

IN THE SUPREME COURT OF THE UNITED STATES

-----X
 :
 SECURITIES AND EXCHANGE COMMISSION, :
 :
 :
 Petitioner, :
 :
 v. :
 : No. 76-1607
 SAMUEL H. SLOAN, :
 :
 :
 Respondent. :
 :
 :
 -----X

Washington, D. C.

Tuesday, March 28, 1978

The above-entitled matter came on for further argument at 10:14 a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
 WILLIAM J. BRENNAN, JR., Associate Justice
 POTTER STEWART, Associate Justice
 BYRON R. WHITE, Associate Justice
 THURGOOD MARSHALL, Associate Justice
 HARRY A. BLACKMUN, Associate Justice
 LEWIS F. POWELL, JR., Associate Justice
 WILLIAM H. REHNQUIST, Associate Justice
 JOHN P. STEVENS, Associate Justice

APPEARANCES:

HARVEY L. PITT, Esq., General Counsel, Securities and Exchange Commission, Washington, D.C. 20549, for the Petitioner.

SAMUEL H. SLOAN, Esq., Eastburn Avenue, Apt. A5, Bronx, New York 10457, for the Respondent.

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will continue the arguments in the Securities and Exchange Commission against Sloan.

Mr. Sloan, you may continue whenever you are ready.

ORAL ARGUMENT OF SAMUEL H. SLOAN ON

BEHALF OF RESPONDENT (RESUMED)

MR. SLOAN: Mr. Chief Justice, and may it please the Court: I wish to bring the attention of the Court to a small factual matter which came to my attention yesterday. You mentioned 36 trading suspension orders, and the source of this is because on page 122 of the Appendix there is a list of orders and there is a typographical error in that the SEC when they copied my original petition left out the December 25, 1975, order.

QUESTION: The question I put, Mr. Sloan, was a purely hypothetical asking whether if 36 consecutive 10-day orders were entered.

MR. SLOAN: Yes. But I did discover that there are 36 listed here, and in fact there were 37, because there is a typographical error in their appendix.

QUESTION: My hypothetical was deliberately one less in order to make it a hypothetical.

MR. SLOAN: OK. For whatever reason, I did notice that. And in the original record I do have the December 25

date in my petition which I filed in the Court of Appeals which has been transmitted to this Court.

However, on the subject of the record, I also wish to bring to the attention of this Court the fact that the SEC has refused to permit the record as it was in the state it was, in the state it was before the Court of Appeals, to be transmitted to this Court. I mention this in my brief, and it's now a matter which is pending before the Court of Appeals because I filed a motion in the Court of Appeals to require the SEC to certify the full record to the Court of Appeals and that matter is now pending.

I have also explained what happened in some detail in a letter which I wrote to the Clerk of this Court, but he has advised me that he will not distribute it at this late date.

What essentially happened was that after the Court of Appeals made its decision, the Court of Appeals sent the record back to the SEC, which is its normal practice. When this Court granted certiorari, the SEC was directed or requested to send the record back to the Court of Appeals so it could be transmitted to this Court. But what it did was it switched the records so that the record that was sent back to the Court of Appeals was not the record which the Court of Appeals had returned to the SEC, and the Court of Appeals was not apprised of this fact. So that the record which this Court has

consists of memorandums dealing with trading suspension orders. I have no objection to this Court reading these memorandums, but the fact remains that they were not filed in the Court of Appeals. All that was filed in the Court of Appeals was the certified list. The record which has not been transmitted to this Court concerns the record of the administrative proceedings against me which was a part of the record in the consolidated case when these two cases were before the Court of Appeals. The SEC says that that record is not pertinent to the issues involved in this appeal and therefore they will not transmit that record to the Court of Appeals for certification to this Court even though they have been requested by the clerk of the Court of Appeals to do so.

So right now we have a situation because I happen to feel that that record is pertinent to the question of mootness which the SEC has raised particularly with regard to certain points which were discussed yesterday.

QUESTION: I thought the Court raised the question of mootness, Mr. Sloan.

MR. SLOAN: The SEC has always said that this case was moot right from the beginning.

