ORIGINAL

# OFFICIAL TRANSCRIPT
# PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-276

TITLE RAYMOND L. DIRKS, Petitioner v.
SECURITIES AND EXCHANGE COMMISSION

PLACE Washington, D. C.

DATE March 21, 1983

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IN THE SUPREME COURT OF THE UNITED STATES

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RAYMOND L. DIRKS,

Petitioner,

v. : No. 82-276

SECURITIES AND EXCHANGE COMMISSION

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Washington, D. C.

Monday, March 21, 1983

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:00 p.m.

APPEARANCES:

DAVID BONDERMAN, ESQ., Washington, D.C.; on behalf of Petitioner

PAUL GONSON, ESQ., Solicitor, Securities and Exchange Commission, Washington, D.C.; on behalf of Respondent

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CHIEF JUSTICE BURGER: We will hear arguments first this afternoon in Dirks against the Securities and Exchange Commission.

Mr. Bonderman, you may proceed whenever you are ready.

ORAL ARGUMENT OF DAVID BONDERMAN, ESQ.

ON BEHALF OF THE PETITIONER

MR. BONDERMAN: Thank you, Mr. Chief Justice, and may it please the Court:

Ten years ago today, in fact virtually at this hour, Petitioner Dirks was in the office of Stanley Goldblum, Chairman of the Board, President, and Chief Executive Officer of then high flying Equity Funding Corporation of America. Justice White, it was at 10:00 in the morning, California time.

(Laughter)

MR. BONDERMAN: Mr. Dirks was there to confont Mr. Goldblum with uncorroborated allegations of a former officer -- a fired former officer of a subsidiary to the effect in relevant part that the major foundations of the company, its life insurance subsidiary, were a fraud and that the company was carrying on its books substantial amounts of "phony policies" which were being sold to reinsurers as though they were real in a Ponzi scheme.

Mr. Goldblum, of course, denied all, arranged for a meeting which lasted much of the day with all of the other major officers of the company in an endeavor to persuade Mr. Dirks

that these allegations were entirely spurious and were being circulated by a disgruntled former fired employee who, although Mr. Dirks hadn't mentioned his name, Mr. Goldblum knew who it was.

Secrist had come to Dirks ten days earlier with these and other allegations, some of which ultimately proved to be true, some of which proved to be false. He had come to Dirks because Dirks had a reputation as an analyst who was willing to investigate beyond just looking at reports, the bottom line financial analysis, because as the Court of Appeal below found the Securities and Exchange Commission had a history of failing to act promptly in dealing with what has come to be known as the Equity Funding Scandal, the SEC having been informed by one of its own former attorneys a year and a half earlier and having taken essentially no action, a quick investigation which was closed. The SEC again being informed within two days of Mr. Dirks, but again concluding that there was nothing there and not taking any action at that time.

Secrist had the idea that in view of the performance by the regulators and in view of the notion within the company that the company had connections through its associate general counsel to the SEC, which made it clear that the SEC would never act, and through its vice president of the Illinois Insurance Commission, which also assured that the Insurance Commission which had regulatory authority would never act, the only way

to public's eyes what Secrist believed, though, as he admitted he had no proof, was a major, perhaps the major fraud in corporate America at the time was to have somebody like Dirks go out, do such investigation as he could and to publicize those allegations in the only way a securities analyst can by telling everybody he can get his hands on with the result that the trading in the stock would cause an adjustment in the price --

QUESTION: Mr. Bonderman, we are dealing here, I guess, only with the activities of Mr. Dirks in those few days before he went to the SEC.

MR. BONDERMAN: That is correct, Justice O'Connor, from the 7th of March until the 26th of March.

QUESTION: Why shouldn't he have gone in the first place to the SEC and then gone ahead and done all of the things that he did?

MR. BONDERMAN: Well, there are two answers to that. I would like to start with the second one if I might.

The second one is that the SEC's position is that even if he had he would have violated the law because it is no defense that you reported it to the SEC --

QUESTION: Well, but I suppose you could argue to us that it should be a defense that he reported it to the SEC. That is another question.

MR. BONDERMAN: That brings me to what I suppose, perhaps, should have been my first.

It was reported to Dirks by Mr. Secrist that the SEC was aware and had been informed in 1971. That was correct. The Courts below so found --

QUESTION: But isn't it his obligation to go as a broker/dealer to the SEC? You would acknowledge that at some point it is his obligation? Would you, or would you not?

MR. BONDERMAN: Well, the answer to that is, I would say, first, if he has an obligation to go to the SEC at all --

QUESTION: Does he ever, in your view, have an obligation?

MR. BONDERMAN: I believe not, but I believe that that is not material here because under the facts present what he had was a rumor, an unverified allegation, perhaps more than a rumor, but certainly less than fact, of the sort that goes on in the market all the time. In fact, Stanley Sporkin, the head of the Securities and Exchange Commission's Division of Enforcement at the time, who was called before Congress and asked why was it that the SEC didn't take action when Dirks did go there on the 26th --

QUESTION: Well, if you would assume for purposes of answering the question that his obligation as a licensee to be a broker/dealer does obligate him to go to the SEC with the information, then could you agree that he ought to go there first?

MR. BONDERMAN: I think the answer to that is no

because I believe that Mr. Dirks did, in fact, go to the SEC himself although Secrist told him on the 19th of March that Secrist had gone to the SEC -- That turned out to be inaccurate. Indirectly the information was brought to the SEC's attention on the 9th -- I believe that the record here is clear that Mr. Dirks went to the SEC on the 26th at the very first time, certainly the very first working day, that he had anything beyond speculation allegation. After he had checked it out, he and Mr. Blundell from The Wall Street Journal, who was, in fact, the first person that Mr. Dirks talked to, did, in fact, go to the SEC.

I might add that Mr. Dirks had a very personal additional reason for not going to the SEC because the last time he was involved in an investigation, he had done just what you suggest. Some clients of his -- This involved a prior case, the ITT Hartford --

QUESTION: Is this in the record?

MR. BONDERMAN: Yes it is. It is in the record.

Mr. Dirks in that case had gone to the SEC because he heard from some of his clients that insider trading was going on, and he went to the SEC and told them requesting that they please keep his name out of it because his clients would not appreciate his sharing their confidences with the SEC. The first thing the SEC did was call up the clients and said, Dirks here is alleging that you know thus and such about inside information

and inside trading in the Hartford case. Needless to say, Mr. Dirks himself was personally disencouraged because of that experience for going to the SEC before he believed he had facts, which he did not have, we believe.

