IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 72-1230

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff-Appellee,

v.

COMPUTER STATISTICS, INC.,
Defendant-Appellant.

Appeal from the United States District Court for the District of Columbia

ANSWERING BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, APPELLEE

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COUNTERSTATEMENT OF THE ISSUES PRESENTED

Where the defendant, a Texas corporation that previously had obtained more than one-half million dollars from the investing public through the sale of its own securities, conceded in the court below that it had repeatedly failed to file timely and proper periodic reports, as required by the federal securities laws, which would have revealed to public investors, inter alia, that the defendant had sustained large operating losses:

1. Did the district court abuse its broad discretion in granting summary judgment to enjoin the defendant from future violations of the reporting requirements of the federal securities laws, despite contentions of the defendant that it would attempt to comply with those requirements in the future?

2. Did the district court abuse its broad discretion in denying the defendant's motion for a change of venue to the Northern District of Texas?

COUNTERSTATEMENT OF THE CASE

This is an appeal by defendant Computer Statistics, Inc. ("CSI") from two orders entered against it by District Judge William B. Bryant on January 10, 1972: the first denied CSI's motion to dismiss for improper venue or, alternatively, to grant a change in venue (App. 196); 1/ and the second granted the Commission's motion for summary judgment, permanently enjoining the defendant from further violations of the periodic reporting requirements of the Securities Exchange Act and the rules thereunder (App. 194-195). 2/

The Commission instituted this action pursuant to Sections 21(e) and 21(f) of the Securities Exchange Act, 15 U.S.C. 78u(e) and 78u(f), to enjoin the defendant from failing to file periodic reports containing material information about its operations in contravention of Sections 13(a) and 15(d) of the Securities Exchange Act, 15 U.S.C. 78m(a) and 78o(d), and the rules promulgated by the Commission thereunder (App. 1-4). Oral argument was separately held on these motions on November 21, 1971 (App. 136, 137, 157, 159, 160, 179-180), and the district judge orally ruled upon the motions that day (App. 157, 181). Contrary to the defendant's assertion that the district judge failed to state any basis for his entry of relief against CSI (D Br. 2-2A), the district judge explicitly noted the "defendant's concession that there is no dispute as to the fact that it failed repeatedly to file timely and proper periodic reports . . ." (App. 194; and see App. 66); "the broad policy considerations under the [Securities and Exchange] Act [that] contemplate a regular flow of information which is accessib1e to the public" (App. 176); "the benefits the general public derives from compliance with . . ." the periodic reporting requirements (App. 178); and the fact that CSI "didn't even file [certain of its reports] until sometime after the [Commission's] suit was filed . . ." (App. 169).

During the comparatively brief period in which CSI was required to file periodic reports, these were filed late. CSI had filed on December 29, 1967, a registration statement

covering a proposed sale of its common stock to the public. This registration statement, filed with the Commission at its Washington, D.C., headquarters, pursuant to Section 6 of the Securities Act of 1933, 15 U.S.C. 77f (App. 9), became effective on March 13, 1968, pursuant to Section 8 of the Securities Act, 15 U.S.C. 77h (App. 1-2, 9, 14, 61, 66, 84). Thereafter CSI, with the assistance of underwriters located in New York and other major cities across the United States, 3/ obtained more than one-half million dollars from public investors. 4/

It was then required to file periodic reports by reason of Section 15(d) of the Securities Exchange Act (see page 15, infra). 5/

Although its annual report on Form 10-K for its fiscal year ended March 31, 1969, was required to be filed with the Commission, in Washington, D.C., on or before July 29, 1969, 6/ CSI failed to file its annual report within the allotted 120-day period and, one day prior to the due date, an extension of sixty days in which to file that report was sought by CSI (App. 2, 10, 19, 62, 85). This was granted by the Commission's staff pursuant to Securities Exchange Act Rule 12b-25, 17 CFR 240.12b-25 (App. 2, 10, 62, 84-85). 7/ Notwithstanding the fact that it had had a total of 180 days (almost six months) in which to disclose to its shareholders and other public investors trading in CSI stock the results of its operations, two days after the extension of time it had been granted expired, CSI requested an additional 45-day extension of time within which to file its first annual report (App. 10, 20). CSI stated (App. 20) that it was requesting the extension because its accountants were "unable to complete their audit [of CSI], for reasons beyond [CSI's] . . control or . . . [CSI's accountant's control]." The record reflects (App. 44, emphasis supplied), however, that CSI's accountants were

"unable to obtain [from CSI] minutes of meetings of [CSI's] shareholders or directors since the special meeting of the board of directors on January 14, 1969, which might disclose significant transactions affecting [CSI's] financial position and results of operations."

The Commission's staff denied CSI 's request for an additional 45-day extension (App. 22-23), but advised CSI that it could appeal the denial of an extension to the Commission (App. 23). CSI declined to seek Commission consideration of its request for an extension; instead, it filed its annual report on October 20, 1969 (App. 2, 10-11, 62, 84-85, 143), approximately thirty days after its extension had expired, and after having taken about seven months instead of the four months contemplated by the rule. 8/

CSI's Form 10-K annual report for its fiscal year ended March 31, 1970, was required to be, but in fact was not, filed on or before July 29, 1970 (App. 3, 11*, 12*, 62). 9/ Instead, on July 28, 1970, again on the

day before the report was due, CSI requested an indefinite but "substantial extension of time to prepare and file . . ." this Form 10-K annual report (App. 28). The primary reason given for the requested extension was that CSI's president had, for the prior two weeks, been involved in business and travel on behalf of a corporate entity other than CSI or its

subsidiaries and expected to remain so engaged for several more weeks (id.). 10/ CSI offered no explanation why it had not requested this extension earlier, although it had been aware of its president's absence for two weeks and was able to specify the likely date upon which its president's sojourn would terminate (id.). And CSI failed to designate a specified date, within 60 days, for the filing of its Form 10-K report, as then required by Rule 12b-25. 11/ This request was denied by the Commission's staff (App. 30-31). CSI appealed this decision to the Commission by letter, requesting that the Commission grant a substantial extension of time in which to file the report (App. 32-33a*). 12/ CSI predicated its request for an extension principally upon the death of one CSI officer "who kept the [company's] operating facts mostly in his head," as well as the illness or resignation of two other CSI officers (App. 33-33a*). 13/ CSI also specified, as a basis for the grant of its requested indefinite extension, the preoccupation of its president with the affairs of another corporate entity (id.). The Commission, in August 1970, denied CSI's request for an extension (App. 35). Nevertheless, it was not until virtually the end of CSI's next fiscal year, February 17, 1971 -- more than six months after this annual report initially was due to be filed, after the service on CSI of a delinquency letter (App. 36), and after the commencement of this action -- that a Form 10-K annual report for CSI's fiscal year ended March 31, 1970, purporting to comply with these rules, actually was filed (App. 11*-12*; and see App. 62).

When this report was filed, CSI's accountants were "unable to express an opinion on the consolidated financial position of Computer Statistics, Inc. at March 31, 1970 or the consolidated results of operations for the year then ended or the supporting schedules" (App. 44). A major reason for this inability of CSI's accountants to determine the accuracy of CSI's belatedly-filed financial statements was CSI's continued refusal to furnish its auditors with "copies of minutes of meetings of shareholders or directors since January 14, 1969, which might disclose significant transactions affecting [CSI's] financial position and results of operations" (id.). 14/

CSI also was required to file with the Commission a semi-annual report on Form 9-K for the six-month period ended September 30, 1970, on or before November 14, 1970. Consistent with its prior history of delinquent filings, the report apparently was not mailed for filing until March 2, 1971, almost four months after the filing was due, after a delinquency letter had been sent to CSI (App. 36) and nearly one month after the commencement of this action (App. 3, 13, 62, 86, 144).

Since the institution of this suit, CSI's Form 10-K annual report for its fiscal year ended March 31, 1971, was required to be filed with the Commission, in Washington, D.C., on or before June 29, 1971. Only a portion of this report had been timely filed. Initially it did not include financial statements; these statements were filed one month later (App. 86, 88), but were not certified, as required. 15/ CSI did not request an extension of time to file these financial statements.

The defendant's violations must be viewed in the light of the fact that its delayed and incomplete filings deprived its public security holders of essential information. At the close of CSI's fiscal year, on March 31, 1969, its shares were held by approximately 700

persons (App. 3, 62, 87). At that time it had stated assets, on a consolidated basis, of $1,220,088 (App. 3, 62, 87). Shareholders' equity in CSI, as of March 31, 1969, had reached more than $740,000. 16/ But CSI's president advised the court below on November 12, 1971, (App. 139), that

"[w]e are a much smaller company than even the Securities and Exchange Commission recognizes,"

that, as of September 30 , 1971, shareholders' equity in CSI "had been completely wiped out" (D Br. 6 n.1A), and that the company, as of November 12, 1971, had a "negative net worth of about eleven-thousand dollars" (App. 139). Had CSI's periodic reports been filed timely and accurately, CSI's shareholders and public investors generally, as well as the Commission, would have learned long before they did of CSI's dire financial straits. 17/

Thus, for example, for its fiscal year ended March 31, 1968, CSI had reported a profit of approximately $34,000 (App. 103). During the next three fiscal years, when CSI's periodic reports were substantially delayed, CSI suffered operating losses, before the inclusion of extraordinary losses, of almost $500,000 (App. 89) -- losses for those three years actually reached $850,000 when extraordinary or nonrecurring losses are considered (App. 89 n.2). Similarly, shareholders' equity in CSI, that had reached $740,000, was reduced by more than one-half in the span of one year of operations, to approximately $364,000 at the end of CSI's fiscal year 1970 (App. 46). CSI, however, did not disclose this information to public investors trading in its stock until almost one year after the end of its fiscal year and after the filing of the Commission's complaint in this action (see pages 6-7, supra). Further substantial depletions of shareholders' equity were not timely reported; and, as we have seen, when these depletions were reported, they were uncertified, throwing into doubt the extent of the report's accuracy. Also undisclosed in timely fashion was the fact that, for its two fiscal years 1970 and 1971 CSI's current liabilities substantially exceeded its current assets (App. 89).

