United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 04-3953(L), 04-4081(CON)

UNITED STATES OF AMERICA,

Appellee,

-v.-

MARTHA STEWART and PETER BACANOVIC,

Defendant-Appellants.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Martha Stewart and Peter Bacanovic appeal from judgments of conviction entered on July 19, 2004 in the United States District Court for the Southern District of New York, following a six week trial before the Honorable Miriam Goldman Cedarbaum, United States District Judge, and a jury.

Superseding Indictment S1 03 Cr. 717 was filed on January 5, 2004, in nine counts (the "Indictment").[*] Count One charged Stewart and Bacanovic with conspiracy to obstruct justice, make false statements, and commit perjury, in violation of Title 18, United States Code, Section 371. Count Two charged Bacanovic, and Counts Three and Four charged Stewart, with making false statements, in violation of Title 18, United States Code, Section 1001(a)(1) and (2). Count Five charged Bacanovic with making and using a false document, in violation of Title 18, United States Code, Section 1001(a)(3). Count Six charged Bacanovic with perjury, in violation of Title 18, United States Code, Section 1621. Count Seven charged Bacanovic, and Count Eight charged Stewart, with obstruction of an agency proceeding, in violation of Title 18, United States Code, Section 1505. Count Nine charged Stewart with securities fraud, in violation of Title 15, United States Code, Sections 78j(b) and 78ff, and Title 17, Code of Federal Regulations, Section 240.10b-5.[**]

Trial commenced on January 27, 2004 and ended on March 5, 2004, when the jury found Stewart guilty on Counts One, Three, Four, and Eight, and Bacanovic guilty on Counts One, Two, Six, and Seven. The jury found Bacanovic not guilty on Count Five.

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[*] The original Indictment was filed on June 4, 2003, charging the same nine offenses.

[**] At the close of evidence, The District Court entered a judgment of acquittal on Count Nine pursuant to Rule 29 of the Federal Rules of Criminal Procedure.

On July 16, 2004, Judge Cedarbaum sentenced Stewart and Bacanovic each to a term of five months' incarceration, to be followed by two years' supervised release with a special condition that each serve five months of that period in home confinement. Judge Cedarbaum also ordered Stewart and Bacanovic each to pay a fine of $30,000 and $4,000, respectively, and a mandatory $400 special assessment.

The District Court stayed the sentences pending appeal in light of the Supreme Court's anticipated decision resolving the effect of *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004), on the federal Sentencing Guidelines. On September 21, 2004, pursuant to Stewart's request, the District Court vacated the stay of Stewart's sentence. Stewart is currently serving her sentence.

Statement Of Facts

The evidence at trial overwhelmingly established that Martha Stewart and Peter Bacanovic engaged in a scheme to obstruct investigations conducted by the United States Securities and Exchange Commission ("SEC"), the Federal Bureau of Investigation ("FBI"), and the United States Attorney's Office for the Southern District of New York ("USAO"). The investigations sought to determine the reasons for sales of stock in a biotechnology company, ImClone Systems Incorporated ("ImClone"), by, among others, ImClone's chief executive officer ("CEO") Samuel Waksal and members of his family, and by his close friend Martha Stewart, all of whom shared the same broker, Peter Bacanovic, at Merrill Lynch. On December 27, 2001, Samuel Waksal and his daughter attempted to sell all the ImClone shares they held at Merrill Lynch, then worth

over $7.3 million. That same day, Martha Stewart too sold all of the ImClone stock she owned, then worth approximately $228,000. The very next day, on December 28, 2001, ImClone announced that the Food & Drug Administration ("FDA") had refused to accept its application for approval of its lead product candidate, a highly touted cancer treatment known as Erbitux. The evidence at trial demonstrated that after learning of the investigations, Martha Stewart and Peter Bacanovic entered into a 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 caused Stewart to be provided information regarding Waksal's efforts to dump ImClone stock, and that Stewart had sold her ImClone stock while in possession of that information.

In establishing Stewart's and Bacanovic's guilt, the Government called twenty witnesses. The Government called FBI Special Agent Catherine Farmer and SEC enforcement attorney Helene Glotzer, who both testified that Stewart was interviewed twice regarding the reasons why she sold all of her ImClone stock on December 27, 2001, and that Stewart denied to investigators that she had any information about selling by Waksal or any member of his family. The Government also played for the jury a recording of Bacanovic's sworn testimony before the SEC, in which he too denied that he had caused Stewart to be provided information about the Waksals' selling.

The Government presented overwhelming evidence that these statements, and others made by Stewart and

Bacanovic, were false. The Government called Bacanovic's assistant, Douglas Faneuil, who testified that he provided information to Stewart about the Waksals' efforts to sell ImClone stock at Bacanovic's direction, and Stewart placed an order to sell all her ImClone holdings after hearing this news. Faneuil further testified that after investigations into Stewart's sale commenced, Bacanovic pressured Faneuil to lie to investigators about the true reasons for Stewart's sale in order to conceal that Stewart had been provided information about the Waksals' selling. Faneuil testified that Bacanovic assured him that he had spoken to Stewart and they were "all on the same page" and "telling the same story." Faneuil's testimony that he had told Stewart about the Waksals' selling was corroborated by the testimony of Waksal's secretary, Emily Perrett, and Stewart's best friend, Mariana Pasternak. Perrett testified that in a call which phone records demonstrated was placed immediately after Faneuil had told Stewart of the Waksals' selling, Stewart urgently demanded to reach Waksal and left a message that "something is going on with ImClone and Martha Stewart wants to know what." Pasternak testified that two days after Stewart's ImClone sale, Stewart confided in her that she had in fact been told that Sam Waksal was dumping all of his stock.

Stewart's knowledge of the Waksals' selling and her desire to cover up that fact were also demonstrated by the testimony of her assistant, Ann Armstrong. Armstrong testified that on the morning of December 27, 2001, Bacanovic called and left the following message for Stewart: "Peter Bacanovic thinks ImClone is going to start trading downward." Armstrong testified that shortly after

Stewart was informed that the SEC, the FBI, and the USAO sought to interview her regarding the reasons for her ImClone sale, Stewart directed Armstrong to bring up on her computer the telephone message that Bacanovic left for her on December 27. Through tears, Armstrong testified that Stewart then sat down at Armstrong's computer and altered Bacanovic's message, changing it from "Peter Bacanovic thinks ImClone is going to start trading downward" to "Peter Bacanovic re imclone." After making this alteration, Stewart asked Armstrong to return the message to its original form, but Stewart could not erase what her effort to alter the message demonstrated about Stewart's desire to conceal the truth about her ImClone sale.

A. The Government's Case

Martha Stewart was the CEO of Martha Stewart Living Omnimedia, Inc. ("MSLO"). Peter Bacanovic was a successful stock broker at Merrill Lynch. Stewart topped Bacanovic's list of valuable clients, which also included Stewart's close friend Samuel Waksal and his daughter Aliza. (Tr. 1456-59, 1467-71).[*] For several years before

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[*] "Tr." refers to the trial transcript; "S.Br." refers to Stewart's brief on appeal; "B.Br." refers to Bacanovic's brief on appeal; "JA" refers to the joint appendix to the appellants' briefs; "GA" refers to the Government's appendix; "S.PSR" refers to the Presentence Investigation Report prepared in connection with Stewart's sentencing; and "B.PSR" refers to the Presentence Investigation Report prepared in connection with Bacanovic's sentencing.

the end of 2001, Stewart's brokerage account at Merrill Lynch had been losing significant value, and Stewart had complained angrily about those losses to Bacanovic. (Tr. 2889).

In late 2001, Stewart's largest investment with Bacanovic was her stock in ImClone. At the end of November 2001, Stewart's ImClone stock was worth approximately $282,816, accounting for more than 10% of the value of Stewart's personal account at Merrill Lynch. (GX 237D; Tr. 1473). ImClone was one of the few profitable investments in Stewart's Merrill Lynch account, and there was every reason to believe it would soon become more profitable. It had been publicly reported that ImClone was expected to receive approval of its cancer treatment, Erbitux, by February 2002. (Tr. 873).

1. "Get Martha on the Phone"

On December 27, 2001, Douglas Faneuil, Bacanovic's 26-year-old assistant, was answering Bacanovic's office phone while Bacanovic was on vacation in Florida. Faneuil had been working for Bacanovic for only six months. Between 9:00 and 10:00 that morning, Faneuil fielded a series of unusual contacts from Samuel Waksal's daughter and accountant. Waksal's daughter Aliza Waksal called before the market opened to place a market order[*]

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[*] A market order is for investors who are willing to buy or sell their stock at the current market price and, as a general matter, "want to sell [or buy] the stock right away." A limit order, in contrast, allows the investor to specify a price at which they wish to purchase or sell

to sell all of her ImClone shares, 39,472 shares worth approximately $2.4 million. (GX 88; Tr. 1185-86, 1482-84). When Waksal's accountant called early that morning, he first directed Faneuil to sell all of the ImClone stock in Samuel Waksal's account, 79,797 shares then worth approximately $4.9 million. (Tr. 1192, 1490). When Faneuil responded that, because Waksal was ImClone's CEO, there were restrictions that prevented Waksal's shares from being sold immediately, the accountant directed Faneuil's attention to a fax the accountant had sent. (GX 84; Tr. 1491). The accountant's fax was marked "URGENT – IMMEDIATE ACTION REQUIRED" and requested that all of the ImClone shares in Samuel Waksal's account be transferred immediately to his daughter Aliza's account. (GX 84; Tr. 1496-97). The accountant told Faneuil that Waksal wanted all of his shares sold from his daughter's account as soon as the transfer was complete. (Tr. 1491). The third contact Faneuil received from a Waksal family member that morning was a call from Samuel Waksal's other daughter, Elana Waksal Posner. In a hurried voice, she asked Faneuil for ImClone's stock price and, when he told her, "she swore and then said, 'it's already going down.'" (Tr. 1501). Posner told Faneuil she would call back. (Tr. 1501).