QUESTION: But, I suppose, the SEC as affirmed by the Court of Appeals, though, found that the information he had during the days before he went to the SEC was material specific in detail?

MR. BONDERMAN: Well, the answer to that is in part, yes, although what the Commission really found was at least -- and the Administrator alleges the same thing -- at least, forgetting what happened earlier on, at least by the weekend between the 23rd and 26th he had such information.

In fact, the information that Dirks had was brought to the attention of Mr. Sporkin on a telephone call by Mr. Blundell of The Wall Street Journal on the evening of the 23rd of March which happened to have been a Friday. Dirks came in and testified starting on the following Monday, the 26th, testified for three days at the end of which time Mr. Sporkin testified before Congress that the SEC had nothing but hearsay, innuendo and rumor, and nothing on which it could act.

That was the SEC's position and testimony before Congress about what Dirks knew. That is after Dirks spent three days telling them.

I would like to talk about --

QUESTION: Before you go on with that --

MR. BONDERMAN: Yes, sir.

QUESTION: -- when a citizen, a private citizen, goes to the SEC as they sometimes go to the FBI, Department of Justice, or a newspaper, are there any regulations first that could guarantee them anonymity? Second, beyond that, are there any protections from liability for slander or libel, if they do it in writing?

MR. BONDERMAN: The answer to both questions is, as far as I know, there are none.

QUESTION: They go at their own risk, then, don't they?

MR. BONDERMAN: I believe they do. In fact, you raise a very good point because when Dirks started to make his checks in the industry and ask people, look, you know how reinsurers operate, is this scheme possible, because it made no sense. It was Ponzi scheme. Is this scheme possible. He was cautioned, don't say anything to anybody. You are going to get yourself in trouble. There are libel laws here. You be very cautious about what you say.

So, the truth is that you are caught between a rock and a hard place in the sense that an analyst like Dirks has no access to the press. He went to The Wall Street Journal. That was the first thing he did. They declined to print the story. The testimony was that they cannot print a story on hearsay

allegations.

They did not act on it, though they worked with Dirks, and ultimately based on the information that Dirks uncovered printed a story after the period of time we are talking about.

QUESTION: Now, on the other side of this equation, if it is an equation, I am not sure, if a person, an analyst, a securities analyst has clients who depend upon him, would he be at risk for a malpractice if he had information and did not give it to them?

MR. BONDERMAN: Well --

QUESTION: Is there any malpractice suit that has reached that area yet?

MR. BONDERMAN: One of the defenses raised by the persons to whom Dirks gave information and who traded -- and let me just regress for a second to say, Dirks told literally a hundred people about this, some of whom bought, some of whom sold, some of whom did neither. Some of those -- Five of those persons who sold were charged in this proceeding below, and they defended themselves, in part, on the grounds that they were caught with two fiduciary obligations, assuming for the moment that this was inside information, which I do not believe for a moment it is. They had two fiduciary obligations. One to their clients, pension funds for example, for whom they were trustee. Information comes to them. They have an obligation to act for those trustees, and they have an obligation not to

violate the law with respect to this information.

The Courts below, or this Commission because it never got to the Court below, held that whatever your other fiduciary obligations are, it gives you no license to violate these laws. I think the question is an open one. It was decided by the administrative law judge, but I am not aware of any further decisions on that point.

What happens here if we think about the public policy implications of what was done, and, indeed, why the Solicitor General and the Assistant Attorney General in charge of the criminal division filed a brief urging reversal, is that as one commentator put it, you have here the biggest boon for the successful commission and continuation of fraud that can be imagined because what you have done to somebody in Dirks' position is to tell him that the only thing he can do without risking a securities violation is to do what counsel suggested below, nothing. That is to say to be silent.

Why do I say that? Because you will recall that Dirks himself did not trade. He did not own any stock. Neither he nor his company traded a single share. What he did was tell everybody he could get his hands on, which included the auditors, which included The Wall Street Journal, which included a whole series of persons in the securities business, large and small, as the SEC found. He basically responded to other people's calls.

QUESTION: Could Mr. Dirks and his firm have traded in the stock on their own during that interval of time?

MR. BONDERMAN: Well, the answer to that is I think there is an argument that they could, and I think there is an argument that they could not.

QUESTION: What is your position?

(Laughter)

MR. BONDERMAN: My position is that if those members of the court in Chiarella who expressed the view that misappropriation of information is grounds under 10b-5 and 17(a) for violation, and the information came to Dirks on the theory that he was going to disseminate it. If he instead used it solely for his own private trading, it might be argued that he misappropriated it. I think that is wrong, but I think a substantial argument can be made based on that branch of Chiarella.

I think there is no argument that can be made, no reasonable argument that can be made, that where Secrist reasonably concluded that the only way to get this out in view of what Secrist understood to be the SEC's defaults in investigating, and which the Court below found to the SEC's defaults in investigating it, the only way to get this out was to do what Dirks did. Dirks did not trade, but did get it out. There is no grounds under Chiarella to find that any person breached any duty to any one.

QUESTION: Would your -- If the information that

Mr. Dirks had received were merely adverse but not indicating criminal conduct, would Petitioner have been liable as a tippee for the failure to disclose?

MR. BONDERMAN: I think the answer to that is probably yes.

QUESTION: Clearly yes.

MR. BONDERMAN: That is correct. The reason that he is not liable here is because under no conceivable definition of the term, insider information, as that has been used, inside information, could this possibly be inside information. That is what the SEC forgot here.

They made the incredible -- and I think it is -- incredible statement as the underlying basis for their rationale in this case that Dirks should have known that this information was intended by the company to remain confidential.

Indeed, it was. Nobody who is committing a fraud desires to have it circulated. But, yet that is the foundation for the whole insider trading rules and regulations stemming from Investors Management, the notion of improper dissemination. There was nothing improper about what Mr. Secrist chose to do.

He had two choices as a fiduciary. The fraud was going on. He could do either of two things. He could, as the Commission suggests he should have, done nothing whatsoever and allowed it to continue.

Instead, he chose to follow a path which lead to its

disclosure sooner rather than later. And, that is because, and it is a proven fact in this case, so found by the Court of Appeals that reporting this information to public officials got nowhere in the past.

That isn't and should not come to anybody as a shock, although this case is a little more aggregious as to what it is that public officials overlooked because entire statutory enforcement schemes, indeed the whole reason we have a 10b-5, a private right of action at all, is a recognition that no matter how well motivated an intention and whatever skillfull a job they are doing, regulators simply cannot probe and uncover all instances where enforcement is appropriate.

That is why we have private enforcement, not only in 10b-5, in the anti-trust statutes, throughout the federal regime. It is why we have informers' rewards. It is why we try to encourage dissemination and uncovery of fraud.