In addition, timely periodic reports of CSI would have alerted public investors to the existence of questionable business transactions. Thus, CSI's belatedly-filed Form 10-K annual report for its fiscal year ended March 31, 1970, indicated that CSI had borrowed significant and substantial sums of money from another corporation -- Texas State Network, Inc. (App. 55) -- owned and controlled by CSI's president and run by most, if not all, of CSI's directors (App. 40-41,140). 18/ The same report belatedly disclosed (App. 42) the fact that CSI had "transferred" certain real property to Texas State Network, Inc. CSI was unable to state definitively whether it would sustain a loss as a result of this transaction (id.).

Finally, CSI's tardy filings enabled it to suppress the substantial losses it had sustained as a result of a most unusual transaction. In its fiscal year 1971, CSI sold two wholly-owned subsidiaries -- Piedmont Associates and Car-0-Matic Car Wash, Inc. -- back to the undisclosed persons from whom these companies had been purchased just two and three years previously, at prices aggregating approximately $300,000 less than the price CSI

had paid to obtain these companies (App. 89-90 & n.3). To compound this already dubious transaction, CSI's delayed filing tardily disclosed that more than 95 percent of the loss it suffered in these two transactions had been recorded retroactively in CSI's financial statements for its fiscal year ended March 1970 -- the year preceding the year in which the losses actually occurred (App. 90 n.3, 111).

The president and controlling shareholder of CSI --Mr. Malkan -- appeared before the district court in this matter and apparently summarized CSI's understanding of the periodic reporting requirements of the federal securities laws, an understanding which furnishes ample basis for CSI's cavalier disdain of the requirement that it promptly disclose the results of its operations (App. 168):

"MR. MALKAN: The purpose of this report is not to inform the investors. The purpose is to comply with SEC regulations.
"THE COURT: Why do you think they want the regulations complied with?
"MR. MALKAN: Because of some cockeyed idea that they have. I would like Your Honor to read this report.
"THE COURT: The cockeyed idea, as I understand it, is to protect the investing public."

STATUTES AND RULES INVOLVED

Sections 13(a), 15(d) and 27 of the Securities Exchange Act of 1934, Securities Exchange Act Rules 13a-l, 13a-l3 and 15d-l, promulgated by the Commission, 28 U.S.C. 1404(a), and Rules 52 and 56 of the Federal Rules of Civil Procedure are set forth in the Statutory Appendix annexed to this brief at pages 1a, et seq.

ARGUMENT

I. THE PERIODIC REPORTING REQUIREMENTS OF THE SECURITIES EXCHANGE ACT ARE NOT, AS CLAIMED BY DEFENDANT'S PRESIDENT, "SOME COCKEYED IDEA," BUT, AS UNDERSTOOD BY THE COURT BELOW, ARE CAREFULLY DESIGNED "TO PROTECT THE INVESTING PUBLIC."

The injunction issued by the court below compels CSI promptly, accurately and completely to make the reports required by law, so that at regular intervals the results of CSI's operations will be made public. CSI's repeated failure to comply with the law in the past made it impossible for investors interested in CSI stock to make informed investment judgments and for CSI shareholders to evaluate the capacity of its officers and directors to control the utilization of their funds. As set forth at pages 9 -II, supra, the record in this proceeding demonstrates the nearly complete financial destruction of CSI that occurred over a period of three or four years, during which time CSI admits that it repeatedly and continually failed to file timely periodic reports -- reports that would have disclosed the losses CSI was incurring, the substantial non-arms' length transactions

between CSI and an affiliated corporation and the resale by CSI at a substantial loss of certain subsidiaries to persons from whom they had been purchased.

The reporting requirements of the Securities Exchange Act, here involved, are related to the registration provisions of the Securities Act of 1933. The Securities Act was enacted "[t]o provide full and fair disclosure of the character of securities sold in interstate and foreign commerce and through the mails, and to prevent frauds in the sale thereof . . ." 19/ Through its registration provisions, 20/ the Securities Act requires the disclosure of pertinent business and financial facts in connection with a public offering of securities so that investors will be provided with a means of reaching an informed judgment as to the investment merits of the security being offered. See, e.g., Securities and Exchange Commission v. Ralston Purina Co., 346 U.S. 119, 124 (1953); see also, Sections 7 and 10, and Schedule A of the Securities Act, 15 U.S.C. 77g, 77j and 77aa.

The Securities Exchange Act was enacted, inter alia, to require periodic reports by publicly-owned corporations that would provide the investing public with reliable, current information concerning the operations of the companies in which they hold securities or have an interest. 21/ The House Committee considering the Securities Exchange Act noted:

"The idea of a free and open market place is built on the theory that competing judgments of buyers and sellers as to the fair price of a security brings about a situation where the market price reflects as nearly as possible a just price. . . . [T]he hiding and secreting of important information obstructs the operation of the markets as indices of real value. . . . The disclosure of information materially important to investors may not instantaneously be reflected in market value, but despite the intricacies of security values truth does find relatively quick acceptance on the market. . . . Delayed, inaccurate, and misleading reports are the tools of the unconscionable market operator and the recreant corporate official who speculates on inside information. .

* * *

"The reporting provisions of the Securities Exchange Act are a very modest beginning to afford . . . long denied aid . . in the way of securing proper information for the investor)" 22/

The Congress that passed the Securities Exchange Act "regarded [the reporting requirements] as the minimum which is requisite for the adequate protection of investors." 23/

A company's obligation to file periodic reports with the Commission may arise as a result of either or both of two corporate actions -- (1) the filing by the issuer of a registration statement for the sale of securities to the public pursuant to the Securities Act if the registration statement becomes effective; or (2) the registration by the issuer of a class of its common stock with the Commission pursuant to Section 12(g) of the Securities Exchange Act, 15 U.S.C. 781(g). 24/ In either event, the issuer is required to file the

same periodic reports -- only the statutory basis for the filing requirement differs. Thus, in the case of a company that has filed a registration statement for the sale of securities to the public, the company's obligation to file periodic reports arises pursuant to Section 15(d) of the Securities Exchange Act, 15 U.S.C. 78o(d); 25/ when the company has registered a class of its common stock with the Commission pursuant to Section 12 of the Securities Exchange Act, it is obligated to file periodic reports by virtue of Section 13(a) of the Securities Exchange Act, 15 U.S.C. 78mn(a). 26/

Among the periodic reports which must be filed by an issuer subject to the statutory reporting requirements by virtue of either Section 13(a) 27/ or Section 15(d) 28/ of the Securities Exchange Act are annual reports on Commission Form 10-K and quarterly reports on Commission Form l0-Q. 29/ Form 10-K recently was amended 30/ and Form 10-Q recently was adopted (to supplement Form 9-K, the semi-annual report), 31/ both effective January 1, 1971, in order to make the disclosures previously required more timely and meaningful. Prior to the recent amendments of these forms, corporations subject to the periodic reporting requirements were required to file their Form 10-K annual reports within 120 days after the close of their fiscal year 32/ and semi-annual reports on Form 9-K were required to be filed within 45 days after the first half of the fiscal year. 33/ CSI's failure to comply with these former reporting requirements is the subject of the Commission's complaint in this action.

The Commission's rules, which require a reporting corporation to file its reports within a specified period of time after the end of the company's fiscal quarter-year or fiscal year, are designed to balance the public's interest in prompt reports with the fact that reporting companies must be afforded an adequate opportunity to prepare reports containing requisite financial and other material information. In order to alleviate the hardship that might occur on rare occasions if the time deadlines for filing periodic reports were absolute, the Commission has established an administrative procedure by which reporting companies may request limited, specified extensions of time in which to file their periodic reports. See Securities Exchange Act Rule 12b-25, 17 CFR 240.12b-25. 34/ In this manner, the Commission's staff and, if an appeal is sought from an adverse determination, the Commission, 35/ determine whether a request for an extension is bona fide and whether the grant would be consistent with the public interest and the protection of investors.

The reports here in issue are former Form 9-K and old Form 10-K. Form 9-K -- the Commission's semi-annual report -- required the disclosure of such matters as gross sales, net income or loss, and a statement of any special items or extraordinary income or losses occurring during the reporting period. See 2 CCH Fed. Sec. L. Rep. ¶31,030. 36/ Form 10-K -- the Commission 's annual report -- required the disclosure of such matters as the financial statements for the registrant, including balance sheets, profit and loss statements, and schedules supporting these statements; the number of shareholders of record for each class of equity security; a description of increases and decreases in the amount of the outstanding equity securities of the registrant; a description of all parents 37/ and subsidiaries of the registrant, and the percentage of voting securities owned, or other basis of control, by the registrant's immediate parent; material changes in the

business of the registrant; the names and amount of voting securities held by persons owning more than 10 percent of the outstanding voting securities of the registrant; the names and other affiliations of the directors of the registrant; the amount of the director's security holdings in the registrant, its subsidiaries or parent, information on the remuneration of officers and directors; and the interest of management and principal shareholders in the purchase or sale of assets by the registrant, or any subsidiary, not in the ordinary course of business. 38/

We submit that such factors may be the basis for informed decisions by investors.

