

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA	:	
	:	SUPERSEDING
- v. -	:	<u>INDICTMENT</u>
MARTHA STEWART and	:	S1 03 Cr. 717 (MGC)
PETER BACANOVIC,	:	
	:	
Defendants.	:	
	:	
- - - - -	:	x

COUNT ONE

(Conspiracy to Obstruct Justice,
Make False Statements, and Commit Perjury)

The Grand Jury charges:

Background

1. At all times relevant to this Indictment, MARTHA STEWART, the defendant, was chairman of the board of directors and chief executive officer of Martha Stewart Living Omnimedia, Inc. ("MSLO"). MSLO was a corporation organized under the laws of Delaware with its principal executive and administrative offices located at 11 West 42nd Street, New York, New York. MSLO was engaged in businesses spanning four major areas: publishing of magazines and books; television production; merchandising; and internet and catalog sales. MSLO's products bear the "Martha Stewart" brand name. MSLO's common stock was listed and traded on the New York Stock Exchange ("NYSE"), a national securities exchange located in New York, New York, under the symbol "MSO."

2. Prior to forming MSLO, MARTHA STEWART had been licensed by NASD, a national securities association, to sell securities and was employed as a securities broker from in or about 1968 through in or about 1973. On March 22, 2002, STEWART was nominated to serve on the board of directors of the NYSE. On June 6, 2002, STEWART was elected to the NYSE board of directors, a position which she held until she resigned on October 3, 2002.

3. At all times relevant to this Indictment, PETER BACANOVIC, the defendant, was licensed by NASD to sell securities. BACANOVIC was employed as a securities broker with the title "Financial Advisor" at Merrill Lynch & Co., Inc. ("Merrill Lynch"), a broker-dealer headquartered in New York, New York, at a branch office located at 1251 Avenue of the Americas, New York, New York.

4. At all times relevant to this Indictment, MARTHA STEWART maintained securities brokerage accounts at Merrill Lynch. PETER BACANOVIC was the registered representative for STEWART's Merrill Lynch accounts and had a close personal relationship with STEWART. Because of commissions generated from her accounts and accounts that BACANOVIC obtained as a result of his relationship with STEWART, as well as her high public profile, STEWART was one of BACANOVIC's most important brokerage clients.

5. At all times relevant to this Indictment, Douglas Faneuil, a co-conspirator not named as a defendant herein, was employed by Merrill Lynch as an assistant to PETER BACANOVIC.

Merrill Lynch's Policies on Safeguarding
Client Information and Insider Trading

6. At all times relevant to this Indictment, Merrill Lynch established and distributed to its employees, including to PETER BACANOVIC, policies regarding employees' duties to maintain in strict confidence information concerning Merrill Lynch's clients. The policies stated, in relevant part:

Confidentiality of Client Information

You may not discuss the business affairs of any client with anyone, including other employees except on a need-to-know basis. Information or records concerning the business of the Firm and/or its clients may not be released except to persons legally entitled to receive them.

Client Information Privacy Policy

Merrill Lynch protects the confidentiality and security of client information. Employees must understand the need for careful handling of this information. Merrill Lynch's client information privacy policy provides that -

. . .

- Employees may not discuss the business affairs of any client with any other employee, except on a strict need-to-know basis.
- We do not release client information, except upon a client's authorization or when permitted or required by law.

7. At all times relevant to this Indictment, Merrill Lynch specifically warned its employees, including PETER

BACANOVIC, of the impropriety of so-called "piggybacking" -- buying or selling a security after a client bought or sold the same security in order to take advantage of that client's perceived knowledge or expertise. The directive stated, in pertinent part:

You should not "piggyback," that is, enter transactions after a client's trades to take advantage of perceived expertise or knowledge on the part of the client. If the client's successful trading pattern arose from an improper element such as inside information, you (and the Firm) could be subject to a regulatory or criminal investigation or proceeding.

8. At all times relevant to this Indictment, Merrill Lynch also distributed policies advising its employees, including PETER BACANOVIC, of their responsibilities under the federal securities laws, which stated in part:

Inside Information

Background and Definition

U.S. Federal and State securities laws and laws of certain other countries make it unlawful for anyone in possession of non-public material information to take advantage of such information in connection with purchasing or selling securities or recommending to others the purchase or sale of securities. Such information must not be disclosed to others who may, thereafter, take advantage of it in purchasing or selling securities.

Information is material if a reasonable person would want to consider it in determining whether to engage in a securities transaction or if it could reasonably be expected to affect the market price of a security if it becomes generally known. Information should be considered non-public

if it has not been disclosed in the news media, research reports, corporate public filings or reports, or in some other similar public manner. Non-public information should generally be regarded as material unless it is clearly unimportant to investors.

BACANOVIC'S Acquisition of Confidential, Nonpublic Information

9. At all times relevant to this Indictment, ImClone Systems Incorporated ("ImClone") was a corporation organized under the laws of the State of Delaware with its principal place of business in New York, New York. ImClone was engaged in the business of developing biologic medicines, including Erbitux, a biologic treatment for irinotecan-refractory colorectal cancer. ImClone publicly described Erbitux as its lead product candidate. ImClone's common stock was listed and traded on the NASDAQ National Market System, an electronic securities market system administered by NASD, under the symbol "IMCL."

10. At all times relevant to this Indictment, Samuel Waksal was the president, chief executive officer, and a director of ImClone. Waksal and several members of his family were clients of PETER BACANOVIC.

11. At all times relevant to this Indictment, MARTHA STEWART and Samuel Waksal were personal friends.

12. On or about October 31, 2001, ImClone submitted to the United States Food and Drug Administration (the "FDA") a Biologics Licensing Application ("BLA") for approval of Erbitux (the "Erbitux BLA"). Pursuant to FDA regulations, within 60 days

following the submission of a BLA, the FDA must decide whether the BLA is administratively and scientifically complete to be accepted for FDA review. Only if a BLA is accepted for filing does the FDA review the application to determine whether the proposed treatment will be approved. It had been publicly reported that the FDA's decision whether to accept the Erbitux BLA for filing was expected by the end of December 2001.