During that same period, between 9:00 and 10:00 a.m., Faneuil was in regular contact with Bacanovic, who was keeping close tabs on his office, and informed Bacanovic of each of the Waksal efforts to sell ImClone stock. (Tr. 1503, 1554). Phone records showed six separate calls

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stock. (Tr. 934).

between Bacanovic and Faneuil between 9:00 and 10:04 a.m. that morning. (GX 440; Tr. 2757-79). At 10:04 a.m., as Faneuil spoke to Bacanovic of the urgent requests from the Waksals to sell their ImClone stock, Bacanovic suddenly halted the conversation and said: "Oh, my God, get Martha on the phone." (Tr. 1503, 1554).

2. "Peter Bacanovic Thinks ImClone Is Going to Start Trading Downward"

Faneuil placed a conference call with Bacanovic to Stewart's office. (Tr. 1503). Stewart, however, was on her way to Mexico for a vacation and not in her office. (Tr. 2108). Bacanovic left a message which was taken by Stewart's assistant, Ann Armstrong. The message was "Peter Bacanovic thinks ImClone is going to start trading downward." (GA 1; Tr. 2109).

After leaving that message, Bacanovic told Faneuil that Stewart would be calling and "you've got to tell her what's going on." (Tr. 1504-05). Faneuil asked, "What can I say? Can I tell her about Sam? Am I allowed to?" (Tr. 1554). Bacanovic responded, "Of course. You must. You've got to. That's the whole point." (Tr. 1555). Bacanovic's direction to provide information to Stewart about Waksal's account activity was in direct violation of Merrill Lynch policies requiring brokers to keep information about their clients' transactions confidential. (Tr. 942-46).

Bacanovic understood that Waksal's urgent selling activity meant that bad news must have been on the way for ImClone. At approximately 1:18 p.m. on December 27, Bacanovic sent an email to Faneuil. The subject of the email was "imcl," and the message was "has news come

out yet?" Faneuil responded, "noting [sic] yet." (GA 3); Tr. 1558-59).

3. Stewart Sells Her ImClone Stock

At approximately 1:31 p.m. on December 27, while Stewart's plane was stopped for refueling on her way to Mexico, Stewart contacted her office and was informed of Bacanovic's message. (Tr. 2113-14, 2130-31). Stewart asked Armstrong to transfer her to Bacanovic's office. (Tr. 2132). Faneuil answered the phone. Faneuil informed Stewart in this call that although ImClone had not released any news, "Peter thought you might like to act on the information that Sam Waksal was trying to sell all of his shares." (Tr. 1560-61). Stewart asked, "All of his shares?" (Tr. 1562). Faneuil responded that although Waksal did not have all of his shares at Merrill Lynch, he was trying to sell all the shares he held in those accounts. (Tr. 1562). Stewart asked what ImClone's stock price was and then placed a market order to sell all of her ImClone stock, 3,928 shares. (Tr. 1562). Stewart's ImClone stock was sold at an average price of $58.43 per share, yielding proceeds of approximately $228,000. (GX 55, 86, 237E; Tr. 1570).

Faneuil called Bacanovic after speaking with Stewart. Bacanovic asked Faneuil what he told her, and Faneuil confirmed that he had told Stewart that Waksal was trying to sell all his shares. Bacanovic asked if Stewart sold her shares. Faneuil replied that she did and informed Bacanovic of the details of the transaction. (Tr. 1569).

4. "Something Is Going On With ImClone And Martha Stewart Wants To Know What"

Immediately after speaking to Faneuil, Stewart placed an urgent call to Waksal. (GX 440). Waksal's secretary, Emily Perrett, testified that when she answered the phone, Stewart stated, "[G]et Sam" or "where is Sam." (Tr. 1067). Stewart then said: "This is Martha. There is something going on with ImClone. Do you know what it is? I need you to go find him." (Tr. 1067). Perrett testified that Stewart's tone of voice was "very hurried and harsh and direct." (Tr. 1068). Perrett responded that she could not reach Waksal, but would give him her message. Perrett recorded the message on Waksal's message log: "Martha Stewart, something is going on with ImClone and she wants to know what." (GA 2); Tr. 1066-67).

5. Stewart's Conversation With Mariana Pasternak

Stewart spent her vacation with her best friend, Mariana Pasternak. During the vacation, Stewart and Pasternak's conversation turned to Waksal. (Tr. 3387-88). Pasternak, a very reluctant witness, (JA 1759), testified that Stewart told Pasternak that Waksal "was selling or trying to sell his stock, that his daughter was selling or trying to sell her stock, and Merrill Lynch didn't sell." (Tr. 3390-91). Pasternak further testified that she recalled Stewart saying that she sold her ImClone stock. (Tr. 3391). Pasternak testified that she also had a recollection that Stewart said, "Isn't it nice to have brokers who tell you those things." (Tr. 3392).

6. The Investigations Begin

The day after Stewart and the Waksals sold their ImClone stock, ImClone announced that the FDA had refused to accept ImClone's application for approval of Erbitux. (Tr. 892). On the next trading day, December 31, 2001, ImClone's stock price opened at $45.39, representing a decline of approximately 18%. After noting ImClone's release of negative news, an employee in Merrill Lynch's compliance department, Brian Schimpfhauser, performed a routine check for suspicious selling of ImClone stock by Merrill Lynch customers affiliated with ImClone. (Tr. 1083-85). Schimpfhauser immediately took note that Aliza Waksal had sold all of her $2.4 million worth of ImClone stock on the day before ImClone's announcement. (Tr. 1088). He saw that Waksal's broker was Bacanovic, and then noticed that Bacanovic had another client who also sold ImClone stock on the same day—Martha Stewart. (Tr. 1089-90). Schimpfhauser brought these suspicious trades to the attention of his superior, who directed another employee in the compliance department, Julia Monaghan, to inquire of Bacanovic about the Waksal and Stewart sales. (Tr. 1103-06; 1183-84).

7. The Tax Loss Selling Cover Story

Because Bacanovic was on vacation, Monaghan first spoke to Faneuil to inquire about the Waksal and Stewart sales. Faneuil immediately called Bacanovic to inform him of the inquiry. Bacanovic then gave Faneuil an explanation for Stewart's sale that Faneuil knew to be false. Bacanovic told Faneuil that Stewart's ImClone sale was a part of tax loss selling – year-end selling of stocks with unrealized

losses as an offset against capital gains in other investments. (Tr. 1474-75, 1573-74). Faneuil knew that although Stewart had engaged in tax loss selling during the week before December 27, her ImClone stock was not part of that selling. Indeed, Stewart's ImClone stock was among the few holdings in Stewart's portfolio that she held at a gain, not a loss, so the sale could not have generated a tax loss. (Tr. 1575-76). Bacanovic rapidly repeated the explanation to Faneuil over and over, and then asked, "OK? OK?," until Faneuil responded, "OK." (Tr. 1573-74).

Monaghan reached Bacanovic on his cell phone on December 31, 2001, and asked him about the Waksal and Stewart ImClone sales. Bacanovic told Monaghan that Stewart's sale was related to a conversation they had about tax loss selling. (Tr. 1183-84, 1199). Monaghan testified that in explaining the reason for Stewart's trade, Bacanovic said nothing about any plan to sell Stewart's ImClone shares at any particular price. (Tr. 1184).

8. January 3, 2002: Faneuil Lies to Investigators

On January 3, 2002, Faneuil was interviewed by the SEC about the Waksal and Stewart ImClone sales. When asked about the Stewart sale, Faneuil did not disclose that he had informed Stewart of the Waksal selling at Bacanovic's direction. Faneuil simply told the SEC that Stewart had asked for a quote, and then sold her stock. (Tr. 1578-79). Faneuil discussed the interview with Bacanovic both before and after it took place. (Tr. 1579-80).

Faneuil testified that, because of the nature of his discussions with Bacanovic, Faneuil avoided using Merrill Lynch's phones to contact Bacanovic until Bacanovic returned from vacation on January 7, 2002. Faneuil explained that because he feared Merrill Lynch recorded calls from the office, he used the cell phone of a fellow employee named Tom to call Bacanovic. (Tr. 1597-98). Faneuil recalled that Tom worked several cubicles away from Faneuil, but could not remember Tom's last name. (Tr. 1597-98). At trial, the Government called Tom Reese as a witness and offered his cell phone records from January 3, 2002. The records showed a four-minute long call from Reese's cell phone to Bacanovic's cell phone on January 3, 2002 at 12:05 p.m. (Tr. 2063-64, 2066). Reese testified that he did not work with or for Bacanovic, had no social relationship with Bacanovic, and did not place a call to Bacanovic on January 3, but would have lent his cell phone to Faneuil if he was asked to. (Tr. 2061-67).

