Lilrich Mines	Jan/Feb	Reynolds Sec.	3200	129,689.34
Lilrich Mines	Jan/Feb	E.F. Hutton	1100	59,822.18
		TOTALS	32900	$ 914,699.06

* On February 29, 1975, Bertoli signed a personal promissory note to Reynolds & Co. as payment for the money Reynolds & Co. had lost in the IBM transactions in the Lilrich account. It was due August 28, 1975, but has not been paid, nor renewed.

** Of the 16,100 IBM shares sold at the various broker-dealers by Executive on behalf of the Bertoli controlled accounts, 4000 shares were for the account of Condosta, 5600 shares were for the account of Lilrich, 5500 shares were for the account of Freelton and 1000 shares were for the account of Vecat.

In his brief Bertoli states that all sales of IBM stock through Executive by Freelton, Lilrich, or Condosta were long sales and properly and accurately reflected on the books and records of Executive; that all sales of IBM through other broker-dealers by Freelton and Lilrich were long sales in receive versus payment, deliver versus payment accounts; that all sales of IBM by Freelton, Lilrich, Vecat and Condosta were current sales with the latest settlement date being February 5, 1975, which was only six days prior to February 11, 1975, the last settlement date on which Executive was in business; that during this time span SEC investigators had discovered the IBM fail to deliver position and the SEC staff spread a false and malicious rumor that Executive was short a substantial amount of IBM stock and could not cover and that this caused The Bank of North America to close out the loan accounts of Executive and to cut off an approximately $2,000,000 line of credit which caused the demise of Executive. Bertoli states that on February 14, 1975, the New York Stock Exchange distributed a list of Executive customers, provided by the SEC staff, which included the accounts of Freelton, Lilrich, Vecat and Condosta and that this resulted in New York Stock Exchange member firms closing out accounts for Freelton and Lilrich without notification or request for delivery, and in some instances prior to settlement date of the trades. Bertoli states, further, that Freelton had a delayed delivery contract and was the owner of a large list of securities which included in excess of 65,000 shares of IBM stock and in turn allocated said contract to Lilrich, Vecat, Condosta and Executive.

There is no support in the record for any of the above statements or charges. The New York Stock Exchange did issue a Notice to member firms on

February 14, 1975, which contained the names of Freelton, Condosta, Vecat and Lilrich, but the Notice stated that it was being issued in connection with the Boston Stock Exchange's suspension of Executive. It is to be noted that this Notice was issued on the same day that the Federal District Court issued a consent injunction against Registrant and the Boston Stock Exchange, of which Registrant was a member, suspended it.

The statement that Freelton owned or had a delayed delivery contract for 65,000 shares of IBM, for which there is no support whatsoever in the record, is irrelevant in view of the failure of Registrant and Bertoli to honor the settlement dates specified in their contracts with the selling brokers.[9/]

As to all of the other charges they are merely repeats of comments and allegations made by Bertoli throughout this proceeding and are without merit in view of the fact that no effort was made to substantiate them during the course of the hearing.

As to Freilich, he was secretary-treasurer of Registrant and responsible for back office procedures during the time the IBM short sales were being made by Bertoli and his controlled accounts. While Freilich may not have placed the orders he certainly knew or should have known of Executive's activities on behalf of those accounts. With respect to the 16,100 shares of IBM which were sold short through Executive he failed to ascertain whether or not those accounts owned the stock at time of sale and, therefore, allowed the short sale provisions to be violated.

9/ Naftalin & Co., Inc., et al., 1973 Transfer Binder, CCH Fed. Sec. L. Rep. ¶79,379.

It is found that Registrant, Bertoli and Freilich, wilfully violated and wilfully aided and abetted violations of Sections 10(a) and 10(b) of the Exchange Act and Rules 10a-1(b), 10a-1(c) and 10b-5 thereunder. It is found, further, that the above described conduct of Registrant, Bertoli and Freilich was also in violation of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rules 10b-5 thereunder, the antifraud provisions of the Federal securities laws.