13. On the morning of December 27, 2001, between 9:00 a.m. and 10:00 a.m. (EST), Douglas Faneuil informed PETER BACANOVIC that Samuel Waksal and a member of his family (the "Waksal Family Member") were seeking to sell all the ImClone shares they held at Merrill Lynch, then worth over \$7.3 million (collectively referred to as the "Waksal Shares"). Faneuil advised BACANOVIC that the Waksal Family Member had placed an order to sell all of the Waksal Family Member's ImClone stock. By approximately 9:48 a.m., the Waksal Family Member's approximately 39,472 shares had been sold for approximately \$2,472,837. Faneuil further advised BACANOVIC that Samuel Waksal had requested that all of the ImClone stock in Samuel Waksal's Merrill Lynch account, approximately 79,797 shares, then worth approximately \$4.9 million, be transferred to the Waksal Family Member and then sold. Samuel Waksal's written direction to Merrill Lynch stated that the transfer request was "URGENT - IMMEDIATE ACTION REQUIRED" and that it was "imperative" that the transfer take place during the morning of December 27, 2001.

14. On December 27, 2001, information regarding efforts by ImClone's CEO, Samuel Waksal, to sell all of the ImClone shares that he held at Merrill Lynch constituted confidential, nonpublic information.

STEWART's Sale of ImClone Stock

15. In breach of the duties PETER BACANOVIC owed to Merrill Lynch and its clients to keep client information confidential, on or about December 27, 2001, BACANOVIC directed his assistant, Douglas Faneuil, to disclose to MARTHA STEWART information regarding the sale and attempted sale of the Waksal Shares -- information that BACANOVIC had misappropriated and stolen from Merrill Lynch and its clients.

16. On December 27, 2001, at approximately 10:04 a.m. (EST), within minutes after being informed of the sale and attempted sale of the Waksal Shares, PETER BACANOVIC called MARTHA STEWART. After being told that STEWART was in transit and unavailable, BACANOVIC left a message, memorialized by STEWART's assistant, that "Peter Bacanovic thinks ImClone is going to start trading downward." At approximately 10:04 a.m., the price of ImClone stock was approximately \$61.53 per share. BACANOVIC, who was on vacation, directed Douglas Faneuil to inform STEWART about the Waksal transactions when she returned the call.

17. On December 27, 2001, at approximately 1:39 p.m. (EST), MARTHA STEWART telephoned the office of PETER BACANOVIC and spoke to Douglas Faneuil, who informed her that Samuel Waksal

was trying to sell all of the ImClone stock that Waksal held at Merrill Lynch. Upon hearing this news, STEWART directed Faneuil to sell all of her ImClone stock -- 3,928 shares. All 3,928 ImClone shares owned by STEWART were sold that day at approximately 1:52 p.m. (EST) at an average price of \$58.43 per share, yielding proceeds of approximately \$228,000.

18. As a client of Merrill Lynch and as a former securities broker, MARTHA STEWART knew that information regarding the sale and attempted sale of the Waksal Shares had been communicated to her in violation of the duties of trust and confidence owed to Merrill Lynch and its clients.

Public Announcement of the FDA Decision

19. After the close of business on December 28, 2001, ImClone issued a press release announcing that the FDA had refused to accept the Erbitux BLA for filing.

20. On December 28, 2001, prior to the public announcement of the FDA decision, the price of ImClone stock closed at \$55.25 per share. On December 31, 2001, the first day that ImClone stock traded after the FDA's decision was publicly announced, the price of ImClone stock opened at \$45.39, representing a decline of approximately 18%.

21. By selling a total of 3,928 shares of ImClone stock on the same day as the sale and attempted sale of the Waksal Shares, MARTHA STEWART avoided significant trading losses. If STEWART had sold at the price at which ImClone stock opened on

December 31, 2001, STEWART would have lost \$51,222. If STEWART had sold at the price at which ImClone stock closed on December 31, 2001, STEWART would have lost \$45,673.

The Scheme to Obstruct Justice

22. In or about January 2002, the Northeast Regional Office of the United States Securities and Exchange Commission ("SEC"), an agency of the United States, the Federal Bureau of Investigation (the "FBI"), and the United States Attorney's Office for the Southern District of New York commenced investigations into trading in ImClone securities in advance of the public announcement of the FDA's negative decision, including into the trades conducted by Samuel Waksal and MARTHA STEWART. The investigations focused on whether such trades were made in violation of federal securities laws and regulations that prohibit trading on the basis of material, nonpublic information. It was material to the investigations to determine, among other things, what was communicated to STEWART about ImClone on December 27, 2001 and the reasons for STEWART's December 27, 2001 sale of ImClone stock.

23. As described more fully below, after learning of the investigations, MARTHA STEWART and PETER BACANOVIC, and others known and unknown, entered into an unlawful conspiracy to obstruct the investigations; to make false statements and provide false and misleading information regarding STEWART's sale of ImClone stock; and to commit perjury, all to conceal and cover up

that BACANOVIC had breached his duties of trust and confidence to Merrill Lynch and its clients and caused STEWART to be provided information regarding the sale and attempted sale of the Waksal Shares, and that STEWART had sold her ImClone stock while in possession of that information. Specifically, and among other things, STEWART and BACANOVIC agreed that rather than tell the truth about the communications with STEWART on December 27, 2001 and the reasons for STEWART's sale of ImClone stock on December 27, 2001, they would instead fabricate and attempt to deceive investigators with a fictitious explanation for her sale -- that STEWART sold her ImClone stock on December 27, 2001 because she and BACANOVIC had a pre-existing agreement to sell the stock if and when the price dropped to \$60 per share.

BACANOVIC's False Statements on January 7, 2002

24. On or about January 7, 2002, in New York, New York, SEC staff attorneys interviewed PETER BACANOVIC by telephone. During the interview, the SEC staff attorneys questioned BACANOVIC regarding, among other things, the sale of ImClone stock on December 27, 2001 by MARTHA STEWART. In furtherance of the conspiracy, and with the intent and purpose to conceal and cover up that BACANOVIC had caused STEWART to be provided information regarding the sale and attempted sale of the Waksal Shares and that STEWART had sold her ImClone stock while in possession of that information, BACANOVIC made the following false statements, in substance and in part, and concealed and

covered up the following facts that were material to the SEC's investigation, among others:

a. BACANOVIC stated that in a conversation with STEWART on December 20, 2001, STEWART said that she had decided to sell her ImClone shares if ImClone's market price fell to \$60 per share. This statement was false in that, as BACANOVIC well knew, STEWART did not inform him of such a decision to sell her shares.

b. BACANOVIC stated that on December 27, 2001, STEWART had spoken to BACANOVIC, that he told STEWART that ImClone's price had dropped below \$60 per share, and that STEWART placed her order to sell her ImClone stock with him. This statement was false in that, as BACANOVIC well knew, STEWART did not speak to BACANOVIC when she placed her order to sell ImClone stock, but rather spoke to Douglas Faneuil, and concealed and covered up that Faneuil conveyed information to STEWART regarding the sale and attempted sale of the Waksal Shares.