QUESTION: But didn't the Court ask the parties to brief the question of mootness?

MR. SLOAN: Oh, yes, they did. But the SEC was briefing the question of mootness already.

Now, this goes to the case of Weinstein v. Bradford, for example, which was discussed yesterday. It is true that the trading suspension orders have expired. However, at the present time there is an order currently outstanding which is a lifetime bar against me from being associated with a securities dealer. I believe that I can show through the record which the SEC has refused to transmit that this lifetime bar was based in part on successive trading suspension orders which the Court of Appeals declared illegal.

QUESTION: Was that order before the Court of Appeals?

MR. SLOAN: Yes, it was, because there were two cases before the Court of Appeals. The Court of Appeals consolidated both cases. The record is combined.

QUESTION: Why is it the Court of Appeals didn't mention it?

MR. SLOAN: Didn't mention what?

QUESTION: The order you are talking about.

MR. SLOAN: Oh, it's part of the same decision. The same decision in the Court of Appeals discussed two different cases, but they were consolidated. This Court when it granted certiorari only agreed to review the issues pertaining to one of the cases, but nevertheless I claim that the record of both cases, since it was a consolidated case, should be here, and I should be allowed to cite documents in

the record of the other case which I think demonstrate that this case is not moot.

QUESTION: Is it your contention, then, Mr. Sloan, that the SEC relied on a number of factors in issuing its lifetime bar order against you and one of them was this 10-day order and therefore it is at least conceivable that if this 10-day order were found to be invalid, they might not have entered the same lifetime bar order against you?

MR. SLOAN: Yes. What my contention is precisely is that the SEC when they issued successive 10-day suspension orders deducted from my net capital certain securities which were in "failed to deliver." Then they found me retroactively in violation of the net capital rule and on the basis of these findings that I was in violation of the net capital rule, they then barred me from the securities business.

If these 10-day suspension orders were illegal in the first place, I would say they cannot rely on them to make net capital deductions and therefore the order which barred me for life in the securities business is invalid.

QUESTION: That's the tie-in between the 10-day suspension and the net capital deduction?

MR. SLOAN: Because the Securities and Exchange has a release 10209, which states that if a broker is short a security which is suspended from trading by the SEC, he is required to deduct from his net capital the "fails to deliver"

in suspended securities, and I in fact was short at the time that they entered successive suspension orders on a number of occasions, and they deducted the "fails to deliver" in suspended securities. Therefore, it seems to me reasonable that if those orders were illegal, they cannot rely on them to bar me from the securities business.

I haven't reached that point in this case. I don't know if this Court affirms the decision. It may be that there will be further proceedings and I will lose on that particular point. But it seems to me that I have the right to make this showing that they did in fact rely on successive trading suspension orders to bar me from the securities business.

QUESTION: As an argument against mootness.

MR. SLOAN: As an argument against mootness. That's precisely the point, because I am here --

QUESTION: What is the present status of the bar against you? Is that involved in some litigation?

MR. SLOAN: No, there is no proceedings at all. The SEC claims that the Commission --

QUESTION: Have you attacked anywhere this bar against your engaging in the securities business?

MR. SLOAN: It was part of the decision in the Court of Appeals. I have not instituted any further proceedings for the reason that the SEC staff claims that as long as the

case is pending in the courts, the SEC itself has no jurisdiction to review the matter because the Court of Appeals acquired exclusive jurisdiction with the filing of the record. I disagree with that contention, but as long as they are going to make it --

QUESTION: Does a challenge to the validity of that order, whether or not there shall be one, will it or will it not turn on the result of this case?

MR. SLOAN: It may turn on the result of this case. I feel that --

QUESTION: And that's why you suggest there is no mootness.

MR. SLOAN: That's right.

QUESTION: Why isn't the issue of that order a closed matter? You haven't brought that case here.

MR. SLOAN: I did bring that case here, but you denied certiorari on that case.

QUESTION: So it's over.

MR. SLOAN: It's over, but nevertheless if this Court finds that the SEC acted illegally in issuing successive 10-day suspension orders --

QUESTION: Can you reopen it?