Section 17(a) of the Exchange Act and Rules 17a-3 and 17a-4 Thereunder.

The Order charges that during the period from October 1, 1974, to February 14, 1975, Registrant wilfully violated and Bertoli and Freilich wilfully aided and abetted violations of Section 17(a) of the Exchange Act and Rules 17a-3 and 17a-4 thereunder among other things, by failing to accurately make, keep current, and preserve certain books and records including blotters, ledgers, customer accounts, memoranda of brokerage orders and instructions for each purchase and sale of securities for the account of Registrant, and copies of confirmations of all purchases and sales of securities.[10/]

The books and records of Registrant were either improperly kept, entries not made, incorrect entries made, or, concealed, all in an attempt to prevent the discovery of the violations previously found herein in connection with IBM and Centronics stock transactions. Some examples of

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10/ Section 17(a), as here pertinent, requires broker-dealers to make, keep and preserve such books and records as the Commission may prescribe by its rules and regulations. Rule 17a-3 prescribes the specific records to be kept by a registered broker-dealer and Rule 17a-4 provides for the preservation of such records.

these activities are: Freilich's instructions to Coraggio concerning journal entries in Centronics; the withholding of McNell customer accounts from the auditor; the posting of Centronics stock to customer accounts as long, when in fact, it did not exist; and the marking of IBM stock sales as long when they were short. In addition, some of the records which were kept were not in such condition that they could be examined, i.e. customer "margin slates" were incomplete and had to be reconstructed, and computer disks which had not been transcribed, that is, from which print-outs had not been made.

The Commission has repeatedly stressed the importance in the regulatory scheme for strict compliance with the requirement that books and records be kept current in proper form.[11/] The requirement that records be kept embodies the requirement that such records be true and correct.[12/] Compliance with the rule relating to maintenance of books and records is regarded as an "unqualified statutory mandate" dictated by a broker-dealer's obligation to investors to conduct its securities business on a sound basis.[13/]

In Exchange Act Release No. 10329 dated August 9, 1973, the Commission restated the basic regulatory purposes of Rule 17a-3(a) in language that is appropriate to the present situation:

> "Rule 17a-3(a) requires that registered broker-dealers prepare records of transactions and dealings in securities for the accounts of the firm's customers as well as for its own risk and account. This requirement is intended to serve three basic regulatory purposes. First, it is intended that the broker-dealer maintain current books and records for the protection and convenience of customers; that is, customers are entitled to prompt responses to inquiries and resolution of claims relating to their accounts. Secondly, a broker-dealer should be in a position to demonstrate to the Commission and the self-regulatory authorities

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11/ "It is obvious that full compliance with those requirements must be enforced and registrants cannot be permitted to decide for themselves that in their own particular circumstances compliance with some or all is not necessary": Olds & Company, 37 S.E.C. 23, 26 (1956); Pennaluna & Company, Inc., 43 S.E.C. 298, 312 (1967).

12/ Lowell Neibhur & Co., Inc., 18 S.E.C. 471, 475 (1945).

13/ Billings Associates, Inc., 43 S.E.C. 641, 649 (1967).

> that he is in compliance with the various rules and requirements, particularly the net capital and customer protection rules, without the burden of bringing books and records up to date being placed upon the regulatory authorities. Third, a broker-dealer must have current books and records to enable him to fulfill his obligations and responsibilities to other broker-dealers with whom he transacts business. (Emphazis added).

It is found that Registrant wilfully violated and Bertoli and Freilich wilfully aided and abetted violations of Section 17(a) of the Exchange Act and Rules 17a-3 and 17a-4 thereunder.

Wilfullness

All of the violations, and the aiding and abetting of such violations, found herein have been found to have been wilfull. The term wilfull has been defined in Tager v. S.E.C., 344 F.2d 5 (1965) where the Court says, at p. 8:

> "It has been uniformly held that 'willfull' in this context means intentionally committing the act which constitutes the violation. There is no requirement that the actor also be aware that he is violating one of the Rules or Acts. Gilligan, Will & Co. v. SEC, 267,F.2d 461, 468, cert. denied, 361 U.S. 896; Hughes v. SEC, 174 F.2d 969, 977 (1949); 2 Loss, Securities Regulation 1310, n. 88 and cases cited therein."