STEWART's Alteration of
BACANOVIC's December 27, 2001 Message

25. On or about January 25, 2002, the FBI and the U.S. Attorney's Office contacted the office of MARTHA STEWART and requested to interview STEWART. The interview was scheduled to occur on February 4, 2002.

26. On or about January 31, 2002, after learning that the FBI and the U.S. Attorney's Office had requested an interview

with her, and immediately following a lengthy conversation with her attorney, MARTHA STEWART accessed the phone message log maintained on computer by her assistant and reviewed the phone message that PETER BACANOVIC had left for her on December 27, 2001. In furtherance of the conspiracy, and knowing that BACANOVIC's message for STEWART was based on information regarding the sale and attempted sale of the Waksal Shares that BACANOVIC subsequently caused to be conveyed to her, STEWART deleted the substance of BACANOVIC's phone message, changing the message from "Peter Bacanovic thinks ImClone is going to start trading downward," to "Peter Bacanovic re imclone." After altering the message, STEWART directed her assistant to return the message to its original wording.

STEWART's False Statements on February 4, 2002

27. On or about February 4, 2002, MARTHA STEWART, accompanied by her lawyers, was interviewed in New York, New York by the SEC, the FBI, and the U.S. Attorney's Office. In furtherance of the conspiracy, and with the intent and purpose to conceal and cover up that BACANOVIC had caused STEWART to be provided information regarding the sale and attempted sale of the Waksal Shares and that STEWART had sold her ImClone stock while in possession of that information, STEWART made the following false statements of facts, in substance and in part, and concealed and covered up the following material facts, among others:

a. STEWART stated that at a time when ImClone was trading at approximately \$74 per share (which prior to December 27, 2001, had last occurred on December 6, 2001), STEWART and PETER BACANOVIC both decided that STEWART would sell her ImClone shares when ImClone started trading at \$60 per share. This statement was false and misleading in that, as STEWART well knew, no such decision had been made.

b. STEWART stated that she did not know whether the phone message BACANOVIC left for STEWART on December 27, 2001 was recorded in the phone message log maintained by her assistant. This statement was false and misleading in that, as STEWART well knew but concealed and covered up, the message was recorded in the phone message log, the substance of which -- "Peter Bacanovic thinks ImClone is going to start trading downward" -- STEWART had reviewed when she temporarily altered the message just four days before the interview.

c. STEWART stated that on December 27, 2001, STEWART spoke to BACANOVIC, who told her that ImClone was trading a little below \$60 per share and asked STEWART if she wanted to sell. STEWART stated that after being informed of ImClone's stock price, she directed BACANOVIC to sell her ImClone shares that day because she did not want to be bothered over her vacation. These statements were false and misleading in that, as STEWART well knew but concealed and covered up, STEWART spoke to Faneuil, not BACANOVIC, on December 27, 2001, and STEWART sold

her ImClone shares that day after Douglas Faneuil conveyed to her information regarding the sale and attempted sale of the Waksal Shares.

d. STEWART stated that before concluding their telephone conversation on December 27, 2001, BACANOVIC and STEWART discussed "how MSLO stock was doing" and Kmart. This statement was false and misleading in that, as STEWART well knew, STEWART spoke to Douglas Faneuil, not BACANOVIC, and had no such discussions that day with either BACANOVIC or Faneuil regarding MSLO or Kmart. STEWART provided these false details of her purported conversation with BACANOVIC to conceal and cover up the fact that STEWART spoke on December 27, 2001 to Douglas Faneuil, who conveyed to her information regarding the sale and attempted sale of the Waksal Shares.

e. STEWART stated that, during the period from December 28, 2001 to the date of the interview, February 4, 2002, STEWART had only one conversation with BACANOVIC regarding ImClone, in which only publicly disclosed matters in the "public arena" were discussed. STEWART further stated that although BACANOVIC mentioned that Merrill Lynch had been questioned by the SEC regarding trading in ImClone generally, BACANOVIC did not inform STEWART that he had been questioned by the SEC or that he had been questioned regarding STEWART's account. These statements were false and misleading in that, as STEWART well knew, during the period from December 28, 2001 through February

4, 2002, STEWART had conversations with BACANOVIC regarding STEWART's sale of ImClone shares and the investigation of that sale, and BACANOVIC had informed STEWART that he had been questioned by the SEC regarding her sale of ImClone. STEWART made these false statements to conceal and cover up that she and BACANOVIC had agreed to provide false information to the SEC, the FBI, and the U.S. Attorney's Office regarding STEWART's sale of ImClone stock and conceal and cover up that BACANOVIC had caused STEWART to be provided information regarding the sale and attempted sale of the Waksal Shares and that STEWART had sold her ImClone stock while in possession of that information.

BACANOVIC's Alteration of His "Worksheet"

28. On or about January 28, 2002, the SEC issued an Order Directing Private Investigations and Designating Officers to Take Testimony. On or about the same date, the SEC served upon Merrill Lynch a request for production of documents, requesting, among other things, documents relating to brokerage accounts maintained by MARTHA STEWART. On or about January 29, 2002, the SEC's request was communicated to PETER BACANOVIC by representatives of Merrill Lynch.

29. As described more fully below, in furtherance of the scheme to obstruct justice, PETER BACANOVIC altered a document in order to fabricate evidence that would purportedly corroborate BACANOVIC's and MARTHA STEWART's claims that STEWART

had decided to sell her ImClone stock if the market price fell to \$60 per share.