9. Bacanovic Changes The Cover Story

Shortly after his interview, Faneuil received a call from Stewart's assistant, Heidi DeLuca. DeLuca complained that the ImClone sale, which resulted in a substantial taxable gain, "screws up our tax loss selling plan." (Tr. 1586). When Faneuil told Bacanovic of DeLuca's complaint, Bacanovic changed his story and told Faneuil that the reason for Stewart's trade was that Stewart had a stop loss order to sell her ImClone stock if it ever fell to $60 per share. Again, Bacanovic repeated the story to Faneuil and then said, "OK? OK?," until Faneuil responded, "OK." (Tr. 1586-87).

10. January 7, 2002: Bacanovic Lies to Investigators

On January 7, 2002, Bacanovic was interviewed by the SEC about the Waksal and Stewart sales. With respect to Stewart's sale, Bacanovic told the SEC that about a week before the sale, on approximately December 20, 2001, Bacanovic and Stewart decided that if ImClone's stock price fell below $60 per share, she would sell. Bacanovic told the SEC that on December 27 he spoke to Stewart and told her that ImClone's stock price had fallen below $60, and she placed her order to sell with Bacanovic. (Tr. 1115, 2241).

On the day of or the day following Bacanovic's interview by the SEC, Bacanovic told Faneuil he wanted to talk and brought him to a nearby coffee shop. Bacanovic stressed his and Stewart's loyalty to each other and how successful he had become in part based on his relationship with Stewart. Faneuil interrupted, wanting to discuss the events of December 27 and saying that he knew what happened, but Bacanovic responded that Faneuil did not know what happened and accused Faneuil of being selfish. Faneuil told Bacanovic that he was more worried about what was going to happen to Bacanovic than about himself. Bacanovic said, "[W]ell, don't worry. I've got everything under control." (Tr. 1599-1601). A week later, Bacanovic approached Faneuil, who Bacanovic knew had a friend who was going to Argentina, and offered to buy an airline ticket so Faneuil could go as well. Faneuil declined. (Tr. 1606-07).

Faneuil also testified about a conversation he had with Bacanovic when he returned to the office after a week's

vacation from January 14 through 18. Faneuil testified that Bacanovic called him into his office and said, "Listen, I've spoken to Martha. I've met with her. And everyone's telling the same story. . . . This was a $60 stop-loss order. That was the reason for her sale. We're all on the same page." (Tr. 1609-10). The evidence showed that Bacanovic and Stewart in fact had met during the week Faneuil was on vacation. Stewart's assistant testified that Bacanovic called Stewart on January 10, 2002 and asked to have dinner with her alone, and that Stewart's calendar showed that Stewart and Bacanovic had a breakfast meeting on January 16, 2002. (Tr. 2144-46).

11. Stewart Alters Bacanovic's Telephone Message

Within days after her January 16 meeting with Bacanovic, and before anyone from law enforcement had asked to speak with her, Stewart retained counsel experienced in securities fraud matters. On January 22, 2002, MSLO's outside counsel at the law firm of Wachtell, Lipton, Rosen & Katz sent an email to MSLO's general counsel, stating: "On MS/ImClone matters, John Savarese will assist." (Tr. 3018-20).

On January 25, 2002, an AUSA and Agent Farmer contacted MSLO's general counsel and requested an interview with Stewart. (Tr. 3021-22). Stewart met with Savarese on January 28; spoke to him by phone on January 29; met with him on January 30; and spoke to him by phone for approximately half an hour at about 4:15 p.m. on January 31. (Tr. 2153).

When Stewart concluded her call with Savarese at the end of the day on January 31, Stewart walked to her assistant Ann Armstrong's desk. The District Court observed that Armstrong, like Pasternak, was a reluctant witness and actually broke down on the witness stand during her testimony. (JA 1758). Armstrong, who still worked for Stewart as her assistant, testified as to what happened when Stewart reached Armstrong's desk. Stewart asked Armstrong to pull up on her computer Bacanovic's message from December 27, 2001. The message log displayed Bacanovic's message: "Peter Bacanovic thinks ImClone is going to start trading downward." Stewart took hold of Armstrong's computer mouse, deleted the words "thinks ImClone is going to start trading downward," and altered the message to read simply: "Peter Bacanovic re imclone." (Tr. 2155-57).

Stewart's alteration was temporary. After making the change, she stood up and directed Armstrong to put the message back the way it was. Stewart then returned to her office and told Armstrong to get her son-in-law, who was one of Stewart's attorneys, on the phone. (Tr. 2157).

12. February 4, 2002: Stewart Lies to Investigators

On February 4, 2002, Stewart was interviewed at the USAO by two SEC enforcement attorneys, an FBI agent, and an AUSA. She was accompanied by two attorneys, John Savarese and an associate from his law firm. Both SEC attorney Helene Glotzer and Agent Farmer testified regarding the interview. Stewart told investigators that on December 27, 2001, she was given a message that Bacanovic had called and wanted her to call him by the end of

the day. (Tr. 2250, 2504). Stewart did not reveal the true content of Bacanovic's message, that Bacanovic "thinks ImClone is going to start trading downward," even though she had reviewed and altered the message less than four days earlier. Stewart was also asked whether there was a written record of Bacanovic's message. Stewart stated that she did not know if there was such a message. (Tr. 2252, 2506).

Stewart then falsely stated that she spoke to Bacanovic on December 27, a lie that mirrored Bacanovic's statement to investigators on January 7, that he had spoken to Stewart on December 27. She denied having any contact with Faneuil. (Tr. 2251). According to Stewart, Bacanovic told her that ImClone had fallen below $60, and she told Bacanovic to sell her shares. (Tr. 2250-51, 2504-05). When asked if she remembered anything else about her conversation with Bacanovic on December 27, 2001, Stewart stated that she and Bacanovic also briefly discussed MSLO's stock price and K-Mart, (Tr. 2251, 2505), subjects she had not discussed with Faneuil. (Tr. 1565). Stewart did not reveal that she had been informed about the Waksal selling in advance of her trade.

Stewart told investigators that she sold her ImClone shares on December 27 because of an agreement she had reached with Bacanovic to sell the stock if ImClone fell below $60 per share. Stewart said that she reached this agreement when ImClone was trading at approximately $74 per share (which before December 27, 2001, had last occurred on December 6, 2001). (Tr. 2250, 2502-03). Stewart explained that she chose to sell on December 27

because she did not wish to be bothered over her vacation. (Tr. 2251, 2505).

Stewart was also asked about her discussions with Bacanovic about ImClone before and after December 27. Stewart said that she had not discussed ImClone with Bacanovic anytime during the week before December 27. (Tr. 2252, 2504). Stewart also said that between December 27 and the date of the interview, she only spoke with Bacanovic two or three times. Of those two or three conversations, Stewart said that they only discussed ImClone once and then only discussed matters in the "public arena." (Tr. 2253-54, 2507-08). When asked if she and Bacanovic had any discussions about the investigation, Stewart stated that Bacanovic had told her that the SEC was asking some questions about trading in ImClone, but she denied that Bacanovic had told her that any of those questions involved her. (Tr. 2254-55, 2507).

13. February 13, 2002: Bacanovic Lies in Sworn Testimony

On February 13, 2002, nine days after Stewart's interview, Bacanovic gave sworn testimony before the SEC. Bacanovic was asked whether he ever told Stewart that Waksal was attempting to sell his ImClone shares on December 27. Bacanovic denied providing Stewart with information about Waksal's selling, stating: "I do not discuss other clients' affairs with other clients. . . I would not discuss his transactions with her, in the same way I would not discuss her transactions with him." (JA 510-11).

Bacanovic testified regarding the events of December 27, 2001. Bacanovic admitted that on the morning of

December 27, before 10:00 a.m., Faneuil had informed him of the requests to sell ImClone by the Waksals. (JA 446-50). Bacanovic testified that on one of the calls with Faneuil that morning, he asked Faneuil to call Stewart to apprise her of the price of ImClone. (JA 450). Bacanovic testified that at that moment ImClone was "approximately $60 a share, or something close to it. Slightly above or slightly below." (JA 451). Bacanovic explained that a week earlier, on December 20, 2001, in a conversation with Stewart about year-end tax loss selling, Bacanovic recommended to Stewart that she sell her ImClone stock. According to Bacanovic, Stewart objected, asking "why would I sell this stock when it's so close to approval?" (JA 487-90). Bacanovic testified that he made a "deal" with Stewart in which she agreed that they would sell her ImClone stock at $60 per share "should it ever fall that low." Bacanovic added that "she [Stewart] never thought it would." (JA 492-93).

ImClone's stock price from December 20 through December 27 belied the story put forth by Bacanovic and Stewart. At the moment Bacanovic attempted to contact Stewart on December 27, ImClone was at $61.52, not at $60 as Bacanovic had testified. (Tr. 3100). That price is significant because ImClone had been trading at about that same price during the entire week before December 27. (GA 4; GX 318). Indeed, on December 19, the day before Bacanovic and Stewart allegedly arrived at the decision to sell ImClone if it fell to $60, a conversation in which Stewart supposedly said that she "never thought" it would "fall that low" to $60, ImClone had traded as low as $60.85. (Tr. 3099-3103). On the day of the alleged decision, December 20, ImClone was at $61.86, (Tr. 3102),

nearly the same price it was when Bacanovic called Stewart on December 27 ($61.52), strongly suggesting that it was not ImClone's stock price that prompted Bacanovic's call to Stewart, but rather it was news that the Waksals were dumping their stock.