MR. SLOAN: I think I can go back to the Securities and Exchange Commission in the first instance and reopen it. That would be the place I would go to with that particular claim.

And that is why I feel it is critical to have the record here so that the Justices of this Court can look at the record and see that in fact they did deduct from my net capital certain sums of money based on successive trading suspension orders.

Now, I will point out that because of the continuing policy of the SEC, this case has been going on for a long time. The specific orders which the Court of Appeals vacated were not themselves used by the SEC as a basis, because by the time this case got in the court -- this is the third suit I have brought -- by the time this case got before the Court of Appeals, it was too late to challenge those suspension orders because there is a 60-day limitation in section 25(a) of the Securities Exchange Act.

Nevertheless, the decision of the Court of Appeals makes it clear, and I believe you will affirm that decision, that if you will affirm that decision, it will be clear that all these orders were illegal that they had been issuing over the past 33 years, and this would give me a basis for going back to the Securities and Exchange Commission and asking them to reopen the proceeding.

QUESTION: It would also destroy our denial of cert in the other one?

MR. SLOAN: No. This is a new proceeding. If I go back to the Commission and start a whole new proceeding --

QUESTION: But you do understand that that other

case is not before us.

MR. SLOAN: I understand that you did not grant certiorari.

QUESTION: Do you understand that the other case is not before us?

MR. SLOAN: No, I do not, your Honor.

QUESTION: Well, let me tell you it is not. Will that help you?

MR. SLOAN: But, but --

QUESTION: Could you argue on that assumption that I might possibly be right?

MR. SLOAN: Well, I am willing to agree that you might possibly be right, but I am not going to concede that.

QUESTION: Well, do that for a minute now and argue on what we have got.

MR. SLOAN: Yes.

QUESTION: We have got the opinion of the Court of Appeals, Judge Anderson's opinion. That's all we have.

MR. SLOAN: You do have the case before you. Even though my petition was denied and their petition in the same case was granted, I don't think the Court's jurisdiction is limited -- I don't expect the Court to decide anything about that case, but I don't think the Court's jurisdiction is limited to these two specific points the SEC has raised.

QUESTION: Well, you will assume that I might be

right?

MR. SLOAN: I will assume you might be right. I said I don't expect this Court to do anything with regard to that matter. I just say that on the issue of mootness, which I am briefing and arguing, that I can demonstrate that the case is not moot through the record. I don't know what is going to happen if the Court of Appeals grants my motion, the SEC transmits the records to the Court of Appeals and it arrives here a month from now or so. It seems to me this is a very undesirable situation to be in.

QUESTION: May I suggest your time is running. You might get on to the merits.

MR. SLOAN: Right.

Now, yesterday the SEC gave three reasons for the trading suspension, and they said that this suspension was this length because there were three different things going on, and this is the reason why they had to let it go for so long. One was market manipulation, two was a change in management, three was a late 10-K filing.

I want to address the facts which are in the record with regard to these three matters.

The change in management took place at a meeting of the board of directors of Canadian Javelin Ltd. on March 6, 1976. At that time a group headed by William Wismer threw out the Doyle group, threw out the management of Canadian

Javelin Ltd., fired Mr. Doyle personally. This is reflected in the March 26 memo which is on page 104-105 of the Appendix.

The 10-K delinquency, which is another reason cited by the SEC, occurred on March 31, 1976, and this can be seen from page 110 of the Appendix.

So prior to March 6 there were 32 suspension orders. Prior to March 31 there were 34 suspension orders. This means that the SEC suspended trading for 31 times because of the market manipulation, for 2 more times because of the change in management, and for another 3 times because of lateness in a 10-K filing.

The SEC also referred to a fugitive from justice yesterday in the argument that they presented. However, on March 6, 1976, Mr. Doyle, who was the notorious fugitive from justice who they are referring to, was thrown out of the company. He was fired personally. And the SEC claims a basis for suspending trading for that reason.

On July 30, 1976, after the suspension was lifted, there was a court-ordered special meeting of the stockholders which I attended in Montreal, which is also discussed in the record, there is a copy of the judge's orders here, holding a special election, and at that point Doyle got back into management and threw the Wismer group out. So now we have a situation where an individual, a Toronto attorney, became president of Javelin Ltd. At that point the SEC suspends trading.