Respondents argue that Section 10(b) of the Exchange Act and Rule 10b-5 thereunder requires an allegation of "intent" to deceive, manipulate or defraud on the part of respondents and that the record is bare as to any allegations or evidence against respondents of "intent" to deceive, manipulate or defraud. In support of this argument respondents cite a series of cases and an article by Louis Loss.

It is unnecessary to consider respondents' argument that higher standards than those set forth in Tager are required in determining wilfullness in view of the fact that it is clear from the evidence in the record that the respondents committed acts with intent to deceive, manipulate or defraud in furtherance of the schemes detailed herein.

Other Matters

At the conclusion of the evidentiary hearing Respondents' motion to dismiss the charges was denied. The motion was renewed by Respondents in their briefs. In view of the record and the findings made herein the motion to dismiss is denied.

On July 22, 1976, Respondents filed a motion to suppress all books and records illegally searched and seized by the Commission's staff in any proceeding before the Commission and any fruits borne from said documents The motion was based on affidavits by Bertoli and Freilich. Upon review of the record and consideration of all arguments presented by Respondents and the Division the motion to suppress is denied.

Public Interest

The violations found herein were the result of a deliberate scheme on the part of respondents, Bertoli and Freilich, to defraud brokerage firms, and the investing public. As a result of their activities the estimated cost to SIPC will be approximately $3,000,000.

Although respondents have strenously denied all charges they have made no attempt at refuting them. They refused to testify, either on their own behalf or at the call of the Division and they produced no witnesses of their own.

The Commission has held that in its disciplinary proceedings an adverse inference may be drawn from a failure to testify or explain facts and circumstances, particularly as to matters within one's knowledge.[14/]

14/ Allen Mansfield, Exchange Act Release No. 12479/May 25, 1976; N. Sims Organ & Co. v. S.E.C., 293 F.2d 78 (1961), cert. denied 368 U.S. 968 (1962); Strathmore Securities, Inc. 43 S.E.C. 575 (1967), aff'd, 407 F.2d 722 (1969); Century Securities Co., 43 S.E.C. 371 (1967).

Although no inference has been drawn herein from the fact that Bertoli and Freilich did not testify the fact remains, nonetheless, that there is no explanation in the record for their apparent unconscionable conduct nor any evidence which could serve to mitigate such conduct.

In addition, the Commission has found it in the public interest to revoke the registration of a broker-dealer and to find its officers to be the cause of such revocation, based on an injuction issued by a court of competent jurisdiction against such broker-dealer.[15/]

ORDER

Upon careful consideration of the record and the arguments and contentions of the parties, it is concluded that the public interest requires the revocation of Executive's registration as a broker-dealer and that Bertoli and Freilich be barred from being associated with a broker-dealer.[16/]

Accordingly, IT IS ORDERED that the registration of Executive Securities Corp. as a broker-dealer is revoked and the firm is expelled from membership in the National Association of Securities Dealers; and that Richard O. Bertoli and Arnold L. Freilich, and each of them, is barred from association with a broker-dealer.

This order shall become effective in accordance with and subject to Rule 17(f) of the Commission's Rules of Practice.

15/ George B. Wallace & Co., 39 S.E.C. 306 (1959); Kimball Securities, Inc., 39 S.E.C. 921 (1960).

16/ It should be noted that a bar order does not preclude making such application to the Commission in the future as may be warranted by the then existing facts. Fink v. S.E.C., 417 F.2d 1058, 1060 (C.A. 2, 1969); Vanasco v. S.E.C., 395 F.2d 349, 353 (C.A. 2, 1968).

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. 17/

Ralph Hunter Tracy
Administrative Law Judge

September 3, 1976
Washington, D.C.

17/ All proposed findings and conclusions submitted by the parties have been considered as have their contentions. To the extent such proposals and contentions are consistent with this initial decision they are accepted.