Also significant to assessing the truth of Stewart's and Bacanovic's statements regarding the plan to sell ImClone at $60 was the fact that Bacanovic made no record of this purported discussion in his Automated Contact Tracking system ("ACT"). Bacanovic kept detailed records of his calls with Stewart and other clients in his ACT notes. (Tr. 2866-83). His ACT notes contained multiple references to clients' price targets, including Stewart's. (GA 5-8; Tr. 2868-77). Bacanovic's ACT notes, however, made no mention whatsoever of any discussion regarding selling ImClone at $60 per share.

Bacanovic was asked about any conversation he had with anyone about the investigation. Bacanovic denied ever speaking with Faneuil about the investigation. (JA 515-16). And, like Stewart, Bacanovic also denied having any discussion with her about the investigation, although his version of what they had discussed differed from Stewart's in one way. Bacanovic maintained that he had not told Stewart anything about the SEC's involvement, but that he had told her only that Merrill Lynch had been conducting an internal review of all ImClone transactions. Like Stewart, Bacanovic stated that he did not tell Stewart anything about anyone asking questions about her transaction. (JA 502-04, 508-09, 512-14).

When asked if he had said anything to Stewart that would have given her any cause for concern about her

ImClone sale, Bacanovic replied that Stewart had no cause for concern. Bacanovic then volunteered that he had a worksheet with notes of his December 20 conversation with Stewart in which they supposedly arrived at the decision to sell if ImClone fell to $60 per share. (JA 504-05).

Bacanovic's worksheet was produced to the SEC. (Tr. 2263-66). The worksheet listed all the stocks held in Stewart's account as of December 20, the value of each holding, the stock's market price, and the unrealized gain or loss in each position. (JA 441). Written on the worksheet were various stock symbols, circles and checks, as well as the notation "@60" next to ImClone. The Government sent the worksheet to the laboratory run by the Secret Service's forensic services division, which tested the ink on the document. The ink was subsequently tested by an ink expert retained by Bacanovic. Both experts agreed that the "@60" notation on the document, as well as one small dash at the end of the listing of Apple Computer, was written in a different ink from the ink used to make all the remaining notations on the worksheet. (Tr. 3297, 3715-16). The Government's ink expert, Lawrence Stewart, testified that all of the notes on the page, with the exception of the "@60" notation and the dash at the end of the Apple Computer line, were made with a Paper Mate stick pen. (Tr. 3303-04). He also testified that the "@60" notation was made with an ink that did not match any ink in the Secret Service's library of 8,500 inks, suggesting that it may have been made with an unusual foreign-made pen. (Tr. 3303). While the dash at the end of the Apple Computer line was not made with a Paper Mate and tested similar to the ink used to make the "@60" notation, there

was insufficient ink left on the document after defense and other testing to determine whether it was in fact made with the same unusual ink as the "@60" notation, although it was quite possible that it was the same. (Tr. 3303-04, 3379-80).

14. March 7, 2002: Faneuil Lies to Investigators Again

Faneuil was interviewed regarding the Waksal and Stewart trades by the FBI and USAO on March 7, 2002. With respect to the Stewart sale, Faneuil told the same lie again, that Stewart called for a quote and decided to sell. (Tr. 1644-45). Faneuil reported this to Bacanovic, who responded, "good." (Tr. 1645).

15. April 10, 2002: Stewart Lies to Investigators Again

After Stewart's interview and Bacanovic's testimony, investigators obtained Stewart's December 27 message for Waksal that "something is going on with ImClone" and Bacanovic's December 27 message for Stewart that "Bacanovic thinks ImClone is going to start trading downward." (Tr. 2272-74). The investigators requested another interview with Stewart, which took place by phone on April 10, 2002. In this interview, Stewart was asked directly whether on December 27 she had been told that any of the Waksals were selling their stock. Stewart falsely stated that she had no recollection of being told that any of the Waksals were selling ImClone stock. (Tr. 2276, 2510-12).

Stewart was also asked about the messages. She stated that she did not recall being informed of the content of

Bacanovic's message as it appeared on the message log. She only recalled being told that Bacanovic called and wanted to speak with her before the end of the day. (Tr. 2275-76). With respect to her message for Waksal, Stewart stated that she was calling him "just to see how he was doing and make sure everything was OK." (Tr. 2277, 2512-13).

16. Stewart's False Public Statements

In connection with a congressional investigation into the FDA's denial of ImClone's Erbitux application, Congress learned of the sales of ImClone stock by the Waksals and Stewart. On Friday, June 7, 2002, the Wall Street Journal reported that congressional investigators had learned that Stewart had sold ImClone stock on December 26 or 27, 2001, and that Stewart was a close friend of Waksal's. (GX 366A). The day before the article, MSLO's stock price had closed at $19.01. By June 12, 2002, MSLO's stock price had fallen to $15 per share. (Tr. 3112-15). At that time, Stewart owned more than 30.7 million shares of MSLO, so the $4 decline in stock price had reduced Stewart's net worth by more than $122 million. (Tr. 3235).

After the market closed on June 12, Stewart released a public statement denying that she had any "improper information." Stewart's statement stated that she had reached an agreement with her broker to sell her ImClone shares if ImClone fell below $60 per share. Stewart further falsely stated: "On December 27, I returned a call from my broker advising me that ImClone had fallen below $60. I reiterated my instructions to sell the shares." (Tr. 3110).

After she issued this statement, MSLO jumped from $15 per share to open at $16.05 on June 13, 2002.

After opening higher on June 13, MSLO's stock price continued its decline under the weight of continuing negative press coverage of Stewart's ImClone sale. By June 18, 2002, MSLO's stock price had fallen to $14.40 per share. On June 19, 2002, Stewart addressed a conference attended by securities analysts and large investors and stated, among other things, that "[t]he sale was based on information that was available to the public" and that she had fully cooperated with the SEC and the USAO. (Tr. 3236-38). That day, MSLO's stock price rose to $16.45. (Tr. 3119).

17. Faneuil Reveals The Truth

From February through May 2002, Bacanovic spoke to Faneuil approximately five times about the investigation. The substance of each of these conversations was essentially the same. Bacanovic told Faneuil that "he has spoken to Martha, everyone is telling the same story, the $60 stop loss story, that story is the truth, we are all on the same page." (Tr. 1645-46). Faneuil testified that one conversation in April or May 2002 was different. Faneuil told Bacanovic, "Peter, I spoke to Martha, I know what happened, I know what I said and I know what she said." Bacanovic replied, "[D]on't even say that, just don't even say that." (Tr. 1646-47).

Faneuil decided to come forward in June 2002. (Tr. 1648). He had not been served with a subpoena, nor had anyone asked to speak with him. (Tr. 1650, 2278). As Faneuil explained, "There came a point in time where I

just couldn't continue to lie, and I felt, of course, not only had I lied to the SEC on two occasions but I felt that the cover-up was part of my daily existence, and I just couldn't take it anymore." (Tr. 1649). Faneuil entered into a cooperation agreement with the Government, pursuant to which he pled guilty to the crime of Receiving Money or Things of Value as a Consideration for Not Informing, in violation of Title 18, United States Code, Section 873, a misdemeanor. (Tr. 1649-52). In addition to pleading guilty to a crime, as a result of coming forward and admitting that he lied to investigators Faneuil has also been barred from the securities industry for life. (Tr. 1653).

After Faneuil was cross-examined extensively regarding, among other things, the defense's charge that his testimony was a product of recent fabrication, the Government called as witnesses two of Faneuil's friends in whom he had confided regarding his interactions with Bacanovic and Stewart on December 27, and his lies to investigators. Zeva Bellel, a 29-year-old who had attended Vassar College with Faneuil, stated that she was with Faneuil on January 4, 2002, about a week after Stewart's sale. She testified that Faneuil was very upset because of something that happened at work. Faneuil explained to her that Waksal and members of his family were selling their ImClone shares, and his boss directed him to inform Stewart of their sales. (Tr. 3481-84). Faneuil then told Bellel how his boss had pressured him to lie to SEC investigators who were looking into Stewart's trade. (Tr. 3486).

The Government also called Eden Werring, a graduate of Yale College who worked as the executive director of

a non-profit called Summer Search that assists low-income high school students. (Tr. 3505). Werring testified that in April 2002 Faneuil told her that something had happened at work and he had to lie for his boss. (Tr. 3506).

B. Bacanovic's Defense Case

Bacanovic called five witnesses in his defense case. He called as his first witness a client, Kenneth Rainin. Rainin testified that he had set target prices to buy or sell stocks with Bacanovic, but he did not like to enter stop-loss orders. (Tr. 3600-11). As his second witness, Bacanovic called Faneuil's former attorney, Jeremiah Gutman. Faneuil had testified that he retained Gutman on January 7, 2002, after he had lied to the SEC about Stewart's trade. (Tr. 1582-83). Faneuil had testified that Gutman at first advised him he had no choice but to go back to the SEC and correct his testimony, but subsequently changed his advice. (Tr. 1583). Gutman told him that a lawyer for Merrill Lynch said that Merrill Lynch had a deal with the Government to hand over Waksal "on a silver platter" and look the other way about Stewart. (Tr. 1583-84). Faneuil had testified that Gutman told him to "lay low," (Tr. 1584-85), and advised him not to lie, but to stick with his story. (Tr. 1583-85, 1738-39). Faneuil had also testified that Gutman's advice seemed "far-fetched," but he had believed Gutman. (Tr. 1585).

