Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

MEMORANDUM TO THE CONFERENCE:

May 28, 1980

AARON v. S.E.C., 79-66

Attached is my opinion concurring in the opinion of the Court. I think everyone is now "in" and this case can come down next week.

Regards,

WEB

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: MAY 28 1980

Recirculated: _____

RE: 79-66 - Aaron v. S.E.C.

I join the opinion of the Court and write separately to make three points:

(1) No matter what mental state § 10b and § 17(a) were to require, it is clear that the District Court was correct here in entering an injunction against petitioner. Petitioner was informed by an attorney representing Lawn-A-Mat that two representatives of petitioner's firm were making grossly fraudulent statements to promote Lawn-A-Mat stock. Yet he took no steps to prevent such conduct from recurring. He neither discharged the salesmen, or rebuked them; he did nothing whatever to indicate that such salesmanship was unethical, illegal and should stop. Hence, the District Court's findings (a) that petitioner "intentionally failed" to terminate the

fraud and (b) that his conduct was reasonably likely to repeat itself find abundant support in the record. In my view, the Court of Appeals could well have affirmed on that ground alone.

(2) I agree that § 10b and § 17(a)(1) require scienter but that § 17(a)(2) and § 17(a)(3) do not. I recognize, of course, that this holding "drives a wedge between [sellers and buyers] and says that henceforth only the seller's negligent misrepresentations may be enjoined." Ante at 12 (Blackmun, J. dissenting). But it is not this Court that "drives a wedge;" Congress has done that. The Court's holding is compelled in large measure by Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976), and gives effect to Congressional intent as manifested in the language of the statutes and in their histories. If, as intimated, the result is "bad" public policy, that is the concern of Congress where changes can be made.

(3) It bears mention that this dispute, though pressed vigorously by both sides, may be much ado about nothing. This is so because of the requirement in injunctive proceedings of a showing that "there is a reasonable likelihood that the wrong will be repeated." SEC v. Manor Nursing Centers, Inc., 458 F. 2d 1082, 1100 (CA 2 1975). Accord SEC v. Keller Corporation, 323 F. 2d 397, 402 (7th Cir. 1963). To make such a showing, it will almost always be necessary for the Commission to demonstrate that the defendant's past sins have been the result of more than negligence. Since the Commission must show some

likelihood of a future violation, defendants whose past actions have been in good faith are not likely to be enjoined. See opinion of the Court, ante. at 20. That is as it should be. An injunction is a drastic remedy, not a mild prophylactic, and should not be obtained against one acting in good faith.