Three months later when the fugitive from justice gets back in control of the company, they do not suspend trading. I point this out because I think this illustrates that really their reason is a fiction.

In addition to that, Mr. Justice Powell yesterday raised the question of whether a corporation has the right to come in and ask for a hearing to protest a trading suspension. Ironically it's reported in the Wall Street Journal that at the time of the May 2, 1976, lifting of the trading suspension, management of Canadian Javelin Ltd. petitioned the SEC to continue the trading suspension. And, incidentally, also the earlier trading suspension which was terminated in January 1975, the management of Canadian Javelin again requested -- a different management -- that the SEC continue the trading suspension and filed a motion and obtained a stay in the district court.

This illustrates a point that very often the corporation itself wants the trading suspension even though it's to the detriment of its own stockholders because of corporate management, for their own personal reasons, may desire that trading not take place.

Now, in the matter of the 10-K, this 10-K report became delinquent on March 31, 1976, as the record states. I have not known of any case -- the SEC often suspends trading because of a 10-K delinquency, but they don't suspend on the

day that the 10-K became delinquent, and they don't suspend even two months later because the trading suspension here was lifted on May 2.

QUESTION: Do you challenge -- I take it you challenge the right of the SEC to issue more than one suspension.

MR. SLOAN: Yes, that's correct.

QUESTION: Then why do you --

MR. SLOAN: Because they did say yesterday that these were the reasons that they suspended trading. I want to show that there was no rational basis for this. What they have done is --

QUESTION: What if there had been? What if there had been? I thought your deal was that without a hearing or without some further proceedings, they just couldn't grant more than one 10-day suspension.

MR. SLOAN: Yes. I do feel that way. That is a point which I thought might be raised when I went into the discussion of this.

QUESTION: That is what the Court of Appeals held.

MR. SLOAN: Yes, that is what the Court of Appeals held. I just wanted to show that there isn't any rational basis.

QUESTION: You concede, don't you, that there are circumstances under which it could issue more than one 10-day consecutive suspension?

MR. SLOAN: No, I do not make that concession. I realize the amicus does make that concession. I do not. Because I do not believe that the SEC can be allowed, particularly when they do not issue reasons for the trading suspensions. Therefore, when they say that we are issuing a new suspension because we have a new reason for the suspension -- and they haven't said that in this case, but if they said that, that something completely new and different has arisen, what would happen is --

QUESTION: What if it was the same old thing?

MR. SLOAN: I think if it was the same old thing, it clearly would be prohibited by the statute. And I am saying even if it was for a different reason, it would also be prohibited. When Congress originally passed the provision in 1934, section 19(a) had four provisions, 1, 2, 3, and 4. Section 19(a)(1), (2), and (3), all required the SEC to give notice and the opportunity for a hearing. Only section 19(a)(4) allowed the SEC to act summarily without notice and the opportunity for hearing. And both the House and Senate reports stated in 1934 that they did not require the SEC to give notice and opportunity for hearing because this was a summary power to be exercised in emergency situations.

QUESTION: Is this an argument that the statute authorizes only one single 10-day suspension?

MR. SLOAN: That is correct. If they want another

one they have to give notice and hearing.

MR. SLOAN: That would be under what is now section 12(j), they could --

QUESTION: All the authority under (4) is exhausted once they made one suspension.

MR. SLOAN: That's right. There have been some instances this year in which the SEC on three separate occasions but not successive has suspended trading in Penn Central Transportation Company and a number of subsidiaries.

QUESTION: Mr. Sloan, do you concede that the SEC would have power under 12(k) to issue a 10-day suspension of trading in, let's say, January and then again to issue a 10-day suspension of trading under 10-K in March --

MR. SLOAN: Yes, I would agree that as the statute is written, it does permit --

QUESTION: --for the same reason?

MR. SLOAN: Yes, it does permit --

QUESTION: Could it not issue a 10-day suspension of trading on January 2 and then that takes you to January 12 and then on the morning of January 13 issue a 10-day suspension of trading?