Bacanovic called Gutman, a member of the bar since 1949, believing that Gutman would impeach Faneuil's testimony. (Tr. 3684-87). In fact, Gutman testified with respect to the "silver platter" statement that he had "told him something like that." (Tr. 3679-80). Gutman testified that he had told Faneuil that Merrill Lynch's counsel had

told him that "he was working something out with the government by which the whole investigation would go away and that there would be nothing to worry about," and "that the deal would involve getting all the Merrill Lynch people off the hook and then let the chips fall where they may." (Tr. 3679-80). When asked whether he had ever advised Faneuil "not to lie, but to stick with his story," Gutman testified that he had told Faneuil "he should not lie, . . . [b]ut I also warned him that if he told a different story . . . he would be sticking his neck out." (Tr. 3689-90). Bacanovic asked Gutman no further questions.

Bacanovic's next witness was a forensic chemist, Dr. Albert Lyter. Lyter testified that he had analyzed the ink on Bacanovic's worksheet and found two different ink formulations on the document. Lyter testified that one ink formulation was used to make the "@60" notation and the dash at the end of the Apple Computer line, and a second ink formulation was used to make all the other entries on the document. (Tr. 3710). These conclusions were similar to those of the Government's ink expert and were not contested by the Government. Lyter further testified that even when pens have the same ink formulation, a piece of equipment called a densitometer can allow one to distinguish among different manufacturing batches of the same type of pen. (Tr. 3710-15). Lyter testified that although the entries other than the "@60" notation and the dash were made using pens with the same ink formulation, at least three different pens using that same ink formulation were employed to make those entries. (Tr. 3715-16).

As his fourth witness, Bacanovic called Stewart's business manager, Heidi DeLuca. Relying on a computer

printout of Stewart's portfolio that contained her handwriting, Bacanovic Exhibit 903, DeLuca testified that on Wednesday, November 7, 2001, she had a conversation with Bacanovic about Stewart's ImClone stock, in which Bacanovic told DeLuca that he intended to speak with Stewart regarding setting a floor of 60 or 61 at which Stewart would sell her ImClone shares. (Tr. 3802-06). The handwritten note upon which she relied stated: "ImClone, $61.52, Wednesday, tender offer, not responding." (GA 13; Tr. 3803). In September 2001, Bristol Myers Squibb had made a tender offer to pay $70 per share for 20% of the outstanding shares of ImClone. (Tr. 877-78). DeLuca testified that Stewart had tendered 5,000 shares of ImClone she held in her personal account, after which 3,928 shares remained. DeLuca stated that she expected that following the tender offer ImClone's stock price would exceed $70 per share and was surprised that it was only trading at $61.52. (Tr. 3803-04).

The Government demonstrated that DeLuca's testimony was at best inaccurate. In his testimony on February 13, 2002, Bacanovic himself had denied having any discussion with DeLuca about setting a floor of $60 per share in ImClone. (JA 520). The Government established that DeLuca had not spoken to Bacanovic about setting any floor price but rather was remembering a conversation with Bacanovic in late October 2001 about ImClone stock in Stewart's pension account that was sold at $61 per share on October 25 and 26, 2001. The Government presented DeLuca with the original of Bacanovic Exhibit 903. (GA 17-22). The original document had a footer showing a date of October 24, 2001, which did not appear on the copy of the document presented to the jury by Bacanovic. When all

of DeLuca's notes on Bacanovic Exhibit 903 were compared to an email she sent Stewart on October 25, 2001 recounting a conversation she had with Bacanovic, it was clear that DeLuca's notes related to a conversation about shares of ImClone stock in Stewart's pension account that she had with Bacanovic on October 24, 2001, not November 8, 2001. (Tr. 3944-51; GA 23). The Government also confronted DeLuca with records showing that she had a telephone conversation with Stewart on October 24, 2001 for 21 minutes from 2:19 p.m. and 2:40 p.m., and offered ImClone's audit trail proving that ImClone had traded at $61.52 while DeLuca was on the phone with Bacanovic on October 24. (Tr. 3953-54).

The fact that DeLuca's conversation took place on October 24 rather than November 8 was significant because the Government was able to demonstrate that DeLuca's recollection of the "selling ImClone at 60 or 61" conversation with Bacanovic related to an entirely different ImClone holding that was sold at $61 per share by October 26, 2001, and had nothing to do with the 3,928 shares Stewart sold from her personal account on December 27, 2001. On October 23, 2001, Stewart had placed an order to sell 51,800 shares of ImClone stock that she held in her pension account with Bacanovic at Merrill Lynch at a price of $65 per share. (GA 6; Tr. 3962-63). At the time, however, ImClone was only trading at around $61 per share, and, on October 25, 2001, Bacanovic recommended that Stewart sell her 51,800 shares at $61 per share. (Exh. ST-AA). Phone records established that DeLuca spoke to Bacanovic for 13 minutes on October 25, 2001, the day Bacanovic recommended Stewart sell her ImClone at $61 per share. (Tr. 3964). Stewart agreed, and on October 25

and 26, 2001, Stewart sold all 51,800 shares out of her pension account at a price of $61 per share. (Tr. 3961-63). DeLuca had been well aware of the sale of the 51,800 ImClone shares at the price of $61. (Tr. 3940).

Relevant to whether DeLuca's testimony was deliberately false or merely inaccurate, the Government also cross-examined DeLuca with evidence that she had submitted false expense reports for Stewart, billing MSLO for the costs of Stewart's vacation with Pasternak in December 2001. (Tr. 3981-84).

Bacanovic's final witness, John Maine, was offered as an expert who had analyzed price and volume data relating to ImClone's trading activity in late 2001. Maine attempted to distinguish ImClone's price decline on the morning of December 27, 2001 from its trading activity in the week preceding December 27. (Tr. 4056-72). Maine, a former stock broker, also testified about the differences between target prices and stop loss orders. (Tr. 4074-75). Finally, in an effort to rehabilitate DeLuca's testimony that her conversation with Bacanovic did occur on November 7, Maine testified that he had reviewed minute-by-minute trading data in ImClone showing that at 9:37 a.m. on November 7, ImClone's high and low prices in that minute were 61.50 and 61.85. (Tr. 4049).

C. Stewart's Defense Case

Stewart called only one witness in her defense case, Steven Pearl. Pearl was an associate at the Wachtell law firm and accompanied Savarese to Stewart's interview on February 4, 2002, to take notes. (Tr. 4152-53). Pearl testified that he had a general recollection that Stewart was

asked what time Bacanovic had left his message for Stewart on December 27, 2001, but did not recall how the question was put to Stewart or what if anything Stewart said in response. (Tr. 4154). Stewart then offered a heavily redacted set of Pearl's notes, which only displayed to the jury three lines from the 18 pages of notes Pearl had taken at the meeting. (Tr. 4167). Stewart was permitted to offer only these three lines over the Government's objection, notwithstanding the fact that the rest of the 18 pages of notes were never shared with the Government. (Tr. 4087, 4177). The three lines of notes contained a long dash, which on cross-examination Pearl admitted may have represented intervening questions and statements made by Stewart that he missed. (Tr. 4169). Pearl further testified that he did not recall whether or not Stewart said anything about her phone log, or whether she in fact had said that she did not know if Bacanovic's December 27 phone message existed. (Tr. 4176-77).

D. The Government's Rebuttal Case

In its rebuttal case, the Government recalled Lawrence Stewart to the stand. Lawrence Stewart testified that, contrary to Lyter's testimony, a densitometer is not a sufficiently precise instrument to determine if pens of the same ink formulation came from different manufacturing batches. So while the experts agreed that the pen used to make the "@60" notation and the dash at the end of the Apple Computer line were made using a different type of pen from the Paper Mate stick pen used to make all the remaining notes on the page, Lawrence Stewart testified that it could not be determined whether one Paper Mate

stick pen or several Paper Mate stick pens were used for the remaining notations. (Tr. 4182-92, 4195).

The Government also offered a portion of ImClone's audit trail from November 7, 2001, showing that while ImClone did trade as low as $61.50 that day, as Maine testified in Bacanovic's defense case, ImClone never traded at a price of $61.52 (the price noted on Bacanovic Exh. 903) on November 7, 2001, further establishing that DeLuca's testimony of her conversation with Bacanovic that day was incorrect.

E. Judgment Of Acquittal On Count Nine

After the close of evidence, but before summations, the District Court granted Stewart's motion for a judgment of acquittal on Count Nine pursuant to Rule 29 of the Federal Rules of Criminal Procedure. (JA 388-410). Count Nine charged Stewart with making a series of false and misleading public statements during June 2002 regarding her sale of ImClone stock that concealed that Stewart had been provided with information about the Waksal sales and that she had sold stock while in possession of that information, in order to stop or at least slow the steady erosion of MSLO's stock price caused by investor concerns. Count Nine charged that Stewart made these public statements with the intent to defraud investors and to maintain the value of her own MSLO stock. (JA 268-73). The District Court found that a reasonable jury could find: (a) that Stewart was aware of the price of her company's stock and of matters that could affect the price of her stock; (b) that Stewart was aware of the importance of her reputation to the continued health of MSLO; and (c) that Stewart believed that MSLO's stock price was falling in June 2002

in response to negative publicity about her ImClone sale and the ensuing investigation thereof. (JA 394-98). Nonetheless, the District Court granted the judgment of acquittal on the ground that the Government had failed to present sufficient evidence that Stewart had an intent to defraud investors when she issued her public statements, notwithstanding the fact that one of the statements was made to a conference of securities analysts and investors. (JA 402-09).