II. IN THE LIGHT OF DEFENDANT'S CONCEDED VIOLATIONS OF THE PERIODIC REPORTING REQUIREMENTS OF THE SECURITIES EXCHANGE ACT, THE FRIVOLOUS NATURE OF ITS REASONS FOR REPEATEDLY DELAYING ITS FILINGS AT TIMES WHEN PROPER FILINGS WOULD HAVE REVEALED TO PUBLIC INVESTORS IMPORTANT ADVERSE INFORMATION ABOUT DEFENDANT'S FINANCIAL AFFAIRS, AND THE INSENSITIVITY OF DEFENDANT'S PRESIDENT TO THE IMPORTANCE OF SUCH REPORTS, THE DISTRICT COURT PROPERLY GRANTED THE COMMISSION'S MOTION FOR SUMMARY JUDGMENT AND ENJOINED THE DEFENDANT FROM FUTURE VIOLATIONS.

The essential purpose of the summary judgment procedures provided in Rule 56 of the Federal Rules of Civil Procedure is to deter useless, cumbersome and expensive trials where there is no genuine issue of material fact. In light of this salutary function, this Court has held that an overly narrow view of the applicability of summary judgment is to be avoided:

"Summary judgment serves important functions which would be left undone if courts too restrictively viewed their power. Chief among these are avoidance of long and expensive litigation productive of nothing, and curbing the danger that the threat of such litigation will be used to harass or to coerce a settlement."

Washington Post Co. v. Keogh, 125 U.S. App. D.C. 32, 35, 365 F.2d 965, 968 (1966), certiorari denied, 385 U.S. 1011 (1967). 39/

Particularly where, as here, the government sues under a prophylactic or remedial statute 40/ for the vindication of the public interest, summary judgment is an effective tool by which to enable an enforcement agency with limited manpower and resources to police serious violations of the law where no contested evidentiary facts exist. See Securities and Exchange Commission v. Geyser Minerals Corp., 452 F. 2d 876 (C.A. 10, 1971). 41/ And since the only questions raised in an action to enjoin violations of the periodic reporting requirements is whether the defendant is violating, has been violating, or is reasonably likely to violate these requirements designed to provide prompt information to the public of the results of the operations of publicly held corporations, summary judgment has been found to be proper in these periodic reporting cases. See, e.g.,

Securities and Exchange Commission v. Atlas Tack Corp., 93 F. Supp. 111 (D. Mass., 1950); Securities and Exchange Commission v. Realty Equities Corp., [Current] CCH Fed. Sec. L. Rep. ¶93,545 (D. D.C., June 15, 1972).

In accordance with Local Rule 9(h) of the Rules of the District Court for the District of Columbia, the Commission filed with its motion for summary judgment a statement of the material facts as to which the Commission contended there was no genuine issue (App. 84-87) and affidavits and exhibits supporting this statement of facts (App. at 9-58, 88-90). The Commission' s moving papers documented the facts set forth at pages 2-11, supra, demonstrating the defendant's repeated disregard of its statutory and regulatory reporting obligations. Although Local Rule 9(h) requires a party opposing a motion for summary judgment to file a statement setting forth those facts as to which it is claimed there is a genuine issue, the defendant chose not to file such a statement. Under these circumstances, Local Rule 9(h) authorized the trial court to assume that the facts asserted by the Commission were admitted to exist without controversy and to determine whether the Commission's moving papers were sufficient to warrant the judgment sought as a matter of law. See Thompson v. Evening Star Newspaper Co., 129 U.S. App. D.C. 299, 301-302, 394 F. 2d 774, 776-777, certiorari denied, 393 U.S. 884 (1968). See also, Continental Casualty Company v. American Security Corp., 143 U.S. App. D.C. 234, 443 F. 2d 649 (1970). Rather than comply with the lower court's rules, CSI apparently relied upon an affidavit of its counsel submitted in support CSI's motion to change venue, which conceded the Commission's factual allegations (App. 66) and suggested only that the defendant had not intended to violate the law but had made good faith efforts to comply (App. 66-67). On this appeal, CSI argues (D. Br. 30-34) that summary judgment was inappropriately granted in light of the facts that (1) CSI had, in its answer, denied any reasonable likelihood of future violations and (2) CSI was not given a chance to demonstrate that it did not intend to violate the law.

CSI's assertion that it may rely upon the denial, contained in its answer, that there is a reasonable likelihood of future violations is answered by the Supreme Court's decision in First Nat'l Bank v. Cities Service Co., 391 U.S. 253, 289 (1968). There, the Court emphasized that, as mandated by the 1963 amendment to Rule 56(e) of the Federal Rules of Civil Procedure, "a party cannot rest on the allegations contained in his . . . [pleadings] in opposition to a properly supported summary judgment motion made against him." See also, Thompson v. Evening Star Newspaper Co., supra, 129 U.S. App. D.C. at 302, 394 F. 2d at 777. 42/

That motive and intent are not elements of the Commission's prima facie case for an injunction under the periodic reporting requirements of the Securities Exchange Act is made clear in Securities and Exchange Commission v. Great American Industries. Inc., 407 F. 2d 453 (C.A. 2, 1968) (en banc), certiorari denied, 395 U.S. 920 (1969), which rejected a contention that good faith was a defense to an injunction. The court said (id. at 457):

"The Commission, however, cannot be expected to have the time, the resources or the material to enable it to police 8-K reports as quickly and thoroughly as it did here. The

statute places the duty of filing correct reports on the issuer; while inadvertence and prompt correction after complaint are mitigating circumstances and may affect liability for damages, they do not defeat the SEC's right to injunctive relief."

Accordingly, the court reversed a denial of the preliminary injunction there sought and "direct[ed] the issuance of an appropriate injunction . . against the corporation, which had, inter alia, violated the current reporting requirements of the Securities Exchange Act, and against certain of the corporation's officers (id. at 462). 43/

Similarly, as recently noted by District Judge Gesell of the court below, with respect to the reporting requirements here under scrutiny:

"Bad faith and fraud need not be shown to warrant an injunction. It appears that the late filings resulted from a series of factors, including financial pressures some years back, inadequate staff, broken promises by retained accounting firms and management's failure to place timely reporting in priority status. This is more than sufficient."

Securities and Exchange Commission v. Realty Equities Corp., [Current] CCH Fed. Sec. L. Rep. ¶93,545 (D. D.C., June 15, 1972). See also, Walling v. Panther Creek Mines. Inc., 148 F. 2d 604, 607 (C.A. 7, 1945).

In any event, defendant has not disputed its failure to file timely reports even after the institution of this action; its failure to file reports solely because of the preoccupation of its president with the affairs of another corporation; its refusal to make minutes of corporate meetings available to its auditors; or its failure in some instances to seek an extension of time from the Commission, so that the Commission, rather than CSI, could determine whether partial or complete filings should be required in the public interest. 44/ These facts, coupled with the remarks of the defendant's president (page 12, supra), who is also a lawyer (App. 132), showing a complete lack of understanding of the public interest that requires the filing of the periodic reports, justified the lower court in concluding that no other facts which might be shown would justify denial of the injunction sought by the Commission. 45/ Even if the court below fully accepted defendant's assertions that it had attempted to comply with the filing requirements of the securities laws and fully intended to comply in the future it was certainly well within its discretion to grant injunctive relief. 46/

It has been held repeatedly that the Commission has demonstrated the necessity for injunctive relief where there is a reasonable expectation of future violations on the part of the defendant, and a reasonable expectation may be inferred by the district court from past violations, Securities and Exchange Commission v. Manor Nursing Centers, Inc., 458 F. 2d 1082, 1100 (C.A. 2, 1972); Securities and Exchange Commission v. Culpepper, supra, 270 F.2d at 249-250, 47/ even when a defendant ceases its illegal activities prior to the institution of any action by the Commission. Securities and Exchange Commission v. Keller Corp., 323 F. 2d 397, 402 (C.A. 7, 1963). 48/ This inference is significantly strengthened where, as here (App. 169), the defendant's unlawful activity continued after

the institution of this injunctive action. United States v. Parke, Davis & Co., 362 U.S. 29, 48 (1960). 49/

In the instant case, all of these factors militated in favor of the entry against CSI of an injunction which does no more than require CSI to obey provisions of the law which it already was obligated to obey and which CSI concededly has failed in the past to obey. 50/

III. THE DISTRICT COURT DID NOT ABUSE ITS BROAD DISCRETION IN REFUSING TO TRANSFER VENUE

Defendant urges (D Br. 22) that venue should have been transferred so that it could more conveniently have produced its books and records or employees of its accountants "to show the impossibility of past efforts and its efforts to ensure no late reports in the future, insofar as possible." Since, as we have seen (pages 21-29), such proof, if believed, would not have prevented the grant of an injunction, there was no reason to transfer venue. Under the circumstances, the grant of the motion would have served merely to delay the ultimate relief to be granted 51/ to the detriment of the investing public 52/ and at unnecessary expense to the Commission. 53/

Under Section 27 of the Securities Exchange Act, 15 U.S.C. 78aa, the United States District Court for the District of Columbia, along with the other district courts of the United States, has "jurisdiction of violations of . . . [the Act] or the rules and regulations thereunder . . . ." With respect to venue, that section provides: "any suit or action to enforce any liability or duty created by . . . [the Act] or rules and regulations thereunder, may be brought," inter alia, in the "district wherein any act or transaction constituting the violation occurred." 54/

The "act or transaction constituting the violation" in this case is the repeated failure of CSI to comply with provisions of the Securities Exchange Act and the rules and regulations thereunder which required it timely to file certain reports in proper form "with the Commission." See Sections 13(a) and 15(d). Under Rule 0-3 of the General Rules and Regulations under the Securities Exchange Act, 17 CFR 240.0-3, "all papers required to be filed with the Commission pursuant to the act or the rules and regulations thereunder shall be filed at its principal office in Washington, D.C." It is well settled that where there is a violation of a statutory duty to perform a required act, the violation will be held to have occurred where the act should have been performed, Johnson v. United States, 351 U.S. 215, 222 (1956), and when a paper must be filed at a designated place, a prosecution for failure to file lies only at that place. Travis v. United States, 364 U.S. 631, 636 (1961). Consequently, CSI does not dispute that the violations of the filing requirements by CSI occurred in the District of Columbia.