MR. SLOAN: No. That would be --

QUESTION: Why not? What is the difference between January and March and January 12 and January 13?

MR. SLOAN: I think this goes really to a matter of

the intent of Congress. Congress did not intend that the SEC -- particularly since it never issues reasons for restraints, we don't know if it has a new reason or a different reason.

QUESTION: Your point is, though, good reasons or bad, with or without reasons, no matter how great the reason or how great the public interest, that 12(k) as a matter of the power of the Commission simply does not empower the Commission to issue a suspension of trading for longer than a 10-day period.

MR. SLOAN: That's correct.

QUESTION: That's your basic position as I understand it. Am I right?

MR. SLOAN: That's correct.

QUESTION: Mr. Sloan, what about the 1975 amendment, one-year amendment?

MR. SLOAN: See, section 12(j) which you are referring to is actually a renumbering, because it was formerly called section 19(a)(2). They moved it over to section 12(j). The Commission has had the power since 1934 to suspend the registration of a security. Now when they enacted 12(j) they included a sentence which in addition to renumbering they included a sentence which said it would be illegal for a broker-dealer to buy or sell or use means or instrumentalities of interstate commerce to effect a transaction in a security whose registration has been suspended or revoked.

So that this makes it clear, although it was clear already, that the SEC could after notice and a hearing suspend the registration, which would also suspend the trading in the security under section 12(j). But they have always had this power since 1934 --

QUESTION: For one year.

MR. SLOAN: For one year.

Incidentally, I would like to mention that in this case --

QUESTION: That's not involved in it.

MR. SLOAN: They haven't exercised that power in section 12(j).

QUESTION: That's what I mean.

MR. SLOAN: They haven't provided us with a hearing.

I would like to point out that in this particular case, the SEC suspended trading for 370 days, which is more than one year. Therefore, they actually suspended trading for more time under section 12(k) without notice and the opportunity for a hearing than they were permitted to suspend with notice and the opportunity for a hearing under section 12(j). So what they are saying is that they can suspend trading for a longer period of time without notice than they can with notice, and I am sure that this could not possibly be what Congress intended.

Now, also yesterday Mr. Justice Powell asked whether

the rollover proceedings are ex parte. And, of course, the Commission says that this is not a rubber stamp proceeding, the Commission very seriously considers the needs of investors and this kind of thing. But again, although I don't want to run into the same trap that I may have fallen into just a second ago, I think that the record demonstrates that the Commission, not only is it a rubber stamp proceeding, but the Commission itself plays no part in the decision to suspend.

In the record of this case, the first trading suspension is dated April 29, 1975. The memorandum which they have submitted as the record of this trading suspension is a memorandum by the staff dated May 2, 1975, three days later. So that it is clear -- this is not a memorandum from the Commission; this is a memorandum from the staff, and it explains the reasons for the trading suspension. From this it is clear that the Commissioners themselves could not have received this memorandum at the time trading was suspended. And in fact since the suspension orders are not signed by the Commissioners, they don't bear the Commissioners' names, we don't even know if the Commissioners knew -- the Commissioners may have been on vacation or some place, We don't even know that they were in Washington at the time. They, therefore, did not participate and perhaps they read in the newspaper that trading had been suspended in Canadian Javelin Ltd. But this is really about all.

It is quite clear that the Secretary of the Commission is performing an administrative task apparently at the direction of members of the staff, and the Commissioners themselves are not involved.

QUESTION: Mr. Sloan let me ask you what is your view of what the Commission's duty was 10 days after the first order was entered if they were persuaded there was market manipulation going on, but they didn't have real solid proof of it? What do you say they should have done?

MR. SLOAN: The market manipulation in this instance ended on February 12, 1975. I had the indictment. This is the information that was filed in Canada by the Canadian authorities. And the last washed trade that took place, which is alleged here, the 406 council boys trading, the last one took place on February 12, 1975. And all the trades alleged here occurred on the Montreal or Vancouver Stock Exchanges.