F. The Verdict

The jury was provided with a redacted indictment containing only the particular charged acts and omissions and statutory allegations at the core of each offense. The redacted indictment omitted the entire background section of the Indictment returned by the Grand Jury, and contained no references or descriptions of Merrill Lynch's policies, Bacanovic's acquisition of information about the Waksal selling, or Stewart's sale of ImClone stock. (*Compare* JA 233-74 *with* JA 416-34).

The jury returned its verdict on March 5, 2004, on its third day of deliberations. In her July 8, 2004 opinion denying the defendants' motion for a new trial, the District Judge observed that the verdict demonstrated two things. First, the jury found beyond a reasonable doubt that Stewart and Bacanovic agreed to lie and did lie to investigators to conceal the fact that when Stewart sold her ImClone stock on December 27, she had been informed by Bacanovic's assistant that Waksal was trying to sell his ImClone shares at Merrill Lynch. Second, "the jury found that the Government had not proven beyond a reasonable

doubt that defendants had fabricated the $60 agreement." (JA 1737-38).

The jury convicted Stewart of Count Three, for making false statements in her February 4, 2002 interview and, in so doing, concealing and covering up facts that were material to the investigations, in violation of Title 18, United States Code, Section 1001(a)(1) and (2). The jury found Stewart guilty of making the following false statements, each of which was a specification in Count Three of the Indictment. Stewart falsely told investigators that she spoke to Bacanovic on December 27 and instructed him to sell her ImClone shares after he informed her that ImClone was trading below $60 per share. Stewart also falsely stated that during the same telephone call, she and Bacanovic discussed the performance of the stock of MSLO and discussed K-Mart. She falsely told investigators that she had decided to sell her ImClone shares at that time because she did not want to be bothered during her vacation. Stewart falsely stated that she did not know if there was any record of a telephone message left by Bacanovic on December 27 in her assistant's message log. She also falsely said that since December 28, she had only spoken with Bacanovic once regarding ImClone, and they had only discussed matters in the public arena. Finally, Stewart falsely told investigators that since December 28, Bacanovic had told her that Merrill Lynch had been questioned by the SEC regarding ImClone, but that he did not tell her that he had been questioned by the SEC or that he had been questioned about her account. (JA 424-26, 916).

The jury acquitted Stewart of one specification charged in Count Three: her statement that she and Bacanovic had agreed that she would sell her shares when ImClone started trading at $60 per share. (JA 424, 916).

The jury found Stewart guilty of making the following false statements to investigators during her April 10 interview and, in so doing, concealing and covering up material facts, in violation of Title 18, United States Code, Section 1001(a)(1) and (2). Each of these statements was a specification in Count Four of the Indictment. Stewart falsely said that she did not recall if she and Bacanovic had spoken about Waksal on December 27 and that she did not recall being informed that any of the Waksals were selling their ImClone stock. Stewart also reiterated her false statement that she spoke to Bacanovic on December 27, that he told her the price of ImClone shares, and that he suggested that she sell her holdings. (JA 426-27, 917).

The jury did not find Stewart guilty of one false statement specification charged in Count Four: her statement that sometime in November or December of 2001, she and Bacanovic decided she would sell her remaining ImClone shares when they started trading at $60 per share. (JA 427, 917).

The jury found Bacanovic guilty of making one false statement during his January 7 interview with the SEC, in violation of Title 18, United States Code, Section 1001(a)(1) and (2). This was a specification in Count Two of the Indictment, which charged Bacanovic with falsely stating that he had spoken to Stewart on December 27, that he told Stewart during that conversation that ImClone's

share price had dropped, and that Stewart had instructed him to sell her shares. (JA 424, 918).

The jury found Bacanovic not guilty of the other false statement charged in Count Two: his statement that on December 20, 2001, he had a conversation with Stewart in which she decided to sell her ImClone stock at $60 per share. (JA 423, 918).

The jury also convicted Bacanovic of perjury in violation of Title 18, United States Code, Section 1621, in Count Six, for one statement he made during his February 13 testimony before the SEC. Bacanovic stated that on the morning of December 27, he had left a message for Stewart with her assistant, Ann Armstrong. He falsely said that the message requested that Stewart return his call, and advised her of the price at which ImClone was then trading. (JA 428-29, 918).

The jury acquitted Bacanovic of five other perjury specifications charged in Count Six. These specifications related to conversations Bacanovic had had with Stewart subsequent to her December 27 trade, the circumstances of her decision on December 20 to sell ImClone at $60 per share, and the worksheet he said he used during their December 20 conversation. (JA 429-33, 918).

The jury also acquitted Bacanovic of a charge of making and using a false document, which was charged as a violation of Title 18, United States Code, Section 1001(a)(3) in Count Five of the Indictment. This count was based on the worksheet with the "@60" notation that Bacanovic gave the SEC in the course of their investigation. The charge alleged that Bacanovic altered the

worksheet to add the "@60" notation and then caused it to be produced to the SEC. (JA 428, 918).

The jury also convicted both Bacanovic and Stewart of conspiracy in Count One. With respect to the conspiracy charge, the jury found that both conspired to carry out all three objects of the conspiracy: making false statements, perjury, and obstruction of an agency proceeding. (JA 416-23, 916-17).

Finally, the jury also convicted both Bacanovic and Stewart of Counts Seven and Eight, respectively, for obstructing an SEC investigation in violation of Title 18, United States Code, Section 1505, by providing and causing to be provided false and misleading information to the SEC relating to Stewart's sale of ImClone stock. (JA 433-34, 917-18).

G. Sentencing

1. Stewart's and Bacanovic's Presentence Reports

The U.S. Probation Office prepared Presentence Investigation Reports ("PSRs") in anticipation of Stewart's and Bacanovic's sentencings. The Presentence Reports employed the same Sentencing Guidelines calculation for each defendant. Each Presentence Report used the November 1, 2001 edition of the Guidelines Manual to determine the defendant's sentence. (S.PSR ¶ 71; B.PSR ¶ 70). For each of the defendants, the Presentence Report found that the defendant's counts of conviction were grouped together, and the base offense level for the group was 12 pursuant to U.S.S.G. § 2J1.2(a). (S.PSR ¶¶ 73-75; B.PSR ¶¶ 71-73). The Presentence Reports did

not apply any enhancements or adjustments. (S.PSR ¶¶ 76-83; B.PSR ¶¶74-81). The Presentence Reports further found that neither defendant had any criminal history points and therefore placed each defendant in Criminal History Category I. (S.PSR ¶ 87; B.PSR ¶ 85). Based on an offense level of 12 and a Criminal History Category of I, the applicable sentencing range for both defendants was 10 to 16 months imprisonment. (S.PSR ¶ 147; B.PSR ¶ 127). The Presentence Reports further noted that because offense level 12 was in Zone C, the minimum term of imprisonment could be satisfied by (1) a sentence of imprisonment; or (2) a sentence of imprisonment that included a term of supervised release with a condition that substituted community confinement or home detention, provided that at least one-half of the minimum term was satisfied by imprisonment, pursuant to U.S.S.G. § 5C1.1(d). (S.PSR ¶ 148; B.PSR ¶ 127).

2. The Parties' Sentencing Submissions

Prior to sentencing, Stewart objected to the Presentence Report claiming that she was entitled to a downward adjustment for having a minor role in her offenses, and that the Sentencing Guidelines did not apply to Stewart's sentence in light of the Supreme Court's decision in *Blakely* v. *Washington*. Stewart also sought a downward departure because of her purportedly extraordinary charitable acts and because of the alleged economic harm to MSLO that would result from her incarceration. Bacanovic did not object to the Presentence Report's Guidelines calculation, but did move for a downward departure because of his purportedly extraordinary charitable acts and on the ground that his criminal conduct was aberrant.

The Government opposed the defendants' sentencing applications.

3. The Sentencing Proceedings

On July 16, 2004, Stewart and Bacanovic each appeared separately before Judge Cedarbaum for sentencing. The District Court found that the evidence did not support Stewart's request for a minor role adjustment and denied the defendants' motions for downward departure. (JA 1833, 1860-61). The District Court in advance of sentencing ruled that the Sentencing Guidelines did apply, noting that *Blakely* v. *Washington* was particularly not on point here because the Sentencing Guidelines applicable to this matter did not require any enhancement. (JA 1819). The District Court calculated that each defendant's offense level was 12 and sentenced each defendant to five months in prison, to be followed by two years of supervised release with a condition of five months of home confinement. (JA 1833-34, 1861).