Defendant's motion for a change of venue was made pursuant to 28 U.S.C. 1404(a), which was enacted to ameliorate the harsh result of forum non conveniens, requiring an outright dismissal of an action, rather than the transfer of the action to a more convenient

forum. Thus, the statute confers even "broader" discretion on a district court considering requests for transfer of venue, Norwood v. Kirkpatrick, 349 U.S. 29,32 (1955). Because a motion for transfer calls for the weighing and balancing of various factors and for the rendition of particularized judgments by those in daily proximity to the delicate problems of trial litigation, 55/ appellate courts repeatedly have recognized that the determination whether a request for a transfer of venue should be granted lies within the broad discretion of the trial court, Blake v. Capitol Greyhound Lines, 95 U.S. App. D.C. 334, 336, 222 F.2d 25, 27 (1955), 56/ and will not be disturbed upon appeal unless it can be shown that the trial court clearly abused its discretion. 57/ The burden is on the moving party to demonstrate that "the balance is strongly in [its] favor . . . ." That burden is a heavy one, since '' . . . the plaintiff's choice of forum should rarely be disturbed.'" 58/ And this Court has held that where, as here, the case has been decided by the court below on the merits, in the absence of a showing of actual prejudice, "the reasons for reversing the judgment on grounds of improper venue are substantially diminished . . . ." Whittier v. Emmet, 108 U.S. App. D.C. 191, 197, 281 F.2d 24, 30 (1960), certiorari denied, 364 U.S. 935 (1961). 59/

Where, as here, it can be shown that a trial will not be necessary, there is no warrant for a trial court to disturb the plaintiff's choice of forum, and a district court properly should consider the likely success of a pending motion for summary judgment in determining whether to grant the defendant's motion for a change of venue. See, e.g., Bohmen v. Baltimore & Ohio Chicago Terminal R. Co., 125 F. Supp. 463, 464 (N.D. Ind., 1954); MacNeil Bros. Co. v. Cohen, 158 F. Supp. 126 (D. Md., 1958); cf. Whittier v. Emmet, supra, 108 U.S. App. D.C. at 197, 281 F.2d at 30.

The defendant urges (D. Br. 12-13), that here the lower court should have granted CSI's motion for a change of venue, without considering the Commission's motion for summary judgment, and that the lower court's purported failure to consider the two motions separately constitutes reversible error. But, since the sole basis asserted by CSI in the court below for the grant of a change of venue was CSI's alleged need to produce six witnesses who would all testify to the same effect (see App. 67-71) -- cataloguing CSI's purported efforts to comply with the periodic reporting requirements -- the court below appropriately could and should have considered the Commission's likely success on its motion for summary judgment, 60/ as the defendant's president appears to have conceded in the court below. 61/

The necessary and anomalous conclusion resulting from CSI's position (that a district court may not consider whether any trial is necessary in determining whether to grant a change of venue) is that even where no trial will be necessary and the government will prevail on summary judgment, the government, which has selected a proper forum, and the public interest it represents, must nevertheless suffer the delay necessary to accomplish a transfer of venue so that another district court, more to the defendant's liking, may enter summary judgment against the defendant. We submit that there is no basis for such a conclusion 62/ and the fact that summary judgment was appropriate in this case is a sufficient basis upon which to sustain the lower court's denial of a change of venue.

Nevertheless, contrary to the assertions of the defendant (D. Br. 4), the record below demonstrates that the defendant's venue motion was considered before and apart from the summary judgment motion (App. 136-137, 157, 179). Accordingly, even if the defendant were correct in urging that the motion for a change of venue had to be considered separately from the motion for summary judgment, the factors of delay (see note 51 supra), and expense to the Commission (see note 53, supra), on the one hand, balanced against the inconvenience to the defendant, which desired to produce largely cumulative evidence to show the alleged unlikelihood of future violations -- evidence that could have been made available by deposition procedures justified the denial by the court below, in the exercise of its discretion, of the defendant's motion to transfer. 64/

CONCLUSION

For the foregoing reasons, the orders of the district court should be affirmed.

Respectfully submitted,

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1/ References to the record appendix, denominated by CSI as a "Joint Appendix," that the defendant has filed with this Court are cited as "App. ___." Certain of the pages of the Appendix filed by the defendant are garbled and other record materials have been omitted; where this appears to make such pages misleading, they have been reprinted correctly and appended to this brief with the same page number. References to those appendix pages in this brief are followed by an asterisk. References to the defendant's brief are cited as "D Br. ____."

2/ The appendix prepared by the defendants also contains a draft order prepared by this Commission with respect to the denial of the defendant's motion concerning venue (App. 193). This draft order was not signed by the lower court (id.), which instead prepared and signed its own order. We assume that the inclusion of the Commission's draft order in the record appendix was an inadvertent error.

3/ See Securities and Exchange Commission Official Public File No. 2-27977-1; and see App. 16.

4/ See Securities and Exchange Commission Official Public File No. 0-4149-2.

5/ CSI was specifically informed of the applicability of these requirements to its operations by the Commission on March 25, 1968 (App. 17-18).

6/ See Securities Exchange Act Rule 15d-1, 17 CFR 240.15d-1l.

7/ See pp. 18-l9, infra, for a discussion of Rule 12b-25.

8/ Although CSI stated in its letter dated September 29, 1969 (App.20), in requesting a further extension, that its accountants had not completed their audit, the Form 10-K belatedly filed by CSI included a certification by CSI's accountants dated August 20, 1969. See Securities and Exchange Commission Official Public File No. 0-4149-2.

9/ On January 3, 1970, CSI registered a class of its common stock with the Commission, in Washington, D.C., pursuant to Section 12 of the Securities Exchange Act (App. 2, 11*, 61, 84), and, accordingly, Section 13(a) replaced 15(d) as the statutory basis for CSI's obligation to file periodic reports (see pages 15-16 & n.26, infra).

10/ Consistent with its apparent philosophy to disclose as little as possible as late as possible, the only other reason offered by CSI for the requested extension was its assertion (App. 28) that it "had a problem in determining whether certain discontinued operations should or should not be included in . . . [its] current . . . Form 10-K." Perhaps because it foresaw the likely response, CSI apparently did not seek the informal assistance of the Commission's staff in resolving this problem (see 17 CFR 202.2).

11/ See the discussion of Rule 12b-25 at pp. l8-19, infra.

12/ The last page of this letter was omitted from the defendant's appendix, and is annexed to this brief as a Supplemental Appendix page 33a*. See note 1, supra.

13/ Compare the report of the Senate Committee which considered the enactment of the reporting requirements of the Securities Exchange Act:

"The argument has also been made that the provision for corporate reports will impose an undue burden on corporations by compelling them to keep their accounts in the manner prescribed by the Commission. The bill, however, merely permits the Commission to

specify the methods to be followed in preparing the reports made to it, but does not attempt to direct the manner in which the corporate books of account shall be kept. The only corporations apt to be seriously affected in this respect are those which do not keep even in their confidential files the information essential for the preparation of reports on which may be based an intelligent analysis of the value of their securities for investment purposes."

S. Rep. No. 792, 73d Cong., 2d Sess., 10 (1934) (emphasis supplied).

14/ Since CSI's accountant's certificate failed to state clearly the opinion of the accountant with respect to the financial statements covered by the certificate, CSI's 10-K annual report failed to comply with the Instructions for Financial Statements on Form 10-K, 17 CFR 249.310, and Rule 2-02(c) of the Commission's Regulation S-X, 17 CFR 210.2-02(c), governing the form and content of financial statements.

The Commission had moved the trial court to permit it to file a supplemental complaint to reflect the fact that the accountant's certificate did not comply with the Commission's rules (App. 79- 82). Contrary to CSI's assumption (D Br. 3), however, this motion was never decided and the case below proceeded on the basis of the Commission's original complaint (App. 1-4).

15/ Certain shareholders had brought suit against CSI in November 1970, claiming that a CSI prospectus dated March 13, 1968, by which CSI had sold its securities to the public, contained false statements and omissions. Since the total damages sought in that Suit, $700,000, exceeded CSI's net assets (as then stated in the Form 10-K--$645,000), CSI 's accountants were unable to express any opinion on CSI's consolidated financial position at March 31, 1971 (App. 88-89 n.1).