QUESTION: But, if you are right, and if there is no accompanying obligation on Mr. Dirks to go right away to the SEC and disclose the information, then that would build an incentive to people who might uncover this information to continually, selectively disseminate it and to extend that time as long as possible to maximize their profits.

MR. BONDERMAN: Well, let me answer that this way, if I might, Justice O'Connor. First of all, I think Commissioner Smith in Investors Management gave the right response to the

notion of selective dissemination. That is a spit word the SEC has invented, and it means nothing. Because, what the selective dissemination means, if it means you did not make it public because you did not put it on the wire, of course, they are right. No one would put this on the wire. The Wall Street Journal would not publish it.

If it means that you chose a few people to select for profit and did not try to get it out as broadly as possible, that is not what was done here. The Court below found --

QUESTION: Well, but if you are right, it might be done in the future for others.

MR. BONDERMAN: If, in fact, someone uses it to line their pocket in a direct sense, I think we have a different case, and, indeed, maybe can have a different rule. But, I would like to suggest that the entire theoretical underpinnings as -- I am referring the Court, for example, to Professor Easterbrook's seminal article and this suggests that there is nothing wrong with the notion, if what you are talking about is encouraging people to investigate fraud and the choice is to have them not investigate fraud, what are the costs you are willing to pay to encourage someone.

If, in fact, Dirks because of his own personality did this essentially for free -- He did, in fact, do it essentially for free -- his company received one indirect commission. But, you cannot expect people to spend their own time and incur

costs to investigate fraud doing that. In fact, it has never been the case in this society, that I am aware, that people -- altruism was supposed to contribute soley and 100 percent to their doing of acts that the society regards as good. That goes for all of us in this courtroom.

QUESTION: Would the sanction put on Dirks apply to anybody else who is not a broker/dealer?

MR. BONDERMAN: That depends if you believe that Judge Wright's single-judge opinion creating a broker/dealer duty to the whole world which he announced was breached. If that were the rationale, I suppose it would apply to all broker/dealer employees --

QUESTION: How about non-broker/dealers?

MR. BONDERMAN: It would apply to anybody else who has an ethical standard of special care. I think --

QUESTION: Well, what if The Wall Street Journal had published the information?

MR. BONDERMAN: I am sorry?

QUESTION: What if The Wall Street Journal had published the information?

MR. BONDERMAN: Well, if the question is whether they would now have a privilege against the libel laws, I do not think they would.

QUESTION: No, no, no. What about the -- Could the SEC get after them?

MR. BONDERMAN: I think even the SEC would admit that publishing it in The Wall Street Journal makes it public. Putting it out over the wire makes it public. I think even the SEC would admit that.

Beyond that, they will not go.

QUESTION: But, that is using inside information. That is publicizing --

MR. BONDERMAN: As I understand the SEC --

QUESTION: Well, if Dirks had put out a big flyer and handed it out in a supermarket, would he had been any better off?

MR. BONDERMAN: No, because the SEC takes the position and did take the position here, in fact, the administrative law judge said it was a position "of great merit." That the only way you can protect yourself against a charge of fraud is to make it public in the sense of putting it on a tape --

QUESTION: Could the SEC have got after some of Dirks' tippees --

MR. BONDERMAN: They did.

QUESTION: -- who are not broker/dealers or anything else?

MR. BONDERMAN: They did.

QUESTION: So, anybody who was a tippee using inside information is subject to SEC sanctions?

MR. BONDERMAN: Yes, because the theory -- The SEC has taken a walk on --

QUESTION: Including a newspaper, I suppose?

MR. BONDERMAN: If the newspaper traded or someone used it to trade and it was not making it public. I suppose you could think of a case of some newspaper with very small circulation in some little town in South Carolina --

QUESTION: Well, what about Dirks, I said. What if he had not told any of his clients? He just made a sign that said so and so is a fraudulent outfit and stuck it up at the corner of something and Wall Street?

MR. BONDERMAN: That is not public disclosure because the persons who do not go by Broad and Wall, for example, people trading in Seattle, Washington never find out about it.

In fact, one of the trading defendants, Dreyfus, did disclose. They disclosed substantially everthing that Dirks had told them on the 23rd to Goldman Sachs to whom they sold some stock. The SEC argued, and the administrative law judge found -- these folks did not appeal -- that even had they done so he said there was great merit in the notion that that is not enough. You cannot simply tell who you are dealing with. You have to make it public. That is the whole point of the SEC's argument.

QUESTION: What if the SEC's basis for assertion of authority is the broker/dealer relationship, what action could they take to enforce this same sort of obligation against someone who is not a broker/dealer and who, therefore, is not subject to disciplinary proceedings?

MR. BONDERMAN: Well, Mr. Justice Rehnquist, that is not the SEC's position. The SEC has taken a walk on Judge Wright's opinion. They say to this Court in footnote 27 that we do not deal with Judge Wright's opinion. Chenery precludes it. It was not advanced below. The Commission did not rely on it. This Court should not. We do not adopt it.

QUESTION: It applies to everybody.

MR. BONDERMAN: Their view is that anybody who gets any information from inside the company automatically -- that is the other half of Judge Wright's opinion --

QUESTION: You are stuck with that?

MR. BONDERMAN: Well, automatically has a duty to disclose. It comes from out of --

QUESTION: Well, perhaps this question should be better put to you opponent, but how would the SEC propose to enforce that duty against someone who is not a broker/dealer?

MR. BONDERMAN: They would propose to sue them in a federal court. I presume they have done so in other cases. Perhaps they might, as the did with Mr. Chiarella choose --

QUESTION: What would they sue for?

MR. BONDERMAN: They would sue for aiding and abetting violations of 10b-5 by someone who traded. That is what they did here. They sued Dirks --

QUESTION: What would they ask for?

QUESTION: Well, isn't the real liability to the

purchaser in those facts. If it is a 10b-5 violation without being the broker/dealer, isn't there a tremendous damage liability?

MR. BONDERMAN: There is a tremendous damage liability. Dirks here, for example, was sued in huge class actions. No one recovered from them because he refused to settle and ultimately never went to trial.

But, also thinking back to Chiarella, let us not forget that this is a criminal statute. What is to prevent the Dirkses of the future from being indicted for this if this Court says that Dirks did wrong here. The next time somebody will think about whether the SEC is going to send them to jail for doing this. It is hard to believe of anything that would be as contraindicated for someone who is attempting to disclose a fraud even if he did not do it perfectly.