ARGUMENT

POINT I

The District Court's Evidentiary Rulings Should Be Affirmed

The defendants contend that they were denied a fair trial because the District Court precluded Stewart from: (a) calling a law professor as an expert witness to testify that Stewart's ImClone sale did not violate the securities laws; and (b) cross-examining Douglas Faneuil as to whether he thought he was violating the law on December 27. (S.Br. 38-39; B.Br. 34-36). These arguments are meritless. While

evidence of Stewart's understanding of whether her ImClone sale was legal or illegal may have been relevant to her motive or lack thereof to deceive investigators about the trade, a law professor's views on whether Stewart's sale in fact violated the securities laws had no relevance to any issue in the case. Stewart's claim that she was precluded from cross-examining Faneuil on whether he thought he had violated the law is simply false. Indeed, Stewart's counsel asked Faneuil directly whether he thought he was doing anything wrong when he provided Stewart with information about Waksal's selling. The only question Stewart was precluded from asking Faneuil was whether he had heard of the misappropriation theory of insider trading.[*] The District Court correctly ruled that while Faneuil's understanding as to whether he had violated the law on December 27 may have been relevant,

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[*] Courts have accepted two theories of insider trading, the "classical" or "traditional" theory of insider trading, and the "misappropriation" theory. Under the "traditional" or "classical theory" of insider trading, Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), is violated when a corporate insider, such as an officer of a corporation, "trades in the securities of his corporation on the basis of material, non-public information." *United States* v. *O'Hagan*, 521 U.S. 642, 651-52 (1997). The "misappropriation theory" of insider trading holds that a person violates § 10(b) when he "misappropriates confidential information for securities trading purposes, in breach of a duty owed to the source of the information." *Id.* at 652; *United States* v. *Falcone*, 257 F.3d 226, 230 (2d Cir. 2001).

the specific legal theory on which his understanding was based, if any, was beside the point. This decision too cannot be characterized as an abuse of discretion.

Bacanovic separately contends that the District Court also erred in precluding cross-examination of Faneuil on his use of marijuana in Jamaica and DeLuca's testimony concerning the substance of a conversation with Faneuil that DeLuca said occurred in February 2002. Both claims are without merit.

A. The District Court Did Not Abuse Its Discretion in Denying Stewart's Requests To Call An Expert Witness And To Cross-Examine Faneuil On Whether He Had Heard Of The Misappropriation Theory

1. Relevant Facts

In advance of trial, Stewart issued a public statement from her attorneys that was posted on her website, www.marthatalks.com, in which they stated that "[t]he indictment reveals that the predicate for the entire investigation – the accusation that Martha Stewart sold her ImClone shares based on inside information – has proven to be false. It is most ironic that Ms. Stewart faces criminal charges for obstructing an investigation which established her innocence." (JA 277-78, 288-89). In response to this public statement, the Government moved *in limine* to preclude the defense from arguing that the jury could draw any inference from the Government's decision not to

charge Stewart criminally with insider trading.* The District Court granted the Government's motion, reasoning as follows:

> Clearly, defendants may inform the jury that the indictment does not charge them with the crime of insider trading. But defendants may not invite the jury to speculate as to why that charge was not included in the indictment. Nor may they argue that the absence of an insider trading charge proves their innocence of such activity.
>
> If the Government presents arguments or evidence that tend to show that defendants were motivated not only by the fear that they would be accused of trading illegally, but also that such a fear was justified – that is, that Stewart's trading was illegal – then it will open the door to defense evidence that the conduct was not illegal.

(JA 319-20).

The Government complied with the District Court's ruling throughout the trial. The Government presented evidence tending to show that Bacanovic and Stewart were concerned about the truth of Stewart's trade being revealed, but never argued or presented evidence that Stewart's trade was in fact illegal. Indeed, in describing

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* Although the Government did not charge Stewart criminally with insider trading, the SEC filed civil insider trading charges against Stewart and Bacanovic. (JA 282).

the defendants' motives to conceal the truth about Stewart's trade, the Government did not even suggest that "the defendants were motivated by the fear that they would be accused of trading illegally," as the Court had allowed. (JA 319). Rather, the Government's opening statement merely told the jury that the defendants concealed the truth because Bacanovic feared the loss of his job and Stewart feared that the truth would harm her reputation and therefore her business:

> . . . Why did they do it? Why didn't they admit what happened? Well, during this trial you will learn that Peter Bacanovic had his high-paying job at stake. He knew that he had broken Merrill Lynch's policies and that Merrill Lynch was very strict about client confidentiality and that you can't tell one client about what another client is doing. So he knew that this tip could cost him his job. And this tip could cost him his license to work as a stockbroker.
>
> What did Martha Stewart have to lose? She had even more at stake. Martha Stewart had a multimillion dollars business empire at stake. And she knew that if it came out that she had done this trade with a tip, it would be bad for her reputation and bad for her business.

(Tr. 780).

Critically, it was not the Government that injected into the trial the issue of whether Stewart was motivated by a

fear of being prosecuted for insider trading, it was Stewart herself. In her opening statement, Stewart stated incorrectly: "The Department of Justice now says that this is the motive for the conspiracy and for the false statements that they claim come later. Because they say Martha Stewart . . . realized that she had engaged in insider trading, and that's the motive now to do something else wrong." (Tr. 843).

And, although the Government complied with the Court's ruling, Stewart did not. In her opening statement, Stewart did argue that the jury could infer from the Government's failure to charge Stewart with insider trading that Stewart had no motive to lie to investigators. Stewart argued that the act of selling ImClone after being informed that ImClone's CEO was selling was "something nobody would have thought was criminal. There is no insider trading charge in this Indictment. Remember that." (Tr. 849).

Even though the Government presented neither arguments nor evidence that Stewart and Bacanovic had committed insider trading, Stewart persisted in demanding that the District Court allow the defense to present evidence, either through expert testimony or through the cross-examination of SEC enforcement attorney Glotzer, that Stewart's ImClone sale was not insider trading. (Tr. 2221). Each time, the District Court told Stewart that she was free to present evidence relevant to the defendant's knowledge and intent, but could not call an expert witness to describe the legal elements of insider trading, unless the defense could establish that the defendant had knowledge of those elements at the time of the acts alleged in the

Indictment. The District Court reasoned: "It matters what the defendants thought was proper or improper, not whether it in fact was;" (Tr. 2103), and therefore "you have to show her knowledge of the law, not your knowledge of the law." (Tr. 2183). The District Court further explained: "I think there is a very substantial difference between what somebody believes and what the law is." (Tr. 2221).

In addition to seeking to present evidence of the law of insider trading to the jury through expert testimony and the testimony of Glotzer, Stewart also attempted to cross-examine Douglas Faneuil on his understanding of the misappropriation theory. On direct examination, Faneuil gave the following testimony, which Stewart erroneously complains in her papers was an effort by the Government to communicate to the jury that Stewart had committed the crime of insider trading:

> Q: Did there come a time when you were working at Merrill Lynch that you did something illegal?
>
> A: Yes.
>
> Q: What did you do, briefly?
>
> A: I told one client about what another client was doing in his account and then lied about it to cover up.

(Tr. 1443).

Faneuil's direct testimony made no mention of insider trading. To the extent Faneuil's testimony about what he did that was illegal was at all ambiguous, it was clarified

during cross-examination that the crime Faneuil believed he committed was not insider trading but lying to investigators:

> Q: Mr. Faneuil, when did you agree with Peter Bacanovic to commit a crime?
>
> A: I would say that there was a tacit understanding after the first conversation that we had when I confronted him about Judy Monaghan's questions regarding the ImClone activities of the 27th.
>
> Q: And that conversation took place on or about December 31st?
>
> A: Correct.
>
> Q: And what crime did you have a tacit understanding with Mr. Bacanovic to commit?
>
> A: To lie about the real reason for Ms. Stewart's stock sale and lie also about the conversation that I had prior to that in which Peter told me to tell Ms. Stewart about Sam Waksal's trading.

(Tr. 1926).

While Faneuil's direct testimony did not mention insider trading, Stewart injected the issue repeatedly on cross-examination. Stewart cross-examined Faneuil on whether he believed that the Waksals engaged in insider trading:

Q: Now, on December 27th, as you were going through the events prior to the time that Ms. Stewart called, did you think that the Waksals were engaged in insider trading?

* * *

A: I would have to say yes.

Q: You did? And when did it dawn on you on the date of the 27th that the Waksals were engaged in insider trading?

A: Well, I think it's fair to say it was more a feeling. I didn't really think about it too hard. It was a busy day, as I said. But I had a sense that something was going on that wasn't entirely proper.

Q: And that something that wasn't entirely proper was insider trading?

A: Correct.

(Tr. 1948-49).

Stewart also cross-examined Faneuil on whether he believed Stewart's sale of ImClone constituted insider trading. The District Court permitted lengthy cross-examination on Faneuil's belief, and only sustained an objection to the questioning when Stewart went further and began to ask Faneuil about the misappropriation theory:

Q: And, therefore, is it fair to say that when you gave that information to Ms. Stew-

art, you didn't think that you were doing anything wrong.

A: I would say because Peter told me to do [it], I did not think I was doing anything wrong.

(Tr. 1956).

Q: At the time you gave her that information [about Waksal's selling], did you believe that she was then precluded legally from trading?

A: I would say that I didn't feel comfortable with the situation.

* * *

Q: Can you answer my question as to whether or not you thought she was precluded from trading based on the information that you gave her, as a matter of law.

A: I will say, then, that maybe I suspected it. I will say then, maybe I suspected so.

* * *

Q: Were you deliberately attempting to assist two of your customers in violating the insider trading laws?

A: Look, at the time I was attempting to be a client associate and take clients' orders and do what Peter told me to do.

* * *

> A: I would say no, I was not deliberately attempting.
>
> Q: Did you ever hear of something called the misappropriation theory?
>
> A: I've heard of it.
>
> MS. SEYMOUR: Objection, your Honor.
>
> THE COURT: Objection sustained.

(Tr. 1961-63).

At a break, Judge Cedarbaum explained why she sustained the Government's objection, reasoning that while Faneuil's belief as to the legality of Stewart's ImClone sale may have been relevant, the particular legal theory underpinning his belief was not.