30. In or about December 2001, PETER BACANOVIC had discussions with MARTHA STEWART regarding engaging in "tax loss selling," i.e., selling stocks that had declined below the price at which they had been purchased in order to recognize losses from those sales to offset taxable gains realized during the same year from profitable sales of other securities. On December 21 and 24, 2001, BACANOVIC executed sales at a loss of stock in twenty-two companies that STEWART held in her Merrill Lynch portfolio.

31. On or about December 21, 2001, PETER BACANOVIC printed a "worksheet" that listed each of the stocks held by MARTHA STEWART at Merrill Lynch, including ImClone, as well as, among other things, the market value of each of the holdings as of the close of business on December 20, 2001, and STEWART's unrealized profit or loss in each stock as of the close of business on December 20, 2001 (the "Worksheet"). On or about December 21, 2001, BACANOVIC made handwritten notes in blue ballpoint ink on the Worksheet concerning transactions and planned transactions in STEWART's account. On or about December 21, 2001, BACANOVIC made no notes on the Worksheet regarding any purported decision to sell STEWART's ImClone shares at \$60 per share.

32. In furtherance of the conspiracy, after learning of the SEC's investigation of STEWART's sale of ImClone stock and with the intent and purpose to mislead the SEC and others into believing that there existed documentary evidence corroborating BACANOVIC's and STEWART's false claim that they had an agreement to sell STEWART's ImClone shares if the market price fell to \$60 per share, PETER BACANOVIC altered the Worksheet, using ink that was blue ballpoint, but was scientifically distinguishable from the ink used elsewhere on the Worksheet. BACANOVIC added the notation "@ 60" near the entry for ImClone.

33. In furtherance of the conspiracy, on or about January 30, 2002, PETER BACANOVIC gave the altered Worksheet to a Merrill Lynch manager with the intent that the altered Worksheet be produced to the SEC in response to the SEC's request for documents. BACANOVIC falsely represented to the Merrill Lynch manager that the altered Worksheet was used in a "selling discussion" he had with MARTHA STEWART. On or about February 14, 2002, Merrill Lynch produced the altered Worksheet to the SEC pursuant to the SEC's request for production of documents.

BACANOVIC's Perjured Testimony Before the SEC

34. On or about February 4, 2002, the SEC issued a subpoena to PETER BACANOVIC directing BACANOVIC to provide testimony under oath.

35. On February 13, 2002, PETER BACANOVIC appeared before the SEC in New York, New York, pursuant to subpoena, and

gave testimony under oath. In furtherance of the conspiracy, and with the intent and purpose to conceal and cover up that BACANOVIC had caused STEWART to be provided information regarding the sale and attempted sale of the Waksal Shares and that STEWART had sold her ImClone stock while in possession of that information, BACANOVIC falsely testified, in substance and in part, about the following matters, among others:

a. BACANOVIC testified that on December 20, 2001, after the close of business, BACANOVIC and MARTHA STEWART had a telephone conversation in which they decided that STEWART would sell her ImClone shares if ImClone fell to \$60 per share. This testimony was false in that, as BACANOVIC well knew, they had made no such decision.

b. BACANOVIC testified that he had notes of his conversation with STEWART on December 20, 2001, that reflected their discussion regarding a decision to sell ImClone at \$60 per share. This testimony was false in that, as BACANOVIC well knew, he had no notes that reflected any actual discussion on or about December 20, 2001 about a decision to sell ImClone at \$60 per share. BACANOVIC also well knew that he had falsely added the notation "@ 60" to the Worksheet after STEWART's sale of ImClone stock and after he learned of the SEC's investigation, for the purpose of obstructing that investigation.

c. BACANOVIC testified that during the period from December 28, 2001 through the date of his testimony,

February 13, 2002, BACANOVIC and STEWART did not discuss STEWART's December 27, 2001 sale of ImClone stock. BACANOVIC further testified that he did not inform STEWART of any questions asked by anyone regarding that sale. This testimony was false in that, as BACANOVIC well knew, BACANOVIC had conversations with STEWART in January and February 2002 regarding, among other matters, the investigations of STEWART's sale of ImClone stock.

STEWART's False Statements on April 10, 2002

36. On or about April 10, 2002, MARTHA STEWART was interviewed by telephone by the SEC, the FBI, and the U.S. Attorney's Office, the representatives of which were in New York, New York. In furtherance of the conspiracy, and with the intent and purpose to conceal and cover up that PETER BACANOVIC had caused STEWART to be provided information regarding the sale and attempted sale of the Waksal Shares and that STEWART had sold her ImClone stock while in possession of that information, STEWART made the following false and misleading statements, in substance and in part, and concealed and covered up the following material facts, among others:

a. STEWART stated that she did not recall if she and BACANOVIC discussed Samuel Waksal on December 27, 2001, nor did she recall being informed on December 27, 2001 that any of the Waksals were selling their ImClone stock. This statement was false and misleading in that STEWART in fact recalled that she

was informed on December 27, 2001 that Samuel Waksal was attempting to sell all of his ImClone shares at Merrill Lynch.

b. STEWART stated that the conversation with PETER BACANOVIC that she had previously described in her February 4, 2002 interview (referenced in ¶ 27 above) -- the conversation in which BACANOVIC and STEWART purportedly decided that STEWART would sell her ImClone shares when ImClone started trading at \$60 per share -- occurred sometime in November or December 2001, after she sold all of her ImClone shares from the Martha Stewart Defined Pension Fund (which occurred on or about October 26, 2001). This statement was false and misleading in that, as STEWART well knew, STEWART and BACANOVIC had made no such decision.

c. STEWART stated that on December 27, 2001, STEWART spoke to BACANOVIC, who told her that ImClone was trading below \$60 per share and suggested that STEWART sell her ImClone shares. These statements were false and misleading in that, as STEWART well knew but concealed and covered up, STEWART spoke to Faneuil, not BACANOVIC, on December 27, 2001, and STEWART sold her ImClone shares that day after Douglas Faneuil conveyed to her information regarding the sale and attempted sale of the Waksal Shares.

The Conspiracy

37. From in or about January 2002 until in or about April 2002, in the Southern District of New York and elsewhere,

PETER BACANOVIC and MARTHA STEWART, and others known and unknown, unlawfully, willfully, and knowingly did combine, conspire, confederate and agree together and with each other to commit offenses against the United States, to wit: to obstruct justice, in violation of Section 1505 of Title 18, United States Code; to make false statements, in violation of Section 1001 of Title 18, United States Code; and to commit perjury, in violation of Section 1621 of Title 18, United States Code.