QUESTION: May I ask you one question here about your theory. I understand the objections to your opponent's theories, but under your view if everything hinges on the character of the information, it is illegal and, therefore, there is no protection to it, it does follow, does it not, that you would say that he would not be liable even if he had traded directly and never told? I mean, he just kept it secret and decided to make as much money out of it as he could.

MR. BONDERMAN: Well, I think, in fairness the answer is not quite because what our theory has been is that under Chiarella looking at the majority concurrence and dissents, there should be

no liability for information where there is no breach of a duty.

QUESTION: Well, in the case I posit, under your view, there is no breach of a duty. I do not know why you are afraid to make the argument.

MR. BONDERMAN: Well, the answer to that --

QUESTION: He has got information. It came into his possession lawfully. There is nothing privileged about it because the more people find out about it the better, and his market activity will eventually cause the information to be known more generally.

MR. BONDERMAN: I agree with that, and we do argue that. But, we can go a step further here because of what Dirks did in a way --

QUESTION: No, if the heart of your argument is no duty --

MR. BONDERMAN: That is correct.

QUESTION: -- then is seems to me it applies in that situation as well as this one.

MR. BONDERMAN: That is the heart of our argument. We also recognize, however, the misappropriation arguments that the Chief Justice made in his dissent, and what we are saying is that it is at least possible to formulate a theory of misappropriation which would not apply here, which might apply if Secrist had come to Dirks and said, look, disseminate this, as, in fact, Dirks did, but instead Dirks went home and traded on it for his own use and

that is all he did. It seems to me there might be a misappropriation argument along the lines made by the Chief Justice in Chiarella.

So, we recognize that such an argument is a possibility.

QUESTION: If that is the test, why wasn't it a misappropriation to -- even if he got only one indirect commission out of it -- to that extent? Wasn't there still a violation of a duty?

MR. BONDERMAN: I do not think so because everybody recognized that, and at least Secrist planned, if that is what it could be called, was that Dirks would do exactly what he did do, which was tell everybody in sight, which was not simply clients. He told competitors. He told people he never heard of, people who called him up on the telephone. He told the Ford Foundation.

QUESTION: But not the SEC.

MR. BONDERMAN: He had reason to believe that the SEC knew -- reason which was accurate. He was told by Secrist on the 19th of March that the SEC knew. He was told by Secrist on the 7th of March that the SEC had been told about it repeatedly over a period of years.

QUESTION: I guess I still do not understand what would be the matter with a rule that said, the broker/dealer can discharge his obligations, if there are any, by telling the SEC and then going ahead and doing whatever he wants because he has made it public. Now, what is the matter with that?

MR. BONDERMAN: That argument is inconsistent, as I understand it, both with the SEC's position and with the entire underlying basis for the development of the law being that it is nonpublic. The fact that I tell the SEC -- obviously this Court can change my mind as to what the law has been --

(Laughter)

MR. BONDERMAN: -- but, obviously if I tell the SEC, it does not make it public. Because the whole notion stems from a parody of information concept, along the lines rejected by this Court in Chiarella, the truth is that there is no parody of information or anything like it because if I tell the SEC and it goes in their investigatory file it is still nonpublic in any sense that that has ever --

QUESTION: In the hearsay file. It is in the hearsay file.

MR. BONDERMAN: That is exactly where it is. It is still nonpublic, and I believe that Mr. Gonson will tell you that and will tell you that in response to those questions.

Thank you. I would like to reserve the remainder of my time.

CHIEF JUSTICE BURGER: Mr. Gonson.

ORAL ARGUMENT OF PAUL GONSON, ESQ.

ON BEHALF OF RESPONDENT

MR. GONSON: Mr. Chief Justice, and may it please the Court:

Raymond Dirks was censured by the Commission for passing material, nonpublic information he had received from Equity Funding to five institutions. On the basis of that information, they sold more than $17,000,000 worth of Equity Funding securities to investors who did not know that those securities were virtually worthless.

In imposing only a censure, the Commission took into account Mr. Dirks' role in bringing to light the massive fraud at Equity Funding as a result of his investigation. But while his role negated any sanction to be imposed upon him as a result of his unlawful tipping activities, it did not excuse them.

QUESTION: Was anybody at SEC censured?

MR. GONSON: Was anybody at the Commission censured? So far as I am aware, no, Your Honor.

Let me address the question of the information to the SEC, which is set forth in both of our briefs. The events that are involved in this case took place in 1973.

In 1971 a former attorney who worked on the staff of the SEC called to say that two employees of the SEC, one Mercado and one Templeton, had information about irregularities at Equity Funding. We asked that they be sent in. They were sent in, but they were very circumspect. They did not tell the kind of story that the lawyer promised that they would.

We followed up on it, and we were unable to get that information. At a later time, the attorney for Mercado who

became concerned that his client had gone to the SEC unaccompanied by counsel then came -- and then there is an issue which counsel raises as to whether an offer of immunity was made whereby Mercado allegedly would discuss that. From the SEC's staff's memorandum it was never perceived that such an offer was made and so that matter was not pursued.

On the 9th of March, which was two days after Secrist told Dirks the story he had told him, the California Insurance Commission representative contacted a staff member of the Los Angeles office of the SEC to reveal in a very vague way that some allegations were being made. And, the response was made that the California authority should look into them and if they promise, if they bring proof to contact us again.

This has to be understood, I think, in the context that at that time approximately 10,000 complaints were received -- this is back in 1973 -- by the SEC. Today it is closer to 20,000 a year.

So, the very detailed hard story that Dirks knew and received from Secrist, and which, by the way, he corroborated in great detail by talking at length with six former and present employees of Equity Funding, was not brought to the SEC, rather a much vaguer, softer information.

Now, it may assist analysis of this case to view Dirks as did the administrative law judge in this case as proceeding on two tracks. On the first track, which is what has been

described to you, Dirks was seeking to confirm and expose what he believed was a fraud. And, as the administrative law judge found had Dirks confined his disclosure to The Wall Street Journal reporters, or had he gone to the authorities, "He might indeed have been perceived as the public spirited hero he portrays himself."

But, there is a second track. Dirks informed his clients about this fraud. Secrist testified that he wanted Dirks to disseminate information to his clients so that they would sell Equity Funding securities --

QUESTION: I take it your position is it would not have made any difference to the SEC if he had gone to The Wall Street Journal first then the SEC and then to his clients.

MR. GONSON: Well, the point of the case --

QUESTION: Would it make any difference to you, or not?

MR. GONSON: The question is whether the information should become public. The issue in this case is not an information issue. It is not whether the information did get out or did not get out --

QUESTION: Well, I will just ask you again, what if -- just leave The Wall Street Journal out -- Suppose he had just gone to the SEC and then went ahead and did what he did. He would still be in trouble with you?