16/ See CSI's 1969 Form 10-K Annual Report, contained in Securities and Exchange Commission Official Public File No. 0-4149-2. This shareholders' equity in CSI also may be computed by calculating, as of the end of 1969, the par value of all issued and outstanding CSI equity securities and any capital in excess of par value. See Finney & Miller, Principles of Accounting 136 (6th ed., 1965). CSI's 1970 Form 10-K indicates that, at the end of 1970, there were 373,252 shares of CSI common stock outstanding (App. 46). Since CSI issued 72,000 shares during 1970 (App. 51), there were 301,252 shares of CSI stock outstanding at the end of 1969. At a par value of $1 per share (App. 46), this amounted to $301,252. At the end of CSI's 1969 fiscal year it had an excess of $482,125 over the par value of its common stock (App. 48). The aggregate of the par value of CSI's stock ($301,252) and capital in excess of par value ($482,125) equals $783,377. Subtracting CSI's 1969 fiscal year deficit ($40,222) (App. 48), results in a shareholders equity in CSI, as of the end of its fiscal year, of $743,155.

17/ In view of the "lack of . . . adequate and accurate financial and other information about the company and its operations," the Commission on July 8, 1971, suspended all over-the-counter trading in CSI's common stock for a 10-day period. See Securities Exchange Act Release No. 9245 (July 8, 1971) (App. 124).

18/ Texas State Network, Inc., also is a substantial shareholder in CSI (App. 40).

19/ Preamble, Securities Act, 48 Stat. 74 (1933).

20/ See Sections 5 and 6 of the Securities Act, 15 U.S.C. 77e and 77f.

21/ "The protection of one's investment once acquired is no less important than protection against acquiring an ill-advised investment." United States v. Pope, 189 F. Supp. 12, 23 (S.D. N.Y., 1960). And cf. Oklahoma-Texas Trust v. Securities and Exchange Commission, 100 F. 2d 888, 892 (C.A. 10, 1939).

22/ H.R. Rep. No. 1383, 73d Cong., 2d Sess., 11-13 (1934). See also S. Rep. No. 1455, 73d Cong., 2d Sess., 68, 74 (1934).

23/ S. Rep. No. 792, 73d Cong., 2d Sess., 11 (1934).

24/ Section 12(g) was added to the Securities Exchange Act in 1964 to require, inter alia, statutory disclosures for over-the-counter securities comparable to those provided by the Securities Exchange Act for securities listed on national securities exchanges. See generally Phillips and Shipman, An Analysis of the Securities Acts Amendments of 1964, 1964 Duke L.J. 706.

25/ Section 15(d) of the Securities Exchange Act provides, in pertinent part:

"[E]ach issuer . . . [filing] a registration statement which has become effective pursuant to the Securities Act of 1933, as amended, shall file with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, such supplementary and periodic information, documents and reports as may be required pursuant to Section 13 of this [Act] in respect of a security registered pursuant to Section 12 of this . . . [Act]."

26/ Section 13(a) of the Securities Exchange Act provides, in pertinent part:

"Every issuer of a security registered pursuant to Section 12 of this . . . [Act] shall file with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security

* * *

"(2) such annual reports (and such copies thereof), certified if required by the rules and regulations of the Commission by independent public accountants, and such quarterly reports (and such copies thereof), as the Commission may prescribe. . ."

In order to avoid any regulatory overlap where, as here (see pages 4 and 6 n.9, supra), a company has filed a Securities Act registration statement for the sale of securities to the public which subsequently has been declared effective and also has registered a class of its common stock with the Commission, Section 15(d) of the Securities Exchange Act provides that the company's obligation to file periodic reports by virtue of its Securities Act registration is suspended "so long as any issue of securities of such issuer is registered pursuant to Section 12" of the Securities Exchange Act.

27/ See Securities Exchange Act Rules 13a-1 and 13a-13, 17 CFR 240.13a-1 and 240.13a-13, set forth in the statutory appendix annexed to this brief.

28/ See Securities Exchange Act Rule 15d-l, 17 CFR 240.15d-1, set forth in the statutory appendix, infra.

29/ Pursuant to Rule 0-l(a)(4) under the Securities Exchange Act, 17 CFR 240.0-1(a)(4), forms adopted by the Commission for registration and periodic reports, as well as the instructions thereto, are deemed rules and regulations of the Commission.

30/ See Securities Exchange Act Release No. 9000, ['70-'7l Transfer Binder] CCH Fed. Sec. L. Rep. ¶77,919 (Oct. 21, 1970).

31/ See Securities Exchange Act Release No. 9004, ['70-'7l Transfer Binder] CCH Fed. Sec. L. Rep. ¶77,920 (Oct. 28, 1970).

32/ Annual reports now are required to be filed within 90 days after the end of the issuer's fiscal year, with the exception of certain schedules which may be filed within 120 days.

33/ Form 10-Q quarterly reports are due 45 days after the end of the first three fiscal quarters of each fiscal year. No Form 10-Q report is required at the end of the last fiscal quarter; the Form 10-K annual report encompasses the information that otherwise would be required in the Form 10-Q for the issuer's last fiscal quarter.

34/ Rule 12b-25, as in effect during the times of CSI's repeated violations of the periodic reporting requirements, provided:

"If it is impractical to furnish any required information, document or report at the time it is required to be filed the registrant may file with the Commission as a separate document an application (a) identifying the information, document or report in question, (b) stating why the filing thereof at the time required is impracticable, and (c) requesting an extension of time for filing the information, document or report to a specified date not more than 60 days after the date it would otherwise have to be filed. The application shall be deemed granted unless the Commission, within 10 days after receipt thereof, shall enter an order denying the application."

35/ The staff of the Commission's Division of Corporation Finance, located in Washington, D.C., has been delegated authority to make the initial determination whether the requested extension should be granted. 17 CFR 200.30-1(e)(5). The staff members making this determination are the same individuals responsible for administratively processing the company's periodic reports. As in the case of other administrative proceedings initially delegated to the staff for determination, the reporting company may request Commission review of an adverse staff ruling. See Rule 26 of the Commission's Rules of Practice, 17 CFR 201.26.

The Commission recently amended the procedures under Rule 1l2b-25 by which an extension of time may be requested. In revising the rule, the Commission reasserted its view that

"[t]he disclosures required in reports file with the Commission are essential to the preservation of free, fair and informed securities markets, it is of critical importance that such reports be filed with the Commission on or before their respective due dates under the Commission's rules. Only the most compelling and unexpected circumstances justify a delay in the filing of a report and the dissemination to the public of the factual information called for therein."

Securities Exchange Act Release No. 9048, 2 CCH Fed Sec. L. Rep. ¶23,047 (Jan. 4, 1971).

36/ Form 10-Q, the Commission's quarterly report which succeeded Form 9-K, now requires, in addition to the foregoing matters, a summary of the corporation's capital structure and shareholders' equity. Form 10-Q has also been amended recently to require the disclosure of any sales by the registrant of its own securities which were not registered under the Securities Act of 1933, in reliance upon an exemption from registration provided in Section 4(2) of that Act, 15 U.S.C. 77d(2). See Securities Exchange Act Release No. 9443 (Feb. 10, 1972), corrected in Release No. 9502 (Feb. 22, 1972). See 2 CCH Fed. Sec. L. Rep. ¶31,037A.

37/ The term "parent" is defined by Securities Exchange Act Rule 12b-2, 17 CFR 240.12b-2, as "an affiliate controlling such person directly, or indirectly through one or more intermediaries."

38/ Form 10-K has been revised to require, in addition, inter alia, a summary of operations for the registrant's previous five fiscal years; a description of properties owned or leased by the registrant; comparative financial statements, including a statement on the source and application of funds to apprise investors of the corporation's cash flow for the company's last two fiscal years. Securities Exchange Act Release No. 9000, [70-'7l Transfer Binder] CCH Fed. Sec. L. Rep. ¶77,919 (Oct. 21, 1970).

39/ Cf., Dressler v. MV Sandpiper, 331 F. 2d 130, 132 (C.A. 2, 1964).

40/ See, e.g., Securities and Exchange Commission v. Capital Gains Research Bureau. Inc., 375 U.S. 180 (1963); Superintendent of Insurance of the State of New York v. Bankers Life & Casualty Co., 404 U.S. 6 (1971).

41/ See also, Securities and Exchange Commission v. Spectrum Ltd., 54 F.R.D. 70 (S.D. N.Y., 1971); Securities and Exchange Commission v. Golconda Mining Co., 291 F. Supp. 125 (S.D. N.Y., 1968); Securities and Exchange Commission v. Latta, 250 F. Supp. 170 (N.D. Calif., 1965), affirmed, 356 F. 2d 103, (C.A. 9), certiorari denied, 384 U.S. 940 (1966); Securities and Exchange Commission v. Searchlight Consol. Mining & Milling Co., 112 F. Supp. 726 (D. Nev., 1953); Securities and Exchange Commission v. Payne, 35 F. Supp. 873 (S.D. N.Y., 1940).

42/ The Advisory Committee on the 1963 Amendments to the Federal Rules of Civil Procedure made clear, by an example of prior holdings intended to be overruled, that summary judgment is appropriate where "the adverse party, in opposing the motion, does not produce any evidentiary matter, or produces some but not enough to establish that there is a genuine issue for trial." 28 U.S.C. App. at 6136 (1964).