Objects of the Conspiracy

Obstruction of Justice

38. It was a part and an object of the conspiracy that MARTHA STEWART and PETER BACANOVIC, and others known and unknown, unlawfully, willfully and knowingly, would and did corruptly influence, obstruct and impede, and endeavor to influence, obstruct and impede the due and proper administration of the law under which a pending proceeding was being had before a department and agency of the United States, namely, an investigation by the SEC, in violation of Title 18, United States Code, Section 1505.

False Statements

39. It was further a part and an object of the conspiracy that MARTHA STEWART and PETER BACANOVIC, and others known and unknown, unlawfully, willfully and knowingly, in a matter within the jurisdiction of the executive branch of the Government of the United States, would and did falsify, conceal,

and cover up by trick, scheme, and device material facts, and make materially false, fictitious, and fraudulent statements and representations, and make and use false writings and documents knowing the same to contain materially false, fictitious, and fraudulent statements and entries, in violation of Title 18, United States Code, Section 1001.

Perjury

40. It was further a part and an object of the conspiracy that PETER BACANOVIC, having taken an oath before a competent tribunal, officer and person, in a case in which the law of the United States authorizes an oath to be administered, namely, in testimony before the SEC, that he would testify, declare, depose and certify truly, and that any written testimony, declaration, deposition and certificate by him subscribed, would be true, unlawfully, willfully, knowingly, and contrary to such oath, would and did state and subscribe material matters which he did not believe to be true, in violation of Title 18, United States Code, Section 1621.

Overt Acts

41. In furtherance of the conspiracy and to effect the illegal objects thereof, the following overt acts, among others, were committed in the Southern District of New York and elsewhere:

a. On January 7, 2002, in New York, New York, PETER BACANOVIC provided false and misleading information to the

SEC regarding the December 27, 2001 sale of ImClone stock by MARTHA STEWART.

b. In January 2002, PETER BACANOVIC in New York, New York, encouraged Douglas Faneuil to refrain from disclosing that Faneuil had informed MARTHA STEWART on December 27, 2001 of the sale and attempted sale of the Waksal Shares.

c. On January 25, 2002, after MARTHA STEWART learned that the FBI and the U.S. Attorney's Office requested to interview her, STEWART placed a call from her cellular telephone to PETER BACANOVIC's cellular telephone.

d. On or about January 30, 2002, in New York, New York, PETER BACANOVIC provided the altered Worksheet to a Merrill Lynch manager with the intent that the Worksheet be produced to the SEC.

e. At 7:09 a.m. on February 4, 2002, the morning of MARTHA STEWART's interview with the SEC, the FBI, and the U.S. Attorney's Office, PETER BACANOVIC placed a call from his cellular telephone to STEWART's cellular telephone.

f. On February 4, 2002, in New York, New York, MARTHA STEWART made false and misleading statements to the SEC, the FBI, and the U.S. Attorney's Office regarding her December 27, 2001 sale of ImClone stock.

g. On February 13, 2002, in New York, New York, PETER BACANOVIC gave false and misleading testimony regarding MARTHA STEWART's December 27, 2001 sale of ImClone stock.

h. On April 10, 2002, in New York, New York, MARTHA STEWART made false and misleading statements to the SEC, the FBI, and the U.S. Attorney's Office regarding her December 27, 2001 sale of ImClone stock.

(Title 18, United States Code, Section 371).

COUNT TWO

(False Statements by Peter Bacanovic)

The Grand Jury further charges:

42. The allegations of paragraphs 1 through 36 are repeated and realleged as though fully set forth herein.

43. On or about January 7, 2002, in the Southern District of New York, PETER BACANOVIC unlawfully, willfully, and knowingly, in a matter within the jurisdiction of the executive branch of the Government of the United States, falsified, concealed, and covered up by trick, scheme, and device material facts, and made materially false, fictitious, and fraudulent statements and representations, to wit, BACANOVIC participated in an interview by telephone with SEC staff attorneys in New York, New York, in which he made the following false statements and concealed and covered up facts that were material to the SEC's investigation:

Specification One

BACANOVIC falsely stated that on December 20, 2001, he had a conversation with STEWART in which she decided to sell her ImClone stock at \$60 per share.

Specification Two

BACANOVIC falsely stated that he had a conversation with MARTHA STEWART on December 27, 2001, in which he told STEWART that ImClone's stock price had dropped and STEWART told him to sell her ImClone stock.

(Title 18, United States Code, Sections 1001(a)(1) and (2)).

COUNT THREE

(False Statements by Martha Stewart)

The Grand Jury further charges:

44. The allegations of paragraphs 1 through 36 and 41 are repeated and realleged as though fully set forth herein.

45. On or about February 4, 2002, in the Southern District of New York, MARTHA STEWART unlawfully, willfully, and knowingly, in a matter within the jurisdiction of the executive branch of the Government of the United States, falsified, concealed, and covered up by trick, scheme, and device material facts, and made materially false, fictitious, and fraudulent statements and representations, to wit, STEWART participated in an interview with the SEC, the FBI, and the U.S. Attorney's Office for the Southern District of New York in New York, New York, in which she made the following false statements and concealed and covered up facts that were material to the investigations:

Specification One

STEWART falsely stated that in a conversation that had occurred at a time when ImClone was trading at \$74 per share, STEWART and BACANOVIC decided that STEWART would sell her shares when ImClone started trading at \$60 per share.

Specification Two

STEWART falsely stated that on December 27, 2001, at approximately 1:30 p.m. (EST), STEWART spoke to BACANOVIC, who told STEWART that ImClone was trading a little below \$60 per share and that he asked STEWART if she wanted to sell, and then STEWART told BACANOVIC to sell her shares.

Specification Three

STEWART falsely stated that she did not recall speaking to BACANOVIC's assistant on December 27, 2001.

Specification Four

STEWART falsely stated that before ending her call with BACANOVIC on December 27, 2001, STEWART and BACANOVIC had discussions regarding what MSLO stock was doing and regarding Kmart.