MR. GONSON: That is correct, Your Honor. Our position is that this case is governed by a series of cases since 1961.

Those that the SEC and the --

QUESTION: So, it would not have satisfied his obligation under the law to go to the SEC first?

MR. GONSON: That is correct. That an insider has to observe what has come to be known as the abstain or disclose rule. Either the information has to be disclosed to the market if it is inside information, which I will get to, or the insider must abstain from trading.

If the agency knows about it but the information has not yet become publicly available --

QUESTION: Maybe it never will be.

MR. GONSON: Well, it may very well be. The fact that the -- The question, Your Honor, boils down to whether if someone has inside information that person is free to trade on it if that information is not available to the market.

QUESTION: Well, of course, your ordinary analyst -- He makes his living by analyzing rumors and that sort of thing, doesn't he? What did Dirks do that was so different here?

MR. GONSON: The Commission pointed out in its opinion that it views the role of analyst as very important and said that they perform valuable functions in putting forth their analytical skills in evaluating data and then putting them together in what has sometimes been referred to as a mosaic.

They take perhaps what might be inconsequential bits of information to others and because of other information they

know and their analytical skills they can make predictions and they can make suggestions as to the company will do or will not do. That is different, said the Commission, from the kind of devastatingly important information that would become obvious to anyone, that there was a massive fraud at Equity Funding.

The Commission said a line has to be drawn between the usual functions of analysts and their trading on inside information that would not be available to anyone. The line is between what might be called fairness, as far as is possible to do so, on the one hand, as against the role that analysts play on the other hand.

QUESTION: How does Dirks make anything public? How would he admit it publicly? You say his obligation is don't trade on it, information that is not public. Could he possibly satisfy his obligation to make it public?

MR. GONSON: He could have gone to the New York Stock Exchange, which he did not do. He could have tried --

QUESTION: What would he have done at the New York Stock Exchange?

MR. GONSON: Pardon me?

The New York Stock Exchange may have then taken action as it ultimately did --

QUESTION: Well, they may not have either. They may not have taken any more action than the SEC did.

MR. GONSON: That is correct. That is correct.

QUESTION: So how could he do it?

MR. GONSON: It may be that he could not do it, Your Honor, but that if he could not do it, then he could not trade on it. The point is the question of whether --

QUESTION: The only way he could do it if he traded himself, he should tell his customers. I mean, tell his purchasers.

MR. GONSON: If there is a way for him to do that. It is very difficult --

QUESTION: What if he insisted to his clients, now, look, before you unload this bad stock, you should tell the person that you are unloading it on that it is bad.

MR. GONSON: That is the principle, Your Honor, yes, exactly right. It is difficult, of course, to do that --

(Laughter)

MR. GONSON: -- when trading stock at an impersonal stock market. Thus, the information has to generally become public in some other way.

QUESTION: Well, I am just not clear, then, what your response is to Justice White about what Mr. Dirks could have done to make it public. Would you explain that more clearly?

MR. GONSON: Yes, Your Honor.

Dirks could have attempted to make it public by doing partly what he did, and that was pressing The Wall Street Journal reporter to publish his story. Eventually, The Wall Street Journal

did --

QUESTION: And, if it were not published, then what could he do?

QUESTION: Nothing.

MR. GONSON: If it were not published and it otherwise did not become publicly available, then he could not have traded on it.

QUESTION: That is your position. Whether he told The Wall Street Journal, the SEC or anybody else, as long as it was not public?

MR. GONSON: That is correct, Your Honor.

QUESTION: Mr. Gonson, suppose Dirks had not been a broker/dealer and still the information had come to him and he passed it on. I take it the SEC would not have had any jurisdiction over him, but would the party who purchased the stock have a case against him?

MR. GONSON: Well, to take the first part of your question, Your Honor, the SEC could have, I do not know whether it would have, could have instituted an injunctive action --

QUESTION: Against this non-broker/dealer?

MR. GONSON: Against the non-broker/dealer. Indeed, it has instituted a great many injunction actions against non-broker/dealers or what we refer to as insider trading violations.

It seeks in those cases, where appropriate, to obtain disgorgement of forgotten gains.

QUESTION: Suppose Mr. Dirks had told only Mr. Lawson of The Wall Street Journal and Mr. Lawson had kept the information, would Dirks be liable?

MR. GONSON: I am sorry, Your Honor, I did not quite catch your question.

QUESTION: Let's assume that Dirks was not a broker/dealer. The information came to him. He passed it on to Lawson of The Wall Street Journal and Mr. Lawson told a friend of his who owned securities, did not publish just told a friend, who would be liable?

MR. GONSON: Your Honor, that would -- Your Honor is constructing a chain of what we refer to as tippees --

QUESTION: Would Dirks be liable? He told Lawson. He is not a broker/dealer.

MR. GONSON: Dirks would be liable if, as we have in the facts in this case, he received information from a person he knew as an insider and the insider wanted him to transmit that information to others so others could sell. The answer is yes. Dirks would be liable.

QUESTION: Even though Lawson himself owned no stock --

MR. GONSON: If Lawson traded on the basis of that information.

QUESTION: Well, he told his friend. How far does the chain go?

MR. GONSON: The chain goes as far, Your Honor, as

persons who know that they receive information from an inside source and intend or reasonably expect either that they or the person they told it to will trade on it. That is how far it goes. It may reach a point where persons may not know the source.

QUESTION: So, each member of the chain would be liable?

QUESTION: If they knew.

MR. GONSON: Yes, if they knew.

QUESTION: Well, yes.

MR. GONSON: Otherwise, all kinds of devious arrangements could be made to bypass the effect of these laws.

Now, if I may get back to the second track I spoke of. Secrist wanted Dirks to disseminate information to his clients so that Dirks would sell these securities in large quantities. That would depress the price, according to Secrist, and that would cause the regulators to take notice.

QUESTION: Did Secrist want to make a private profit or was he just interested in exposing it?

MR. GONSON: So far as the record shows, Secrist was just interested in exposing. He testified, as a matter of fact, that Dirks, and Dirks testified as well, that Dirks asked Secrist, did you sell this stock short. In other words, are you trying to induce me to do something to depress the price. Secrist said, no. Secrist said that a friend of his had approached him and said, I will put up the money. We will sell the stock short, and

then we will divide the profits. But, Secrist had rejected that out of hand.

QUESTION: Does the SEC take the position that a broker/dealer has an obligation to disclose to the SEC evidence of criminal conduct that the broker/dealer learns of?