Now, in a hypothetical situation, if there is a market manipulation, I would say that a trading suspension order which halts trading for 10 days is sufficient to bring to an end any market manipulation, because usually market manipulators rely on certain things to keep the price up. They have the park securities. I was a broker-dealer for five years and I somehow have some idea what they do when they manipulate a stock. And when a trading suspension comes along, they suspend trading for 10 days. That brings to an end any

market manipulation. When the stock opens for trading again, any stock in margin accounts almost always, very often, is sold. The people who have the stock locked in almost always have to get out. There are investigations involved. The stock comes down and the manipulation is over. And I think this could be assumed that this would happen even in theory. And I think this is what Congress had in mind. They said this was an emergency power. They didn't say this was something the Commission could do for more than a year, as in this case, or for 13 years, as in Continental Vending Machine case.

QUESTION: You don't suggest, then, that there should be some other legal proceeding or some other legal remedy that was available at the end of the 10 days to perpetuate the suspension?

MR. SLOAN: The SEC already has a number of remedies. They have administrative remedies. They have injunctive remedies. If there is some remedy, in addition to that the appropriate relief is for them to apply to Congress for this remedy. Congress has given them section 12(j), and it is stated in the Senate Report 94-75 that this was intended to be exercised when they wanted to suspend trading for a period of extended duration.

Now they say this is insufficient because many companies are not registered because they don't have as much as a million dollars in assets and 500 stockholders which is

required by section 12(g) of the Securities Exchange Act. So they say many securities are not registered and therefore what's going to happen in the case of a security which is not registered. How are we going to stop trading in that?

I think the answer is Congress simply didn't intend they should be allowed to do this because you must remember there are many corporations which are very small and which the public interest is simply not sufficient for the SEC to --

QUESTION: Your answer to Mr. Justice Stevens is that under the statute there just isn't any remedy provided to suspend trading in a security for more than 10 days, even with a hearing.

MR. SLOAN: No. We are talking about securities which are not registered. Canadian Javelin is registered so it doesn't apply.

QUESTION: That's true about nonregistered ones.

MR. SLOAN: Right. There are companies which are small corporations, they have less than --

QUESTION: How about answering my Brother Stevens' question, then, what should the SEC have done here with respect to a registered security? Start a new proceeding?

MR. SLOAN: With respect to a registered proceeding, they could start with another 12(j). With respect to a nonregistered --

QUESTION: After notice and hearing.

MR.SLOAN: Yes. After notice and hearing.

QUESTION: So at the end of 10 days they should have gone under 12.

MR. SLOAN: Right. That's what they should have done in this case.

By the way, in this case there was no issue of misconduct, at least according to the indictment and according to the SEC's complaint against Canadian -- because the SEC filed a complaint in the Southern District of New York but the defendants were Doyle and his cohorts. Canadian Javelin Ltd. was not named as a defendant. Solely in the information filed in Canada, Canadian Javelin was not a defendant. So there was no issue of misconduct, therefore section 12(j) could not have been invoked. They make a big point of this, but I think the remedy is to go to Congress and ask for extended powers if that's what they need.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Your time has expired, Mr. Sloan.

Mr. Pitt, you have three minutes left.

REBUTTAL ARGUMENT OF HARVEY L. PITT ON
BEHALF OF PETITIONER

MR. PITT: The only brief points I wish to make are that, as Mr. Sloan concedes at the end of his submission, 12(j) was inapplicable in the circumstance because the market

manipulation which went on was not engaged in by the company and therefore issue of misconduct was not involved and 12(j) was inapplicable. That would have meant there was no remedy whatsoever.

In addition, the manipulation that we charged was charged to have begun in the beginning of 1975 and continued right up to the date of the complaint. It did not stop in February 1975 according to the charges in our allegation.

The last point --

QUESTION: Mr. Pitt, is Mr. Sloan correct in telling us that the change in management and the late 10-K filings occurred in March of 1976 so they really couldn't have justified the first 25 or 30 suspension orders?

MR. PITT: We learned about it about that time.

QUESTION: So your principal period of suspension --

MR. PITT: Was for manipulation.

QUESTION: Manipulation.

MR. PITT: That is correct.

QUESTION: Is it also correct that there was an order entered on Christmas that just didn't get into the record?

MR. PITT: Apparently so.