In Securities and Exchange Commission v. First Guardian Securities Corp., 95 F. Supp. 580 (S.D. N.Y., 1950), cited by CSI (D Br. 30), a genuine issue of fact was found to exist solely because the answer had denied contentions made in the complaint. Whatever may have been the merits of that holding two decades ago when that case was decided, it does not now state the law. Rule 56(e) of the Federal Rules of Civil Procedure now makes clear that "when a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings . . . ." At least to the extent that Great Western Land & Development Inc. v. Securities and Exchange Commission, 355 F. 2d 918 (C.A. 9, 1966), also cited by CSI (D Br. 30), relies upon the First Guardian decision, the sole authority there cited, is likewise in error.

43/ More often the issue as to good faith has been raised on the question whether or not a violation of the securities laws has occurred. It has been held in injunctive actions that "even though the violation results from a bona fide mistake as to the law . . " this is not relevant as to the existence of a violation. Securities and Exchange Commission v. W. J. Howey Co., 328 U.S. 293, 300 (1946); see also, Securities and Exchange Commission v. Culpepper, 270 F. 2d 241, 249 (C.A, 2, 1959); Securities and Exchange Commission v. Guild Films Co., Inc., 279 F. 2d 485, 490 (C.A. 2), certiorari denied sub nom. Santa Monica Bank v. Securities and Exchange Commission, 364 U.S. 819 (1960); Securities and Exchange Commission v. Van Horn, 371 F. 2d 181, 186 (C.A. 7, L966). Cf. Securities and Exchange Commission v. Capital Gains Research Bureau, Inc., supra, 375 U.S. at 200. As a general matter; in such cases it was apparently assumed that if the violation can be proved the injunction will issue.

In Securities and Exchange Commission v. Texas Gulf Sulphur Co., 312 F. Supp, 77 (S.D. N.Y., 1970), upon which defendant relies (D Br. 31-32), the district court declined to issue an injunction against all but two of the defendants who had been found to have

violated the Act, noting as to certain of the others, that the violations had occurred five years earlier in a "once-in-a-lifetime affair," 312 F. Supp. at 88, and "that the wide publicity accorded these defendants will serve as an adequate deterrence, when coupled with the fact that none of these defendants will retain the profits which they realized, by reason of their violations." 312 F. Supp. at 90. It should also be noted that the affirmance and denial of certiorari referred to in CSI's brief with respect to that case are not relevant because the Commission did not appeal -- the appeals were by those enjoined and by other defendants against whom findings of violation had been made and, in some instances, ancillary relief had been granted. See Securities and Exchange Commission v. Texas Gulf Sulphur Co., 446 F. 2d 1301 (C.A. 2, 1971), certiorari denied, 404 U.S. 1005.

44/ It should be noted that the Congress which passed the periodic reporting provisions of the Securities Exchange Act explicitly was aware of the hardship these requirements might impose but chose, in any event, to place in a paramount position the interest of public investors in obtaining prompt, accurate and complete information on corporate operations. See, e.g., Hearings Before the House of Representatives Committee on Interstate and Foreign Commerce on H.R. 7852 and H.R. 8720, 73d Cong., 2d Sess., pp. 261, 560, 647, 655, 656; Hearings Before the Senate Committee on Banking and Currency on S. Res. 84 (72nd Cong.) and S. Res. 56 and S. Res. 97 (73d Cong.), 73d Cong., 1st Sass., pp. 6532, 6534, 6636, 6675, 7168-7169.

45/ CSI also suggests (D Br. 34-35) that this Court should require the district court to issue an opinion setting forth the basis for its grant of the Commission's motion for summary judgment, although CSI concedes that, pursuant to Rule 52 of the Federal Rules of Civil Procedure, findings of fact and conclusions of law are unnecessary where a court determines to grant summary judgment, since facts are not in issue. See Simpson Bros.. Inc. v. District of Columbia, 85 U.S. App. D.C. 275, 279-280, 179 F. 2d 430, 434-435 (1949), certiorari denied, 338 U.S. 911 (1950); and see Lucking v. Delano, 74 U.S. App. D.C. 134, 135, 122 F. 2d 21, 22 (1941). Indeed, findings of fact on a motion for summary judgment may be ill-advised since they might carry the unwarranted implication that a fact question had been presented. General Teamsters v. Blue Cab Co., 353 F. 2d 687, 689 (C.A. 7, 1965); A&R Inc. v. Electro-voice Inc., 311 F. 2d 508, 513 (C.A. 7, 1962); Trowler v. Phillips, 260 F. 2d 924, 926 (C.A. 9, 1958); cf., Toregas v. Susser, 110 U.S. App. D.C. 177, 290 F. 2d 368 (1961).

46/ See, Securities and Exchange Commission v. Culpepper, supra, 270 F. 2d at 249; Securities and Exchange Commission v. Northeastern Financial Corp., 268 F. Supp. 412, 414 (D. N.J., 1967); Securities and Exchange Commission v. Kamen & Co., 241 F. Supp. 430, 431-432 (S.D. N.Y., 1963).

47/ Accord, Securities and Exchange Commission v. MacElvain, 417 F. 2d 1134, 1137 (C.A. 5, 1969), certiorari denied, 397 U.S. 972 (1970); Tanzer v. Huffines, 408 F. 2d 42, 43 n. I (C.A. 3, 1969); Los Angeles Trust Deed & Mortgage Exchange v. Securities and Exchange Commission, 285 F. 2d 162, 180-181 (C.A. 9, 1960), certiorari denied, 366 U.s. 919 (1961); Securities and Exchange Commission v. Boren, 283 F. 2d 312, 313 (C.A. 2, 1960).

48/ See also, Securities and Exchange Commission v. Culpepper, supra, 270 F. 2d at 249; Securities and Exchange Commission v. Universal Serv. Assoc., 106 F. 2d 232, 239-240 (C.A. 7, 1939), certiorari denied, 308 U.S. 622 (1940); Otis & Co. v, Securities and Exchange Commission, 106 F. 2d 579, 583-584 (C,A. 6, 1939); cf., United States v. Article of Drug, Etc., 362 F. 2d 923, 928 (C.A. 3, 1966).

49/ See also, Wirtz v. Atlas Roofing Mfg. Co., 377 F. 2d 112, 116-117 (C.A. 5, 1967); Securities and Exchange Commission v. Boren, supra, 283 F. 2d at 313; Otis & Co. v. Securities and Exchange Commission, supra, 106 F. 2d at 583-584; Securities and Exchange Commission v. Universal Service Assoc., supra, 106 F. 2d at 239.

50/ CSI also urges (D Br. 34) that the injunction entered by the court below was too broad. But we fail to understand the basis for this assertion in light of the fact that the lower court's decree merely requires CSI to adhere to the statutory and regulatory requirements here involved. Under such a circumstance the district court cannot be said to have abused its broad discretion to frame an appropriate decree. Securities and Exchange Commission v. Manor Nursing Centers. Inc., supra, 458 F. 2d at 1102-1103; Frostee Co. v. Dr. Pepper Co., 361 F. 2d 124, 126-127 (C.A. 5, 1966); cf., Securities and Exchange Commission v. Keller Corp., supra, 323 F. 2d at 402-403.

51/ It has been noted that Section 1404(a) has become one of the "battery of motions by which a defendant can introduce matters peripheral to the merits of the case and thereby postpone the day of trial," Kitch, Section 1404(a) of the Judicial Code: In the Interest of Justice or Injustice? 40 Ind. L. J. 99, 101 (1965), and that "[a]s a delaying tactic it has few equals," (emphasis in original) Green, Jury Trial and Mr. Justice Black, 65 Yale L. J. 482, 494 n. 36 (1956); Lykes Bros. Steamship Co. v. Sugarman, 272 F. 2d 679, 682 (C.A.2, 1959)

52/ Cf. Levenson v. Little, 81. F. Supp. 513, 517 (S.D. N.Y., 1949); Coffill v. Atlantic Coast Line R.R. Co., 180 F. Supp. 105, 108 (E.D. N.Y., 1960).

53/ With respect to companies such as CSI, the Commission has assigned to the Director of the Division of Corporation Finance responsibility for ''all matters . . . arising under the Securities Exchange Act of 1934 in connection with . . . (2) the examination and processing of periodic reports filed pursuant to Sections 13 and 15(d)." See 17 CFR 200.18. Because of its belief "that the Division of Corporation Finance by reason of its familiarity with the facts involved in a particular [report-filing] case is in a position to proceed expeditiously and efficiently for the institution and prosecution of injunctive proceedings," the Commission has assigned to the Division Director and his staff responsibility to review the facts of particular cases, advise the Commission when enforcement action seems appropriate and, under the general supervision of the Commission's General Counsel, to institute and prosecute actions to compel compliance with the reporting requirements of Sections 13(a) and 15(d) of the Exchange Act. 35 Fed. Reg. 19986 (1970). The offices of the Director of the Division of Corporation Finance and his entire staff, as well as the Office of the General Counsel of the

Commission, are all located at the headquarters of the Commission in Washington, D.C. See 17 CFR 200.11. Thus, those of the Commission's officers and agents with knowledge of the facts are located exclusively in the District of Columbia; and the defendant's claim that the Northern District of Texas would be a more convenient forum is nothing more than a request that its convenience be substituted for that of the Commission based upon the location of the defendant's offices and officers. See Securities and Exchange Commission v. Golconda Mining Corp., 246 F. Supp. 54, 58-59 (S.D. N.Y., 1965), mandamus denied sub nom. Golconda Mining Corp. v. Herlands, 365 F. 2d 856, (1966).