MR. GONSON: Your Honor, the SEC did not take that position in this case.

QUESTION: Well, does it take that position generally?

MR. GONSON: That the broker/dealer has an independent obligation to report crime to the SEC? Not that I am aware of, Your Honor.

QUESTION: To report anything uncovered in the area of criminal activity. No, is that right?

MR. GONSON: I am not aware that it has taken that position, Your Honor.

QUESTION: Not as part of the duties of the licensee or professional obligations of the licensee?

MR. GONSON: So far as I am aware.

QUESTION: Do I correctly understand, the SEC does not place any reliance on his status as a broker/dealer at this stage of the proceeding, other than for the discipline purpose?

MR. GONSON: That is correct, Your Honor. Other than the fact that since he was a resistrar it was appropriate to proceed against him administratively. The theory of the case does not depend --

QUESTION: Your theory would be exactly the same if it were a non-broker/dealer, and is it not correct that if the same case arose in the future, it would be, in your view, it would subject the person who passed on the information when he should not have to a liability of around $17,000,000?

MR. GONSON: In a private action?

QUESTION: Yes.

MR. GONSON: Assuming the requisites for liability --

QUESTION: These facts. Assuming these facts --

MR. GONSON: -- for a private action were met. It could conceivably have that -- Well, although there is case law which as developed in an area not germane to this case delimiting, restricting the amount of recovery in terms of damage liability, but that is a separate issue, of course --

QUESTION: Well, does it follow from your answer that if Blundell, the reporter, had done everything that Dirks had done, that he might be liable?

MR. GONSON: If Blundell knew everything that Dirks knew and himself traded, the answer is yes, Blundell would be liable.

A question quite separate from the question as to whether he should publish something --

QUESTION: But, he would not be liable if he put it in the paper?

MR. GONSON: He would not be liable if he put it in the paper. But, this is not a disclosure case, Your Honor. We are

talking about people who are trading in securities on the basis of undisclosed information.

QUESTION: What if it is a reporter for the Albuquerque Journal instead of The Wall Street Journal, does publishing in the Albuquerque Journal about, say a New York Stock Exchange traded security count as disclosure in your book?

MR. GONSON: It may -- Yes, Your Honor, it may be adequate disclosure if, in fact -- It probably would be. Other wire services would probably pick up that story, and it would soon become available to --

QUESTION: Most individuals do not have access to a wire service that they can just go to their office and start typing out a message.

MR. GONSON: That is correct, Your Honor. You are raising a question that has been asked before and that is assuming somebody is not in a position to compel public disclosure of an inside fact that person knows, and very well established case law, and, as a matter of fact, discussed in this Court's Chiarella decision establishes that person may not trade.

QUESTION: May I ask one other question, please. Supposing during the period between, I think it was March 7th and the time he went out to the west coast, he had nothing but the Secrist source of information, which were the bad facts but no verification, was he then under a duty to refrain or disclose?

MR. GONSON: That raises the question, Your Honor, as

to whether that information was material. That, of course, is a closer question then much later when he had confirmed that with six former Equity Funding insiders.

The Commission found that it was material, that it was very specific. It came from a source which Secrist -- excuse me -- which Dirks himself said was a credible source. It was a three-and-one-half-hour, very detailed conversation.

The Commission found that yes, it was. But, I am not sure that this Court need reach that because trades, of course, were made throughout that period and most of them at the very end of the period when, by that time, the information had been confirmed in great detail by others who had seen or witnessed others participate in the fraud --

QUESTION: But the duty arises when the information becomes material, and, of course, you are not entirely sure when it is material until you get the additional information, I guess.

MR. GONSON: Well, the question of materiality is a question, I suppose that you should probably assess at the time --

QUESTION: That is what triggers the duty?

MR. GONSON: That is correct, the materiality of the information.

QUESTION: Mr. Gonson, we are not giving you much of a chance to argue you case, but there are so many interesting questions.

Suppose -- Well, let me put it this way. How long

would Secrist be the possessor of inside information? Suppose he had withheld it for four or five years. No one else had ever discovered it. He obviously did not owe any duty not to disclose confidential information to Equity, did he?

MR. GONSON: No, he did not, Your Honor.

QUESTION: He did not.

MR. GONSON: No argument made by -- no duties to shareholders, not to the corporate --

QUESTION: If he had finally concluded five years later that he had a guilty conscience. He should have disclosed it sooner. He then told a friend and the friend who owned Equity stock sold -- I suppose there is no statute of limitations that runs against a former insider?

MR. GONSON: By virtue of the fact that he knew the information for a long time?

QUESTION: Yes. I think one might assume that the information was no longer accurate or dependable -- not in this case where the fraud was manifest.

MR. GONSON: Well, that raises a number of questions, Your Honor. Was the information material? Was it then public? I think the fact that he knew about it a long time is not as relevant as the fact that the person who is receiving it learned it only then. The question then would be was it material. Of course, we would have to look for a duty, which I would like to get to, and if it was received in a breach of duty and the

person knew that it was coming from an insider, then he would be disabled from trading on it.

QUESTION: Would an obligation that Dirks' clients owed to their buyers have anything to do with inside information? It would not, would it? It is just that they have information they should have disclosed.

MR. GONSON: That is correct, Your Honor.

QUESTION: So, they may have a duty, an independent duty under 10b --

MR. GONSON: Their duty, Your Honor, is derivative of Secrist's duty in this case.

QUESTION: Well, why is that? It is just that they had information they should have disclosed to their buyers. It would not make any difference whether it was inside information or not, would it?

MR. GONSON: Your Honor, this case is about Secrist's duty as an insider --

QUESTION: I understand that.

MR. GONSON: -- and persons who stand in his shoes.

QUESTION: What could -- Suppose a holder of Equity stock who gets ahold of some inside information and decides to sell his stock because he does not think it is worth what it should be and he sells it. Now, what can the company do to him? What is there to disgorge?

MR. GONSON: Are you speaking of whether the company

has a right of action, Your Honor?

QUESTION: Yes.

MR. GONSON: The company -- we discussed that in our brief, if I may answer your question very briefly. If there was no duty of confidentiality owed to the company, then the company probably would have no action.

QUESTION: What if there was a duty?

MR. GONSON: But, this is far fueled from the case that we have before us.

QUESTION: Well, what if there was a duty? Suppose there is a duty. What can the company --

MR. GONSON: A duty owed to the company?

QUESTION: Yes.

MR. GONSON: Then the company might take some action for breach of that duty.

QUESTION: Like what. What could he make him disgorge?

