June 27, 1983

Mr. Justice:

From: Dave Van Zandt

Re: Dirks v. SEC, No. 82-276

LFP's Response to Your Dissent

Although his clerk, Jim Browning, wanted to write off the dissent as a difference in theoretical approach, LFP apparently was quite bothered by it. He and the clerk spent most of Sunday revising the opinion. I take his response as a compliment to the dissent. His changes, however, are simply clarifications and do not challenge the basic thrust of the dissent.

Changes made by LFP

1) P. 4: The new footnote 8 accuses the dissent of rewriting the facts of the case and quotes two conclusions, one by the SEC decision and the other by Judge Wright. It does not cite, however, contradicting facts to support LFP's view. I see no reason to respond.

2) P. 13: The replacement of the quotation from Commissioner Smith's concurrence clarifies the nature of tippee liability. It is consistent with footnote 5 in the dissent. There is no need to respond.

3) P. 15: The change restates LFP's improper purpose test. It now relies on footnote 15 in Cady, Roberts. As the dissent already points out in footnote 9, that statement was appended to only the first element of the Cady, Roberts theory, and in Cady, Roberts footnote 31, the duty is more clearly stated without an

improper purpose requirement. To reflect this additional source, however, footnote 6 in the dissent must be changed. I recommend the following:

"6. The Court cites only a footnote in an SEC decision and Professor Brudney to support its rule. Ante, at 15-16. The footnote, however, merely identifies one result the securities laws are intended to prevent. It does not define the nature of the duty itself. See n. 9, infra. Professor Brudney's quoted statement ..."

4) P. 16: New footnote 23 argues that Secrist and Dirks did not have the intent to deceive purchasers of Equity Funding securities and therefore did not have the requisite scienter for Rule 10b-5 liability. I think the dissent clearly points out that Secrist intended Dirks to trade on the information in order to deceive unknowing purchasers into buying the securities as part of his scheme to cause the price to collapse. My inclination is to do nothing about this. The rest of the changes on the page simply clarify his theory.

5) P. 18: The addition to footnote 27 attempts to cast the view of the dissent as a version of the equality of information theory; it also harps again on the theme of new footnote 23--that is, that Secrist did not have an intent to defraud. The last paragraph seems to be a very conservative tract that rejects the notion that insider trading harms market participants at all. As Part III of the dissent argues, that theory has never been adopted by Congress or the Court. While you could get into a long-winded policy debate in the footnotes, I think the dissent

already rebuts this notion adequately. You could add to footnote 14 in the dissent the following sentence after "(1970)":

"The Court also seems to embrace a variant of that extreme theory, which postulates that insider trading causes no harm at all to those who purchase from the insider. Ante, at 18, n. 27. Both the theory and its variant sit at the opposite end of the theoretical spectrum from the much maligned equality-of-information theory, and have never been adopted by Congress or ratified by ~~the~~ this Court. See Langevoort, 70 Calif. L. Rev. ..."