CSI, relying upon United States v. Swift & Co., 158 F. Supp. 551 (D. D.C., 1958), claims (D. Dr. 14-15) venue should have been transferred, since testimony certainly would be necessary if CSI in the future seeks a modification of the injunctive decree entered below. But unlike Swift, the injunction below merely requires CSI to obey the rules and regulations it voluntarily undertook to obey and modification of such a decree is unlikely. In any event, as Swift points out, should modification ultimately prove necessary and testimony be required, the court can consider transfer at that time.

54/ The section explicitly provides: "Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred;" civil actions are proper in "such district" as well as "in the district wherein the defendant is found or is an inhabitant or transacts business . . ."

55/ See, e.g., Time Inc. v. Manning, 366 F.2d 690, 698 (C.A. 5, 1966); Lykes Bros. Steamship Co. v. Sugarman, supra, 272 F. 2d at 680 (C.A. 2, 1959); Securities and Exchange Commission v. Golconda Mining Corp., supra, 246 F. Supp. at 57.

56/ See also, Pilot Life Ins. Co. v. Boone, 236 F. 2d 457, 462 (C.A. 5, 1956).

57/ See e.g., Metropolitan Paving Company v. Int'l Union of Op. Eng., 439 F.2d 300, 305 (C.A. 10), certiorari denied, 404 U.S. 829 (1971); General Foods v. Carnation Company, 411 F.2d 528, 533 (C.A. 7, 1969), certiorari denied, 396 U.S. 940 (1969); Texas Gulf Sulphur Co., v. Ritter, 371 F.2d 145, 147 (C.A. 10, 1967).

58/ Blake v. Capitol Greyhound Lines, supra, 95 U.S. App. D.C. at 336, 222 F. 2d at 27; Wiren v. Laws, 90 U.S. App. D.C. 107 109, 194 F. 2d 873, 875 (1951).

Contrary to defendant's assertion (D. Br.23), the Supreme Court's holding in Norwood v. Kirkpatrick, 349 U.S. 29, does not vitiate this court's holding in Wiren v. Laws, supra. In Norwood, the Supreme Court noted that the factors to be considered in determining a transfer motion, as set forth in Wiren and other cases, remained the same as they had been with respect to a motion to dismiss for forum non conveniens, 349 U.S. at 32. Only the trial court's discretion, which increased, had changed (id.).

59/ See also, Nowell v. Dick, 413 F. 2d 1204, 1212 (C.A. 5, 1969); MacNeil Bros. Co. v. Cohen, 264 F.2d 190, 193 (C.A. 1, 1959).

CSI mistakenly relies (D. Br. 26) on Young v. Director, U.S. Bureau of Prisons, 125 U.S. App. D.C. 105, 367 F.2d 331 (1966), for the contrary proposition. But Young, was recognized by this Court to be one of those "exceptional classes of cases where the convenience of parties and witnesses are so clear-cut that a per se rule of law [favoring transfer] has evolved." Fine v. McGuire, 139 U.S. App. D.C. 341, 343 n. 2, 433 F. 2d 499, 501 n. 2 (1970).

60/ See page 34, supra.

61/ In arguing CSI's venue motion the defendant's president advised the lower court orally that "[t]hese matters are rather intertwined . . . . The very matters which relate to the summary judgment also relate to the motion for transfer" (App. 134). As if to emphasize the point, the defendant's president also subsequently advised the lower court that "it is hard to argue the venue without getting into the substance here . . ." (App. 152).

62/ The cases relied on by CSI do not dictate a different view. Thus, for example, in United States v. Swift & Co., supra, 158 F. Supp. 551, the court merely noted that consideration of a motion for summary judgment in an antitrust action could be as lengthy as a trial and decided to consider venue first. In Hercules v. S/S Aramis, 226 F. Supp. 599 (E.D. La., 1964) the court noted that a court may first consider a motion to transfer before considering a summary judgment filed simultaneously. And in Gold v. Scurlock, 290 F. Supp. 926, 929 (S.D. N.Y., 1968), the court stated that, in deciding a motion to transfer venue, it is inappropriate to survey the merits of a summary judgment motion which, unlike the situation below, in fact had not been made and had not been argued or briefed.

63/ As was observed in United States v. General Motors Corp., 183 F. Supp. 858, 862 (S.D.N.Y., 1960):

"Expense to the Government is a matter for serious consideration. The appropriation available to the Antitrust Division is limited; and this, in turn, limits its enforcement activities. There is an important public interest in conserving the Division's funds."

See also, Securities and Exchange Commission v. Golconda Mining Corp., supra, 246 F. Supp. at 58-59.

64/ CSI urges (D. Br. 34-35) that this case should be remanded for an opinion by the trial judge detailing his findings of fact in denying CSI's motion for a transfer of venue. But the Federal Rules of Civil Procedure expressly dispense with the necessity of findings of fact on venue motions.

STATUTORY APPENDIX

Securities Exchange Act of 1934, 15 U.S.C. 78a, et seq.:

Section 13(a)

Periodical and Other Reports

Section 13. (a) Every issuer of a security registered pursuant to section 12 of this title shall file with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security --

(1) such information and documents (and such copies thereof) as the Commission shall require to keep reasonably current the information and documents required to be included in or filed with an application or registration statement filed pursuant to section 12, except that the Commission may not require the filing of any material contract wholly executed before July 1, 1962.

(2) such annual reports (and such copies thereof), certified if required by the rules and regulations of the Commission by independent public accountants, and such quarterly reports (and such copies thereof), as the Commission may prescribe. Every issuer of a security registered on a national securities exchange shall also file a duplicate original of such information, documents, and reports with the exchange.

Section 15(d)

Over-the-Counter Markets

SECTION 15

* * *

(d) Each issuer which has filed a registration statement containing an undertaking which is or becomes operative under this subsection as in effect prior to the date of enactment of the Securities Acts Amendments of 1964, and each issuer which shall after such date file a registration statement which has become effective pursuant to the Securities Act of 1933, as amended, shall file with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, such supplementary and periodic information, documents, and reports as may be required pursuant to section 13 of this title in respect of a security registered pursuant to section 12 of this title. The duty to file under this subsection shall be automatically suspended if and so long as any issue of securities of such issuer is registered pursuant to section 12 of this title. The duty to file under this

subsection shall also be automatically suspended as to any fiscal year, other than the fiscal year within which such registration statement became effective, if, at the beginning of such fiscal year, the securities of each class to which the registration statement relates are held of record by less than three hundred persons. For the purposes of this subsection, the term "class" shall be construed to include all securities of an issuer which are of substantially similar character and the holders of which enjoy substantially similar rights and privileges. Nothing in this subsection shall apply to securities issued by a foreign government or political subdivision thereof.

Securities Exchange Act of 1934: (continued)

Section 27

Jurisdiction of Offenses and Suits

SECTION 27. The district courts of the United States, the United States District Court. for the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this title or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this title or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this title or rules and regulations thereunder, or enjoin any violation of such title or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 128 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 225 and 347). No costs shall be assessed for or against the Commission in any proceeding under this title brought by or against it in the Supreme Court or such other courts.

3a

Rules under the Securities Exchange Act, 17 CFR 240. et seq. (as in effect at the time of the violations)

Rule 13a-l

§240.13a-1 Requirement of annual reports.

Every issuer having securities registered pursuant to section 12 of the act shall file an annual report for each fiscal year after the last full fiscal year for which financial statements were filed in its registration statement. Registrants on Form 8-B shall file an annual report for each fiscal year beginning on or after the date as of which the succession occurred. The report shall be filed within 120 days after the close of the fiscal year or within such other period as may be specified in the appropriate form.

Rule 13a-13

§240.13a-13 Semiannual reports on Form 9-K.

(a) Every issuer of a security registered pursuant to section 12 of the act which is required to file annual reports on Form 10-K (§249.310) or Form U5S (§259.5S), or which is required to file a report on one of such forms as Part II of Form 16-K (§249.316) or Form 19-K (§249.319), shall file a semiannual report on Form 9-K (§249.309) for the first half of each fiscal year ending after the close of the latest fiscal year for which financial statements of such issuer were filed in a registration statement pursuant to section 12.

(b) Such reports on Form 9-K shall be filed not more than 45 days after the end of the 6-month period for which they are filed. However, the report for any period ending prior to the date on which a class of securities of the issuer first becomes effectively registered pursuant to section 12 may be filed not more than 45 days after the effective date of such registration.

(c)Notwithstanding paragraph (a) of this section, semi-annual reports on Form 9-K shall not be required to be filed by the following types of issuers.

(1) Banks and bank holding companies;

(2) Investment companies;

(3) Insurance companies, other than title insurance;

(4) Public utilities and common carriers which file financial reports with the Federal Power Commission, Federal Communications Commission or the Interstate Commerce Commission;

(5) Companies engaged in the seasonal production and seasonal sale of a single-crop agricultural commodity;

(6)Companies in the promotional or development stage to which paragraph (b) or (c) of §210.5a-01 of this chapter (Rule 5A-01 of Article A of Regulation S-X) is applicable;

(7) Foreign issuers other than private issuers domiciled in a North American country or Cuba.

(d) Notwithstanding the foregoing paragraphs of this section, reports pursuant to this section on Form 9-K shall not be deemed to be "filed" for the purpose of section 18 of the act or otherwise subject to the liabilities of that section, but shall be subject to all other provisions of the act.

Rule 15d-1

§240.15d-1 Requirements of annual reports.

Every registrant under the Securities Act of 1933 which is subject to section 15(d) of the Securities Exchange Act of 1934 shall file an annual report for each fiscal year after the last full fiscal year for which certified financial statements were contained in its registration statement under that act at the time such statement became effective. The report shall be filed within 120 days after the close of the fiscal year or within such other period as may be specified in the appropriate annual report form.