Specification Five

STEWART falsely stated that she decided to sell her ImClone stock on December 27, 2001 because she did not want to be bothered over her vacation.

Specification Six

STEWART falsely stated that she did not know if there was a phone message from BACANOVIC on December 27, 2001 in the log of telephone messages maintained by her assistant.

Specification Seven

STEWART falsely stated that since December 28, 2001, she had only one conversation with BACANOVIC regarding ImClone, in which they only discussed matters in the "public arena."

Specification Eight

STEWART falsely stated that since December 28, 2001, BACANOVIC mentioned to STEWART in a telephone conversation that Merrill Lynch had been questioned by the SEC regarding ImClone, but did not tell STEWART that he had been questioned by the SEC or that he had been questioned by the SEC regarding STEWART's account.

(Title 18, United States Code, Sections 1001(a)(1) and (2)).

COUNT FOUR

(False Statements by Martha Stewart)

The Grand Jury further charges:

46. The allegations of paragraphs 1 through 36 and 41 are repeated and realleged as though fully set forth herein.

47. On or about April 10, 2002, in the Southern District of New York, MARTHA STEWART unlawfully, willfully, and knowingly, in a matter within the jurisdiction of the executive branch of the Government of the United States, falsified,

concealed, and covered up by trick, scheme, and device material facts, and made materially false, fictitious, and fraudulent statements and representations, to wit, STEWART participated in an interview with the SEC, the FBI, and the U.S. Attorney's Office for the Southern District of New York in New York, New York, in which she made the following false statements and concealed and covered up facts that were material to the investigations:

Specification One

STEWART falsely stated that she did not recall if she and BACANOVIC discussed Samuel Waksal on December 27, 2001, nor did she recall being informed on December 27, 2001 that any of the Waksals were selling their ImClone stock.

Specification Two

STEWART falsely stated that in a conversation that occurred sometime in November or December 2001, after she sold all of her ImClone shares from the Martha Stewart Defined Pension Fund, STEWART and BACANOVIC decided that STEWART would sell her shares when ImClone started trading at \$60 per share.

Specification Three

STEWART falsely stated that on December 27, 2001, at approximately 1:30 p.m. (EST), STEWART spoke to BACANOVIC, who told her that ImClone was trading below \$60 per share and suggested that STEWART sell her ImClone shares.

(Title 18, United States Code, Sections 1001(a)(1) and (2)).

COUNT FIVE

(Making and Using False Documents by Peter Bacanovic)

The Grand Jury further charges:

48. The allegations of paragraphs 1 through 36 and 41 are repeated and realleged as though fully set forth herein.

49. In or about January 2002, in the Southern District of New York and elsewhere, PETER BACANOVIC unlawfully, willfully, and knowingly, in a matter within the jurisdiction of the executive branch of the Government of the United States, made and used false writings and documents knowing the same to contain materially false, fictitious, and fraudulent statements and entries, to wit, BACANOVIC altered the Worksheet to add the notation "@ 60" and caused it to be produced to the SEC.

(Title 18, United States Code, Sections 1001(a)(3) and 2).

COUNT SIX

(Perjury by Peter Bacanovic)

The Grand Jury further charges:

50. The allegations of paragraphs 1 through 36 and 41 are repeated and realleged as though fully set forth herein.

51. On February 13, 2002, in the Southern District of New York, PETER BACANOVIC, having taken an oath before a competent tribunal, officer and person, in a case in which the law of the United States authorizes an oath to be administered, namely, in testimony before an officer of the SEC, that he would testify, declare, depose and certify truly, and that any written

testimony, declaration, deposition and certificate by him subscribed, would be true, unlawfully, willfully, knowingly, and contrary to such oath, stated and subscribed material matters which he did not believe to be true, namely, the testimony on or about February 13, 2002, the underlined portions of which he believed to be materially false:

Specification One

(Page 14, Line 11 - Page 16, Line 7)

Q: And she [MARTHA STEWART's assistant] told you that Ms. Stewart was in transit?

A: Ms. Stewart was in transit, that she didn't know when she would be speaking with her, and that she would try to give her the message.

Q: And what was the message?

A: The message was to please call us back, and also to please advise her that ImClone stock was at whatever the price was at that time.

. . .
Q: And you specifically told [MARTHA STEWART's assistant] that ImClone stock was dropping?

A: No. We just gave her the price of the stock.

. . .
Q: When you called [MARTHA STEWART's assistant], can you just try and think, to be as specific as possible, when you asked her to ask Ms. Stewart to please call you back, did you say, "It's urgent, call me back immediately"? Something like that?

A: No. I said, "I would like to speak with her, if possible, today and regarding ImClone and the current price of the stock is. Understanding that she is in transit and that she sometimes is very, very difficult to reach."

Specification Two

(Page 69, Line 2 - Page 72, Line 4)

Q: When was the last time you saw her?

A: In January.

Q: When in January?

A: I would be able to give you the exact date, it's in my office in my calendar. I saw her approximately in the middle of the month.

. . .
Q: Did ImClone come up in the meeting at all?
A: She had asked me if I had spoken to Sam, and I said, no, I had not. And that was it.

. . .
Q: Did her investment in ImClone come up at all?
A: No.

. . .
Q: In addition to that meeting, have you talked to her at all since December 28th? Besides that meeting?
A: Well, I spoke with her about the fact that I wanted to schedule the meeting. I spoke with her to confirm that I had received the second part of the transfer. And then she - and I spoke with her when she reconfirmed that these payments were going to be going out.

Q: And when you spoke with her in any of these conversations, did ImClone come up?
A: Did not.
Q: Did Sam Waksal come up?
A: No. Oh - I don't recall. Possibly. I don't recall if Sam Waksal - we might have made reference to a newspaper article.

Q: What newspaper article?
A: There have been so many, I don't really remember. One of the earlier ones that began to appear.
Q: Do you remember what it was about the article that you guys were discussing?
A: Just the publicity.
Q: The publicity involving her?
A: No. There was no publicity, this was not about her, this is about Sam.