MR. GONSON: If he had received a profit in breach of the duty --

QUESTION: What if he did not make the profit? He avoided a loss.

MR. GONSON: That would raise a question, Your Honor, I am not in a position to answer. I do not know whether and to what extent the corporation would be able to recover.

But, if I may return to the principle issue in this case, the issue is one, of whether Secrist's duty either to

abstain from trading or to disclose the information devolved upon Dirks.

The Commission held that Dirks stood in the shoes of Secrist and like Secrist had a duty to disclose the Equity Funding fraud to those he traded with or caused others to trade.

QUESTION: Did Secrist in the view of the Commission commit the same offense, whatever that may be, that Dirks committed?

MR. GONSON: The facts support the answer as yes, Your Honor. Secrist testified that he told Dirks this information hoping that Dirks would give that information in turn to his clients, that the clients would trade and that the impact of the trading would lower the stock price dramatically and that would cause the regulators to notice.

QUESTION: Did the Commission ever go after Secrist?

MR. GONSON: So far as I am aware of, the Commission did not. Secrist, of course, would not be amenable not being a registrar with the agency.

QUESTION: Your theory, I thought, was broad enough so the liability did not depend on the fact --

MR. GONSON: It does not, Your Honor, but in this proceeding, which was an administrative proceeding, then, of course, persons would be amenable to that proceeding only if there was --

QUESTION: In the Commission's view, Dirks' conduct was bad but Secrist's was not?

MR. GONSON: I suppose, perhaps, you are drawing an implicit assumption based upon the fact that the Commission chose to proceed against Dirks and not against Secrist.

QUESTION: I leave the assumption drawing to you.

QUESTION: It is just that there is a particular kind of remedy available against Dirks that is not available against Secrist.

MR. GONSON: That is exactly correct.

And, of course, while we are here in this Court only with regard to Dirks, the Commission's administrative proceeding was against the five institutions who had received the information from Dirks as well.

QUESTION: Could a staff member from the SEC ever be an insider in terms of the statute?

MR. GONSON: Oh, certainly, Your Honor. We have all kinds of elaborate rules that prevent staff members from trading on securities.

QUESTION: When information first came to them from whatever sources about this, is there some procedure to deal with failures to act as distinguished from acting to take advantage of the inside information?

MR. GONSON: That is if the staff members had been derelict in their duty in not following through. Yes, there are administrative procedures --

QUESTION: Disciplinary procedures, I take it?

MR. GONSON: Yes.

In retrospect I suppose there are other kinds of information that may come to the SEC, and as I explained, some 20,000 complaints a year that may later turn out to be something that the staff persons at that time felt were not as important as other complaints. I do not know whether that was so in 1973.

QUESTION: I get from that that you suggest that the SEC is sometimes skeptical of the information it gets.

MR. GONSON: Well, sometimes, Your Honor, it is a question, I think, of case load and volume where --

QUESTION: I would not assume that you, that the SEC would believe and accept every rumor that comes to their attention.

MR. GONSON: No, of course, it certainly does not, and it investigates a great many of them.

QUESTION: When there are repeated rumors focusing on one area, that certainly should trigger SEC action, should it not?

MR. GONSON: It generally does, Your Honor, if you are talking about a large number of complaints that are made or complaints over a period of time, but what we are talking about here is a complaint, if you will call it that, in 1971 then another one in 1973, neither one conveying very much in the way of detailed information.

If I may return to the question of duty -- The Commission

in this case dealt with Secrist and Dirks. Secrist was an insider and as an insider owed a duty to shareholders of Equity Funding and to those who were to become shareholders by the very act of buying the stock. And, that duty was a duty of disclosure to them, a duty not to defraud them. And, that duty rests upon the fiduciary relationship recognized in the common law between the corporate insider and the shareholder and not on the separate and distinct duty of the insider to the corporation to preserve the confidentiality of the corporation's secrets.

Dirks and the Solicitor General who has filed a brief in this case confused these two duties. They disregard the duty to the shareholders. They argue instead that because Secrist had no duty to keep confidential the information about the fraud he breached no duty to Equity Funding.

Now, this Court recognized in the Chiarella case in discussing the traditional prohibitions against insider trading by insiders and their tippees that the duty to disclose inside information arises not from any obligation to the corporate source of the information, but from the "relationship between the corporate insider and the stockholders of the corporation."

The Court there referred among other sources to the Commission's Katie Roberts decision in which the Commission had recognized that a relationship of trust and confidence exists between the shareholders of a corporation and its insiders giving rise to a duty of disclosure in order to prevent a corporate

insider from taking advantage of the uninformed shareholders.

The Court also refers to this Court's 1909 decision in Strong v. Repide essentially for a similar proposition. Now, the duty to shareholders is separate from the duty of confidentiality that the insider also owes to the corporation.

This case, as I mentioned before, is not about confidentiality. It is not about the corporation's interest in keeping the fraud quiet. It is about the shareholder's interest in knowing about the fraud and the insider's duty to tell them about it before --

QUESTION: Mr. Gonson, may I interrupt you? If we just concentrate on duty to shareholders, how would the financial interests of the shareholders have been served by a total disclosure of the fraud?

MR. GONSON: Of course, at any time when the fraud would become known, the stock would become worthless or virtually worthless and whoever would be holding it at that time would have worthless stock. But, I believe, and I think that this is probably an accurate statement, that people who buy stock assume the risk that some companies are not going to do well.

I do not think that people assume the risk, however, that infavored insiders are going to be able to bail out and dump their stock on them before that time comes.

QUESTION: No, but the people who are potentially victims in this situation are the people who may buy into the

company --

MR. GONSON: That is correct.

QUESTION: -- not those who are already -- So, you really, it seems to me, be focusing on the duty to potential future shareholders because existing shareholders -- It just cuts the other direction.

MR. GONSON: Yes, Your Honor. In the Chiarella case this Court quoted Judge Learned Hand's reasoning in Gratz v. Claughton, a Second Circuit case, that "the director or officer assumed a fiduciary relation to the buyer by the very sale; for it would be a sorry distinction to allow him to use the advantage of his position to induce the buyer into the position of a beneficiary although he was forbidden to do so once the buyer had become one."

And, our position and the Commission said, Your Honor, that just as Secrist could not trade his tippees, Dirks could not trade and Dirks' tippees, the institutions, could not trade.

QUESTION: Everyone should go down together?

MR. GONSON: So long, Your Honor, as they know the information comes from an insider, was communicated with the intention that purchasers be defrauded. That intention was carried out. Everybody who is in that chain ought to be disabled from trading on that information.