4a

Rules under the Securities Exchange Act (as amended)

Rule 13a-1.

Rule 13a-l. Requirement of Annual Reports Every issuer having securities registered pursuant to section 12 of the Act shall file an annual report on the appropriate form authorized or prescribed therefor for each fiscal year after the last full fiscal year for which financial statements were filed in its registration statement. Registrants on Form 8-B shall file an annual report for each fiscal year beginning on or after the date as of which the succession occurred. Annual reports shall be filed within the period specified in the appropriate report form. At the time of filing the annual report, a registrant other than a person registered under the Public Utility Holding Company Act of 1935 or the Investment Company Act of 1940 shall pay to the Commission a fee of $250, no part of which shall be refunded.

(Amended Jan. 4, 1971, eff, Feb. 4, 1971., Release 34-9048, Further amended Jan. 25, 1972, eff, March 1, 1972, Release 34-9465.)

5a

Rules under the Securities Exchange Act (as amended)

Rule 13a-13

RULE 13a-13. QUARTERLY REPORTS ON FORM 1O-Q

(a) Except as provided in paragraph (b); every issuer which has securities registered pursuant to Section 12 of the Act and whish is required to file annual reports pursuant to Section 13 of the Act on Form 10-K, 12-K or U5S shall file a quarterly report on Form 10-Q, within the period specified in General Instruction A to that form, for each of the first three fiscal quarters of each fiscal year of the issuer, commencing with the first such fiscal quarter which ends after securities of the issuer become so registered.

(b) Quarterly reports on Form 10-Q need not be filed by the following issuers:

(1) Investment companies required to file quarterly reports pursuant to Rule 13a-12;

(2) Real estate companies required to file quarterly reports pursuant to Rule 13a-15;

(3) Foreign private issuers required to file reports pursuant to Rule 13a-16;

(4)Life insurance companies and holding companies having only life insurance subsidiaries; or

(5) Companies in the promotional or development stage to which paragraph (b) or (c) of Rule 5A-01 of Article 5A of Regulation S-X is applicable.

(c) Public utilities, common carriers and pipe line carriers which submit financial reports to the Civil Aeronautics Board, the Federal Communications Commission, the Federal Power Commission or the Interstate Commerce Commission may, at their option, in lieu of furnishing the information called for by Form 10-Q, file as exhibits to reports on this form copies of their reports submitted to such Board or Commission for the preceding fiscal quarter or for each month of such quarter, as the case may be, together with copies of their quarterly reports, if any, for such periods sent to their stockholders.

(d) Notwithstanding the foregoing provisions of this rule, reports on Form 10-Q, or reports submitted in lieu thereof pursuant to paragraph (c), shall not be deemed to be "filed" for the purpose of Section 18 of the Act or otherwise subject to the liabilities of that section, but shall be subject to all other provisions of the Act.

(Revised Oct. 28, 1970, eff. with respect to each fiscal quarter, other than an issuer's fourth fiscal quarter) which ends after the date securities of such issuer become registered pursuant to sec. 12 of the Act or pursuant to the Securities Act of 1933, or after December 31, 1970, whichever date is later, Release 34-9004.)

6a

Rules under the Securities Exchange Act (as amended)

Rule 15d-1

Rule 15d-1. Requirement of Annual Reports

Every registrant under the Securities Act of 1933 shall file an annual report, on the appropriate form authorized or prescribed therefor, for the fiscal year in which the registration statement under that Act became effective and for each fiscal year thereafter, unless the registrant is exempt from such filing by Section 15(d) of the Securities Exchange Act of 1934. Annual reports shall be filed within the period specified in the appropriate report form. At the time of filing the annual report, the registrant other than a person registered under the Public Utility Holding Company Act of 1935 or the Investment Company Act of 1940 shall pay to the Commission a fee of $250, no part of which shall be refunded.

(Amended Jan. 4, 1971, eff. Feb. 4, 1971, Release 34-9048. Further amended to provide for payment of fee, Jan. 25, 1972, eff. March 1, 1972, Release 34-9465.)

Federal Rules of Civil Procedure

Rule 52

Rule 52. Findings by the Court.

(a)EFFECT. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

(b) AMENDMENT. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment.

Rule 56

Rule 56. Summary Judgment.

(a) FOR CLAIMANT. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from be commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) FOR DEFENDING PARTY. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) MOTION AND PROCEEDING THEREON. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Rule 56 (continued)

(d) CASE NOT FULLY ADJUDICATED ON MOTION. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and, a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) FORM OF AFFIDAVITS; FURTHER TESTIMONY; DEFENSE REQUIRED. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) WHEN AFFIDAVITS ARE UNAVAILABLE. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) AFFIDAVITS MADE IN BAD FAITH. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may he adjudged guilty of contempt.

failed timely to file the report, and the report was not in fact filed until October 20, 1969. 6/

4. On November 4, 1969, defendant filed with the Commission a registration statement for its common stock pursuant to Section 12(g) of the Securities Exchange Act, 15 U.S.C. 78l(g). 7/ That registration statement became effective, by operation of law, on January 3, 1970. Section 13(a) of the Securities Exchange Act, 15 U.S.C. 78m(a), provides that every issuer of a security registered pursuant to Section 12 of the Securities Exchange Act is required to file periodic reports with the Commission. By virtue of its registration of its common stock pursuant to Section 12(g), Computer Statistics became subject to the periodic filing requirements of Section 13 of the Securities Exchange Act on January 3, 1970. 8/

5. Pursuant to Section 13(a) of the Securities Exchange Act and Rule 13a-1 thereunder, 17 CFR 240.13a-1, defendant was required to file with the Commission an annual report on Form 10-K for its fiscal year ending March 31, 1970. This annual report was required to be filed on or before July 9, 1970.

6/ See letter from Computer Statistics, Inc., to Securities and Exchange Commission, dated October 17, 1969, a copy of which is annexed to this affidavit as Exhibit 8.

7/ See registration statement of Computer Statistics, Inc., dated October 31, 1969, a copy of which is annexed to this affidavit as Exhibit 9.

8/ Section 15(d) of the Securities Exchange Act only prescribes a single filing requirement for corporate issuers. Thus, as long as Computer Statistics was required to file periodic reports pursuant to Section 13 of the Securities Exchange Act, its obligation to file such reports pursuant to Section 15(d) was “automatically suspended.”

was made on July29, 1970, and it was not until July 28, 1970, that a request by the defendant for an extension of time in which to file its Form 10-K annual report was made. 9/ This request was denied on August 6, 1970. 10/ By letter dated August 10, 1970, the defendant appealed this decision. 11/ On August 25, 1970, the Commission denied this appeal. 12/ No annual report was filed by the defendant and on December 11, 1970, a delinquency letter was sent to the defendant advising it of its failure to file the required 10-K report. 13/ Thereafter, on February 3, 1971, this action was instituted by the Commission. The report was mailed on February 15, 1971, subsequent to the commencement of this action. 14/ The actual 10-K filed by the defendant failed to comply with the instructions with respect to the financial statements for Form 10-K, 17 CFR 249.310, in that the accountant's opinion contained therein does not comport with Rule 2-02(c) of Regulation S-X, 17 CFR 210.202(c),

9/ See letter from Computer Statistics, Inc., to Securities and Exchange Commission, dated July 28, 1970, a copy of which is annexed to this affidavit as Exhibit 10.

10/ See Order of the Securities and Exchange Commission, dated August 6, 1970, a certified copy of which is annexed to this affidavit as Exhibit 11, and a confirming telegram from the Securities and Exchange Commission to Computer Statistics, Inc., a copy of which is annexed to this affidavit as Exhibit 12.

11/ See letter from Computer Statistics, Inc., to Securities and Exchange Commission, dated August 10, 1970, a copy of which is annexed to this affidavit as Exhibit 13.

12/ See Order of the Securities and Exchange Commission, dated August 25, 1970, a copy of which is annexed to this affidavit as Exhibit 14.

13/ See letter from John B. Casey, chief, Branch of Filings and Reports, to Computer Statistics, Inc., dated December 11, 1970, a copy of which is annexed to this affidavit as Exhibit 15.

14/ See copy of Form 10-K, dated February 15, 1971, annexed to this affidavit as Exhibit 16.

App. 33a*

HUNTON, WILLIAMS, GAY, POWELL & GIBSON

The trial is scheduled for October, and we would be seriously prejudiced by delay. There is still a great deal of work to be done prior to trial.

On the other hand, there has been another reason for delay of the CSI report. We agreed to sell back a subsidiary, Piedmont Associates, Inc., at approximately our cost to the principals from whom we had acquired it. The agreement was reached in April, 1969, during our last fiscal year. Unfortunately, the buyers advise me, the financing which they have been promised has been repeatedly delayed it seems from day to day and from week to week. We had hoped to avoid the expense of full audit of this subsidiary which is totally unrelated to our other business and located in Warrenton, Virginia, about 1,000 miles from our home office.

Before concluding, let me observe that neither Mrs. Malkan nor I draw any salary from CSI. I receive no more than actual expenses. Mrs. Malkan, at no salary, has given me all the administrative, clerical, secretarial and similar help that I have had for our corporate and home office work. That has been considerable for this small company because we have endeavored to minimize the company's outside professional fees.

Therefore, I respectfully request that the Commission grant a substantial extension of time to file our 10K.

Sincerely,

COMPUTER STATISTICS, INC.

By Arnold Malkan, President

August 11, 1970