Specification Three

(Page 77, Line 16 - Page 82, Line 21)

Q: Did there come a time when she wanted to sell the ImClone stock?
A: Well, it was at my solicitation.
Q: Tell me about that.
A: When we were doing her portfolio review for tax planning purposes that took place in the week prior to Christmas, it came to me as a great surprise, having felt that I had liquidated all ImClone shares from her accounts at that time, that the stock was still there.
Q: Let me just - you had a tax planning discussion with her?
A: Which was also a portfolio review - a comprehensive portfolio review with her.
Q: And this happened the week before Christmas?

A: Correct.
Q: So, approximately?
A: I believe the exact date was December 20th, I believe.
Q: And where did this take place?
A: On the telephone. And we reviewed each and every position in the account. And we discussed the fundamentals of all the positions. We discussed gains and losses for all the positions. We discussed the overall status of the portfolio, and included in that discussion was ImClone. And so we reviewed ImClone and discussed what her intentions were for ImClone at that time versus my recommendations.
Q: What were her desires for the ImClone stock?
A: She felt - that the time, the stock had already come off its highs a little bit. And she wanted to hold the stock, and I challenged that by saying, "The stock has [sic] clearly declining, why would you hold it? Why are you holding this, considering we sold 50,000 or 40,000 shares two months ago?" . . . And she goes - and at that point, we determined that if, in fact, it fell much further, then we would sell it.
. . .
Q: So, going back, she didn't really want to sell it, you recommended that she sell it. You can continue on from there.
A: So, we made a deal. I said, "Okay, if you would not like to sell the stock now, how long are you going to wait before you sell this stock?"
Q: I'm sorry, on December 20th, when you had this conversation, do you remember what the price of the stock was?
A: It was in the mid 60s. And, at that point, we determined that \$60 a share would be a suitable price, should it ever fall that low. Of course, she never thought it would.

Specification Four

(Page 104, Line 15 - Page 105, Line 8)

Q: Did you ever tell Martha Stewart that the SEC had been speaking with Merrill Lynch about sales in ImClone at the end of the year?
A: I said that we had had - we had been reviewing this internally. And that was all.
Q: In other words, you didn't mention that the SEC was looking into this?
A: No.
Q: Tell me about the conversation you had with her when you said, "We've been reviewing this internally."

A: I said, you know, "In light of the news, the disclosures and news and following the stock price, Merrill Lynch has been reviewing, you know, all our transactions in ImClone."
Q: Did you tell her that anyone was asking questions about her transactions specifically?
A: I did not.
Q: Did she ask you that?
A: She did not.

(Page 124, Line 22 - Page 125, Line 13)

Q: At any time, did you and she discuss the investigation - any investigation by the Securities and Exchange Commission?
A: No.
Q: Did you and she discuss any investigation by any entity at all into trading in ImClone stock or --
A: I believe I said earlier that Merrill Lynch itself was investigating the situation with ImClone without making reference to any transaction or any person and obliquely just referring to the company.
Q: Other than the Merrill Lynch investigation, did you and she discuss any other investigation into ImClone? . . . Can you just say that out loud --
A: No.
Q: - for the record?
A: No, we did not.

Specification Five

(Page 106, Line 13 - Page 107, Line 6)

Q: Did you say anything that would give her cause for concern, the fact that she sold on December 27th?
A: No. Because she had no cause for concern. Because we had reviewed this position, I have notes of the conversation, it was completely typical, and she would have had no cause for concern. So, no.
Q: And you have notes of what conversation?
A: Well, I mean, I have a worksheet that I worked from that day, that we did on the 20th, where all of this stuff, which is a printout of a screen, with all sorts of markings on it. And so, I mean, all of this was discussed at the time, long prior. And so she had no reason for concern.
Q: And the information about her selling - her possibly selling ImClone at 60 would be reflected on that worksheet?

A: Yeah, I mean, reflected on the worksheet in a very loose way. I mean, things are highlighted, marked for sales. Some things are circled. I mean, it's scribbled on.

Specification Six

(Page 114, Line 10 - Page 115, Line 3)

Q: Who came up with the \$60 price for ImClone? To sell?

A: We quibbled over it. And so we came to this price together.

Q: What was the price you recommended? Did you recommend a price --?

A: I recommended an immediate sale.

Q: So you wanted her to sell about --

A: Right away.

Q: And what price did she come to you and say, "I'll sell it at."

A: She didn't really have a price. I said, "Listen, what will you settle for? How low does this have to go before you're prepared to part with this?" She said, "I don't know." I said, "Well, how about \$60 a share? Does that sound reasonable?" And the conversation was something like that. She said, "Yes, sure, \$60."

(Title 18, United States Code, Section 1621).

COUNT SEVEN

(Obstruction of Justice by Peter Bacanovic)

The Grand Jury further charges:

52. The allegations of paragraphs 1 through 36, 41 and 51 are repeated and realleged as though fully set forth herein.

53. From in or about January 2002 through in or about April 2002, in the Southern District of New York and elsewhere, PETER BACANOVIC unlawfully, willfully and knowingly, corruptly influenced, obstructed and impeded, and endeavored to influence, obstruct and impede the due and proper administration of the law under which a pending proceeding was being had before a

department and agency of the United States, namely, the SEC, by providing and causing to be provided false and misleading information and documents to the SEC relating to the sale of ImClone stock by MARTHA STEWART.

(Title 18, United States Code, Sections 1505 and 2).

COUNT EIGHT

(Obstruction of Justice by Martha Stewart)

The Grand Jury further charges:

54. The allegations of paragraphs 1 through 36, 41 and 51 are repeated and realleged as though fully set forth herein.

55. From in or about January 2002 through in or about April 2002, in the Southern District of New York and elsewhere, MARTHA STEWART unlawfully, willfully and knowingly, corruptly influenced, obstructed and impeded, and endeavored to influence, obstruct and impede the due and proper administration of the law under which a pending proceeding was being had before a department and agency of the United States, namely, the SEC, by providing and causing to be provided false and misleading information to the SEC relating to STEWART's sale of ImClone stock.

(Title 18, United States Code, Sections 1505 and 2).

COUNT NINE

(Securities Fraud by Martha Stewart)

The Grand Jury further charges:

56. The allegations of paragraphs 1 through 36 and 41 are repeated and realleged as though fully set forth herein.

57. At all times relevant to this Indictment, MARTHA STEWART's reputation, as well as the likelihood of any criminal or regulatory action against STEWART, were material to MSLO's shareholders because of the negative impact that any such action or damage to her reputation could have on the company which bears her name, as STEWART well knew. In MSLO's 1999 prospectus the company stated, "Our continued success and the value of our brand name therefore depends, to a large degree, on the reputation of Martha Stewart."