QUESTION: That I take it was given great deliberation on that day?

MR. PITT: There was. There was deliberation with

respect to each of these suspension orders, as I indicated yesterday.

QUESTION: On whose part?

MR. PITT: By the Commission itself.

QUESTION: All the Commissioners were in their offices on Christmas?

MR. PITT: Yes.

QUESTION: All the members of the --

MR. PITT: I don't recall the precise date. I would have to look that up. I don't recall the precise date of the order. What happens is that each of the Commissioners must approve the trading suspension order. It cannot be done by any other --

QUESTION: Is it done in writing?

MR. PITT: Pardon?

QUESTION: Is it done in writing?

MR. PITT: There is a minute of the Commission entered, that is correct.

QUESTION: Where is that?

MR. PITT: There is an official Commission minute record book that is kept in the agency.

QUESTION: Would that have been for December 25, too?

MR. PITT: I don't know if that was -- I must confess I do not know if that was the precise date that that trading suspension order was entered. What would have

happened is that the order might have been entered on the 25th formally, but the decision to enter that order would have been taken three or four days prior to that.

QUESTION: I just want to be sure of this. You are telling us that the full Commission, every member, acts on a suspension order and personally signs something.

MR. PITT: A quorum of the Commission, a minimum of three of the five members. If some members are sick or out of town they might not participate, but a minimum of three Commissioners must participate, and their votes are recorded in an official minute. If a matter is taken around seriatum --

QUESTION: What do they have before them?

MR. PITT: They have a staff memorandum and the advice of their legal assistants. Each Commissioner has a separate legal assistant.

QUESTION: Do the minutes show the reasons for the rollover of the suspension?

MR. PITT: Sometimes they might. In many cases they would --

QUESTION: Does the record contain a typical minute?

MR. PITT: This record does not contain a typical minute.

QUESTION: Or any, does it?

MR. PITT: No.

QUESTION: Does it contain any minute?

MR. PITT: No.

QUESTION: Are the supporting papers in the file somewhere as to what was presented to the Commission?

MR. PITT: Yes. Those are in the record. The staff recommendations and the information that was given to the Commission --

QUESTION: Why not the Commission's minute, then, if all the rest of it is here?

MR. PITT: I simply don't know why that was not put in the record below.

QUESTION: Could I ask --

QUESTION: But you said you did see the minute that said on Christmas Day the Commission --

MR. PITT: No, your Honor. The Commission did not meet on Christmas Day, but the period of the trading suspension commenced on Christmas Day. The staff recommendation would have come up three or four days earlier, at which point the Commission would have met. The Commission probably took that action on December 12th or 22nd, to commence on December 25th. The Commission itself would not meet on Christmas Day.

QUESTION: Do the minutes record any findings?

MR. PITT: The minutes indicate that the staff has made certain matters known to it in general and that the Commission has taken action because of public interest and protection of investors requires.

QUESTION: Are those minutes available to Mr. Sloan when he complains about what the SEC has done?

MR. PITT: I am simply unaware whether he requested them in this case or whether they were made available.

QUESTION: What is the policy of the Commission?

MR. PITT: The policy of the Commission is often to make its minutes available in court litigation where they are requested and under the Freedom of Information Act --

QUESTION: Quite apart from court litigation, normally you can see a court order without having a litigation. Is that the policy of the Commission?

MR. PITT: The Commission's minutes are made available under the Freedom of Information Act unless they contain certain matters that might be exempt, and they are. --

QUESTION: That implies that they are not made available to Mr. Sloan, unless he proceeds under the Freedom of Information Act.

MR. PITT: If Mr. Sloan makes a request to the Commission to see Commission minutes and there is no exempt material in there, he would see the Commission's minutes.

QUESTION: Did he get some of these memos that are in the record? Do you get them by subpoena process or simple request?

MR. PITT: He did get -- I think he requested them and we made them available as part of the record.

QUESTION: Are you representing to us that if he requested the minutes, he would have got the minutes.

MR. PITT: I would have to know what was in the minutes, the precise minutes of these particular actions to say whether there might have been excisions, but I think he would have gotten the minutes, yes.