QUESTION: Again, I will ask what I asked a moment ago. If Dirks and/or his tippees had disclosed everything they knew

to their buyer, would that have discharged their duty to the stockholders of Equity?

MR. GONSON: Yes, it would, Your Honor. If there were a way, yes, certainly. That is the principle of the case. If the buyer of the stock is given full disclosure, all the facts, the material facts known by the seller --

QUESTION: That discharges the duty not only to the buyer but to the stockholders?

MR. GONSON: It discharges the duty to those who are purchasers in response to Justice Stevens.

QUESTION: I thought you said the insider owes a duty to the stockholders --

MR. GONSON: Owes a duty to the stockholders not to deceive them --

QUESTION: He is not deceiving them. He just goes and sells his stock and he tells the buyer exactly what the facts are.

MR. GONSON: As I mentioned by quoting --

QUESTION: Does that satisfy the duty to the stockholders?

MR. GONSON: Yes, Your Honor. When I speak to duty of the stockholders, I am referring it to the possible other side of the case where the insider, as was the case in Strong v. Repide in this Court, buys the stock, then, of course, he would breach the duty to that stockholder in purchasing without disclosure of material information because of the fiduciary relationship that he bears.

When he sells stock then he breaches the duty to the purchaser who by that very act of fraud, if you will, then becomes the shareholder.

QUESTION: Mr. Gonson, I just want to be clear about this, but as I understand your position, it is perfectly immaterial that Dirks' firm profited by the information he had disseminated? That is immaterial to your position, isn't it?

MR. GONSON: Well, I think it is immaterial to our legal position, Your Honor.

QUESTION: It is immaterial to your basic theory.

MR. GONSON: It is immaterial, yes, to the basic theory, although it provides, of course, some reason for him --

QUESTION: It provides some color, but that is really all, isn't it?

MR. GONSON: Yes, Your Honor. This was the second track I referred to. I never was able to develop that he was pursuing with equal vigor --

QUESTION: But the liability would have existed even if there had been no profit whatever?

MR. GONSON: That is correct, Your Honor, because potentially under the theory of this case, Dirks was free to have enjoyed that $17,000,000 profit --

QUESTION: And, may I ask an irrelevant question? Is it a fact that The Wall Street Journal was nominated for the Pulitzer Prize and Dirks was prosecuted?

MR. GONSON: Is that an irrelevant fact?

QUESTION: I said, is it a fact. I do not know whether it is a fact or not?

MR. GONSON: I have been told it is a fact, but then their two activities were very much different, Your Honor.

QUESTION: Would it strike you as curious from the standpoint of society in general if that were true?

MR. GONSON: Your Honor, it does not strike me as curious, if I may answer the question. If one discovers a crime and is on his way to the police station to tell them about it and decides on the way to take a little piece of it himself, then, I think, that tarnishes his image as a hero.

If another person publishes an article and does not profit himself, I think there is a distinction. That does not strike me as curious.

Thank you.

CHIEF JUSTICE BURGER: Do you have anything further, Mr. Bonderman?

ORAL ARGUMENT OF DAVID BONDERMAN, ESQ.

ON BEHALF OF THE PETITIONER -- REBUTTAL

MR. BONDERMAN: If I might make a few brief points in my remaining time, I would like to answer Justice White's questions.

The SEC's position is not that everybody should go down together. It is that the fraud should be allowed to continue because all incentive for anybody, whether it is Secrist or Dirks,

to disseminate any such information if they do not have access to a wire, should be withdrawn from them because they should risk SEC proceedings, $17,000,000 liabilities --

QUESTION: Dirks could get off the hook by making the whole thing public, in which event, everybody would go down together.

MR. BONDERMAN: Except Dirks could not make it public. He tried as best he could. He did not have a wire service. No one would print these --

QUESTION: Well, suppose it was printed.

MR. BONDERMAN: If The Wall Street Journal had, in fact, published it, which it refused to do, I would believe that the SEC would have said, okay, thereafter it is public. But --

QUESTION: Then everybody could take his chances?

MR. BONDERMAN: That is right, but the truth is that Dirks, remember, did not trade. He told everybody. This is not a trading without disclosure. Dirks told everybody he could.

QUESTION: Let me ask you one other question about your theory. What about -- Assuming that Secrist had traded, would there be liability for Secrist?

MR. BONDERMAN: I think so.

QUESTION: Why?

MR. BONDERMAN: Because I believe it is not us, but the SEC is confused as to whom Mr. Secrist has a duty. He has a duty first to the shareholders not to profit himself. I believe that.

Secondly, he has a duty to the public to disclose fraud. That is what he was trying to do. If instead what he had done is simply take the information, put it in his pocket and lined his pocket, we would not have the implication that we do here of a man who is trying to disseminate the fraud --

QUESTION: What if he tried to tell The Wall Street Journal just as Dirks did, and The Wall Street Journal would not publish and then he said, well, the only way I can get this into the public is by selling and causing the market to fall and cause an investigation, would he still be liable?

MR. BONDERMAN: I think that is a tough case. I think he probably would because Dirks is not in the same position under Chiarella and under the common law fiduciary cases as Secrist is.

Dirks had no contact with this company. He is not a fiduciary of the company. He had no contact with the stockholders. He was not in a position of faith and trust.

QUESTION: No, but if he had traditional inside information, he would be in the same position.

MR. BONDERMAN: But, that is because there would have been a breach of duty supposedly in making that information available. Where, I ask you, is there any breach of duty? You have to go back.

What is wrong with the SEC's position here and why their arguments make no sense and why they cannot answer your questions --

QUESTION: Well, their argument is that the duty to refrain or disclose was something that imposed on Secrist, he violated that and the person to whom he disclosed had the same duty. That is their theory.

MR. BONDERMAN: The problem with their theory is that it is obviously wrong. Did Secrist have a duty not to disclose information relating to the criminal conduct? Let's go back and see where this whole tippee theory came from.

The notion is that inside information is in a sense a corporate asset. That it is information good or bad to be controlled by the corporation for its private purposes, whether it is Texas Gulf's strike, good, or McDonald-Douglass' collapse and dividend loss, which is bad, but to be released and will be released in due course by the company when the company has taken such legitimate advantage of it as it is entitled to. That is where the whole notion came from.

Now, how can you possibly apply that theory to information with respect to an illegal ongoing fraud which the management has been concealing for 11 years and will conceal for the rest of all of our lives if it can. You cannot, I submit. That is why there is no breach of duty.

Thank you.

CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 2:02 p.m., the case in the above-entitled

matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:
RAYMOND L. DIRKS, Petitioner v. SECURITIES AND EXCHANGE COMMISSIO
#82-276

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