58. During the evening of June 6, 2002, the Associated Press reported that MARTHA STEWART sold ImClone shares prior to the news of the FDA's rejection of the Erbitux application, a fact which had not previously been publicly reported. On June 7, 2002, following the public announcement that STEWART had sold ImClone shares on the same day as members of the family of Samuel Waksal, MSLO's market price began steadily to fall, from a closing price of \$19.01 on June 6, 2002 to a closing price of \$11.47 on June 28, 2002.

59. As of June 6, 2002, MARTHA STEWART held 30,713,475 shares of MSLO Class A common stock, which constituted 62.6% of

the outstanding Class A common stock of MSLO. STEWART also held 100% of the outstanding 30,619,375 shares of MSLO Class B common stock. Each share of the Class B common stock was convertible on a one-for-one basis into Class A common stock at STEWART's option. Combined, these shares gave STEWART control over 94.4% of shareholders' voting power.

60. As set forth more fully below, in an effort to stop or at least slow the steady erosion of MSLO's stock price caused by investor concerns, STEWART made or caused to be made a series of false and misleading public statements during June 2002 regarding her sale of ImClone stock on December 27, 2001 that concealed and omitted that STEWART had been provided information regarding the sale and attempted sale of the Waksal Shares and that STEWART had sold her ImClone stock while in possession of that information. STEWART made these false and misleading statements with the intent to defraud and deceive purchasers and sellers of MSLO common stock and to maintain the value of her own MSLO stock by preventing a decline in the market price of MSLO's stock. These false and misleading statements were contained in: (a) statements made on behalf of STEWART by STEWART's attorney to the Wall Street Journal, published on June 7, 2002; (b) written public statements issued by STEWART on June 12 and 18, 2002; and (c) statements made by STEWART at a conference for securities analysts and investors on June 19, 2002.

The June 7 Statement

61. On or about June 6, 2002, MARTHA STEWART was advised that the Wall Street Journal intended to publish an article stating that STEWART sold ImClone shares on December 27, 2001, a fact that had not yet been publicly reported. With the intent and knowledge that false and misleading information would be publicly disseminated, STEWART caused her attorney in New York, New York to provide to the Wall Street Journal the following false and misleading information regarding the reason for STEWART's December 27, 2001 sale of ImClone stock (the "June 7 Statement") that concealed that STEWART had been provided information regarding the sale and attempted sale of the Waksal Shares and that STEWART had sold her ImClone stock while in possession of that information:

The sale was executed because Ms. Stewart had a predetermined price at which she planned to sell the stock. That determination, made more than a month before that trade, was to sell if the stock ever went less than \$60.

This false and misleading information was published in an article in the Wall Street Journal on June 7, 2002.

The June 12 Statement

62. On June 12, 2002, the news media widely reported that Samuel Waksal had been arrested and charged in a criminal complaint with insider trading. Following this announcement, the

stock price of MSLO fell approximately 5.6%, from an opening price of \$15.90 to a closing price of \$15.

63. On June 12, 2002, after the close of trading on the NYSE, MARTHA STEWART in New York, New York, prepared and caused to be issued a public statement (the "June 12 Statement"), in which STEWART made the following false and misleading statements that concealed that STEWART had been provided information regarding the sale and attempted sale of the Waksal Shares and that STEWART had sold her ImClone stock while in possession of that information, among others:

a. STEWART falsely stated that she had agreed with her broker "several weeks" after a tender offer made by Bristol-Myers Squibb to ImClone shareholders in October 2001, at a time when the ImClone shares were trading at about \$70, that "if the ImClone stock price were to fall below \$60, we would sell my holdings";

b. STEWART falsely stated that on December 27, 2001, "I returned a call from my broker advising me that ImClone had fallen below \$60 . . . and reiterated my instructions to sell the shares"; and

c. STEWART falsely stated that she "did not have any nonpublic information regarding ImClone when [she] sold [her] ImClone shares."

The June 18 Statement

64. As of June 18, 2002, MARTHA STEWART was scheduled to speak at a conference for securities analysts and investors (the "Conference"), at which she expected that questions could be asked about her sale of ImClone shares. In preparation for that Conference, STEWART prepared and approved another public statement about her ImClone sale. On June 18, 2002, after the close of trading on the NYSE, MARTHA STEWART in New York, New York, prepared and caused to be issued a public statement (the "June 18 Statement"), in which she made the following false and misleading statements that concealed that STEWART had been provided information regarding the sale and attempted sale of the Waksal Shares and that STEWART had sold her ImClone stock while in possession of that information, among others:

a. STEWART falsely stated that "[i]n my June 12, 2002 statement I explained what did happen";

b. STEWART falsely stated that her December 27, 2001 sale of ImClone stock "was based on information that was available to the public that day";

c. STEWART falsely stated that "[s]ince the stock had fallen below \$60, I sold my shares, as I had previously agreed to do with my broker"; and

d. STEWART falsely stated that she had cooperated with the SEC and U.S. Attorney's Office "fully and to the best of my ability."

65. On the morning of June 19, 2002, MARTHA STEWART read the June 18 Statement at the Conference in New York, New York.

Statutory Allegations

66. In or about June 2002, in the Southern District of New York and elsewhere, MARTHA STEWART unlawfully, willfully and knowingly, directly and indirectly, by use of the means and instrumentalities of interstate commerce, the mails and the facilities of national securities exchanges, did use and employ manipulative and deceptive devices and contrivances, in violation of Title 17, Code of Federal Regulations, Section 240.10b-5, by (a) employing devices, schemes and artifices to defraud; (b) making untrue statements of material facts and omitting to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; and (c) engaging in acts, practices and courses of

business which operated and would operate as a fraud and deceit upon purchasers and sellers of MSLO common stock.

(Title 15, United States Code, Sections 78j(b) and 78ff;
Title 17, Code of Federal Regulations, Section 240.10b-5;
and Title 18, United States Code, Section 2.)

FOREPERSON

DAVID N. KELLEY
United States Attorney