QUESTION: Mr. Pitt, could I ask -- suppose you think there is manipulation in an unrestricted security and you want to suspend trading and you look at the statute and the statute says 10 days. You suspend and you continue to suspend. What is that pending? You can't go on forever as long as you think there is manipulation.

MR. PITT: That is correct.

QUESTION: What is it pending? What are you trying to find? You are investigating? You have probable cause, you think, to believe what?

MR. PITT: To believe that we can go into court and either get a preliminary injunction --

QUESTION: Under what section of the statute?

MR. PITT: Under section 21 of the Securities Exchange Act.

QUESTION: So there is a remedy that you can have?

MR. PITT: To stop the manipulation.

QUESTION: Yes. So there is a remedy. You are not without remedy.

MR. PITT: We are not -- the remedy we lack, if Mr. Sloan's interpretation of the 10-day suspension power is correct, is from the time we learned that there might be manipulation to the time that we conclude there is one and can go to court to stop it. Under Mr. Sloan's theory, we would be compelled to let the manipulation take place.

QUESTION: You could do it on your own until you can convince a judge to give you a preliminary injunction.

MR. PITT: Until we can find out who did it and convince a judge to --

QUESTION: So without evidence you can do it ex parte, but you really can't --

MR. PITT: As I indicated yesterday, I think that we could have used --

QUESTION: You say ex parte. You didn't give Mr. Sloan notice of it.

MR. PITT: Mr. Sloan availed himself of a procedure that is published in the Code of Federal Regulations to apprise the Commission --

QUESTION: That doesn't preclude him from being ex parte, does it?

MR. PITT: No, it does not.

QUESTION: Mr. Pitt, isn't it the general rule that when a lawyer gets a temporary injunction or restraining order, he is the hardest man to find once he gets it?

(Laughter.)

QUESTION: I am going to be fair to you. If you admit that's true, why wouldn't it be true once you get the 10-day, one you can renew forever. Why wouldn't you be absent?

MR. PITT: First, we do not suggest that we can renew this suspension forever. I wish to stress that.

QUESTION: Only 370 days.

MR. PITT: In this particular case, although the court did not find --

QUESTION: What's the one that went 13 years that Mr. Sloan was talking about?

MR. PITT: The one that went on for 13 years was a bankruptcy proceeding and --

QUESTION: Was this a series of 10-day suspensions?

MR. PITT: It was a series --

QUESTION: For 13 years?

MR. PITT: It was a series of 10-day suspensions. In that case we had specific requests from court-appointed officers to suspend the trading, and the Commission obliged the trustee in bankruptcy while the reorganization proceeding was effected. Our present policy would not be to repeat that kind of activity.

QUESTION: Mr. Pitt, am I correct that the suspension order suspends trading in the stock by anyone whether involved

in manipulation or not. If you had to go into court to proceed against manipulators, you might get an injunction against manipulation, but could you in court get an injunction in trading by everyone?

MR. PITT: No, we could not.

QUESTION: So really this is a broader remedy in its coverage than the one you can get in court with notice and hearing and all the rest, isn't it?

MR. PITT: This is a broader remedy, and it is solely a stop gap remedy until we can stop the market forces that are disrupting an orderly market place.

QUESTION: Stop gap.

MR. PITT: Stop gap. That is correct.

QUESTION: May I ask one other question. Is Mr. Sloan correct in saying -- the first suspension, I believe, was on April 29, and the first memorandum the Commission filed explaining the reason for the suspension or recommending it is May 2. Is that correct?

MR. PITT: That is the first memorandum that's in the record. I cannot be sure whether there was an earlier memorandum. But what often happens in response to that question is that the staff will come up on an emergency basis orally and advise the Commission that it has learned of certain facts and tell the Commission, as in this case, it talked to Royal Canadian Mounted Police authorities that they suspected a

manipulation and that there was a possible criminal indictment in Canada, and the Commission would on the basis of that oral presentation enter a suspension order. Under the Sunshine Act as it is now in effect, those discussions would be recorded and there would be a tape recording to verify it. That Act was not in effect at the time that this occurred.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 10:51 a.m., the oral argument in the above-entitled matter was concluded.)