> MR. MORVILLO: His state of mind with regard to the illegality of this sale is very much relevant to this trial.
>
> THE COURT: That may be. But the legal basis for his state of mind, whatever it was, whether it was because of the misappropriation theory or some other legal theory, is entirely beside the point. I rule against you.

(Tr. 1975).

2. Applicable Legal Principles

While the Constitution guarantees criminal defendants the right to present a defense, *see generally Chambers* v.

Mississippi, 410 U.S. 284, 294-95, 302 (1973); *United States* v. *Blum*, 62 F.3d 63, 67 (2d Cir. 1995), that right is not absolute and the "trial judge[ ] retain[s] wide latitude" in imposing "reasonable limits" to guard against "confusion of the issues" or "interrogation that is . . . only marginally relevant." *Delaware* v. *Van Arsdall*, 475 U.S. 673, 679 (1986). The Sixth Amendment "does not give criminal defendants carte blanche to circumvent the rules of evidence." *United States* v. *Almonte*, 956 F.2d 27, 30 (2d Cir. 1992); *see United States* v. *Pascarella*, 84 F.3d 61, 70 (2d Cir. 1996) (affirming exclusion of defense evidence that was "confusing, or of only marginal relevance").

It is fundamental that "[e]vidence which is not relevant is not admissible." Fed. R. Evid. 402. "Relevant evidence" is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Even when evidence is arguably relevant, the court may still exclude the evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403.

This Court reviews a district court's evidentiary rulings for abuse of discretion. *See United States* v. *Anglin*, 169 F.3d 154, 162 (2d Cir. 1999). It is axiomatic that "[p]articular deference is accorded to a ruling of the trial judge with respect to relevancy," because the trial judge "has a familiarity with the development of the evidence

and the jury's reaction to it which an appellate court cannot equal." *United States* v. *Southland Corp.*, 760 F.2d 1366, 1375 (2d Cir. 1985) (Friendly, J.). The same measure of deference applies to a district court's Rule 403 rulings, because it "sees the witnesses, the parties, the jurors and the attorneys, and is thus in a superior position to evaluate the likely impact of the evidence." *Liz* v. *Canarozzi*, 142 F.3d 83, 88 (2d Cir. 1998). This Court will not deem the trial judge to have abused her discretion in making an evidentiary ruling absent the conviction that the district judge acted "in an arbitrary and irrational fashion." *United States* v. *Dhinsa*, 243 F.3d 635, 649 (2d Cir. 2001); *United States* v. *Salameh*, 152 F.3d 88, 110 (2d Cir. 1998) (*per curiam*).

Finally, even if the District Court has erred in excluding evidence, this Court will disregard the error as harmless, so long as there is "fair assurance" that the jury's "judgment was not substantially swayed by the error." *Kotteakos* v. *United States*, 328 U.S. 750, 764-65 (1946). To treat an error as harmless, the Court is "not required to conclude that it could not have had any effect whatever; the error is harmless if [the Court] can conclude that that testimony was 'unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.'" *United States* v. *Rea*, 958 F.2d 1206, 1220 (2d Cir. 1992) (quoting *Yates* v. *Evatt*, 500 U.S. 391, 403 (1991)).

3. Discussion

After hearing the evidence in the case, Judge Cedarbaum correctly decided that proof of (a) whether Stewart's ImClone trade in fact violated the securities laws

and (b) whether Faneuil had heard of the misappropriation theory of insider trading was irrelevant and likely to confuse and mislead the jury.* Judge Cedarbaum also correctly decided that the Government had not violated her *in limine* ruling precluding any proof of whether Stewart's trade was in fact illegal and therefore had not opened the door to defense evidence of the trade's legality. Because Judge Cedarbaum was in the best position to determine issues of relevance, potential for confusion of the jury, and whether her own *in limine* ruling had been violated, and because her decisions cannot fairly be characterized as

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* Citing page 4738 of the trial transcript, Stewart also complains that the District Court "forbid defense counsel from arguing in closing that the 'tip' she received was not unlawful." (S.Br. 38). Stewart inaccurately describes what occurred below. Although the District Court's *in limine* ruling certainly would have precluded such an argument, Stewart's counsel did not attempt it as she claims in her papers. Rather, in his summation, Stewart's counsel erroneously and improperly sought to suggest to the jury that during the course of the Government's investigation the Government had contended that Samuel Waksal tipped Stewart. This assertion was both entirely outside the record – there was no evidence of the Government's views on that issue during its investigation of Stewart – and false. The District Court sustained the Government's objection, and directed Stewart's counsel to refrain from referring to matters that were not the subject of trial testimony. (Tr. 4737-38).

"arbitrary and irrational," Judge Cedarbaum's decisions should not be disturbed.

B. Stewart's Proffered Expert Testimony Was Irrelevant And Had The Potential To Confuse And Mislead The Jury

The District Court properly concluded that while Stewart's state of mind as to the legality of her trade may have been relevant, a law professor's opinion on the legality of Stewart's trade was not and had the potential to confuse and mislead the jury. (Tr. 1974-75, 2103, 2181-83, 2221). Significantly, neither Stewart nor Bacanovic cited a single case in which any court has approved the admission of the expert testimony of a law professor on the legality of a defendant's conduct. To the contrary, it is well established that such testimony is inadmissible, because explanations of the law are exclusively the province of the trial court. "'It is not for witnesses to instruct the jury as to applicable principles of law, but for the judge.'" *United States* v. *Scop*, 846 F.2d 135, 139 (2d Cir. 1988) (quoting *Marx & Co.* v. *Diners' Club, Inc.*, 550 F.2d 505, 510 (2d Cir. 1977)). "Generally, the use of expert testimony is not permitted if it will 'usurp either the role of the trial judge in instructing the jury as to the applicable law or the role of the jury in applying the law to the facts before it.'" *United States* v. *Duncan*, 42 F.3d 97, 101 (2d Cir. 1994) (quoting *United States* v. *Bilzerian*, 926 F.2d 1285, 1294 (2d Cir. 1991)); *see also United States* v. *Scop*, 846 F.2d at 139 (Fed. R. Evid. 704, which governs expert testimony, "was not intended to allow experts to offer opinions embodying legal conclusions").

The proposed expert testimony from the law professor violated both prohibitions. Stewart sought to have the expert invade the province of the court to instruct the jury on the law. The proposed testimony would also have invaded the province of the jury. In order to opine that Stewart's trade did not violate the insider trading laws, he would have had to testify regarding his findings of fact, such as what information was in fact provided to Stewart; whether that information was material; whether Bacanovic directed that the information be provided to Stewart; whether Bacanovic or Faneuil owed a duty to keep the information confidential; whether Bacanovic or Faneuil intentionally breached that duty; and whether Stewart understood that the information was obtained in breach of Bacanovic's or Faneuil's duties of trust and confidence. *See United States* v. *Falcone*, 257 F.3d at 230-31 (describing elements of misappropriation theory). The District Court properly rejected this effort.

In addition to invading the province of both the court and the jury, the proposed expert testimony was also irrelevant and had the potential to confuse and mislead the jury. Evidence of the state of the law is irrelevant absent proof that the defendant had actually relied on the legal materials she seeks to introduce. See *United States* v. *Powell*, 955 F.2d 1206, 1214 (9th Cir. 1992) ("Legal materials upon which the defendant does not claim to have relied . . . can be excluded as irrelevant and unnecessarily confusing because only the defendant's subjective belief is at issue: the court remains the sole source of the law."); *United States* v. *Harris*, 942 F.2d 1125, 1132 (7th Cir. 1991) ("the defendant may present evidence to the jury showing the basis for the defendant's alleged good faith

belief. Necessarily, this evidence may include expert testimony about case law, to the extent that the defendant claims actual reliance on that case law. Case law on which the defendant did not in fact rely is irrelevant because only the defendant's subjective belief is at issue."). Unless Stewart had consulted the law professor before she was interviewed by investigators in 2002, the law professor's opinion of whether her trade was legal or illegal was simply of no consequence to any fact the jury needed to decide. A law professor's opinion on whether Stewart's trade was legal could not have made it any more or less likely that Stewart lied to investigators in early 2002. As Judge Cedarbaum correctly stated below, "It matters what the defendants thought was proper or improper, not whether it in fact was." (Tr. 2103).

The proposed law professor's opinion was also irrelevant for the additional reason that even if it was accepted that Stewart's trade while in possession of information that Waksal was selling was not insider trading, it would not render her statements to investigators that she was not given that information any less false.

C. The Government Did Not Open The Door To Defense Proof Of The Legality Of Stewart's Trade

In their briefs, Stewart and Bacanovic do not lay out any theory of relevance for the proposed expert testimony. Rather, they argue that they should have been permitted to offer evidence of the legality of Stewart's trade because the Government "opened the door" by presenting evidence or arguments that Stewart's trade was illegal, (S.Br. 38), and because it was necessary to rebut the Government's

"relentless[ness] in intimating that she had committed" the crime of insider trading. (S.Br. 28-33; B.Br. 39).

Judge Cedarbaum, however, who made the *in limine* ruling and heard the Government's evidence, disagreed and correctly found that the Government had not suggested that Stewart committed the crime of insider trading and had therefore not opened the door. Rather, Judge Cedarbaum recognized that the only party relentlessly seeking to introduce the subject of insider trading was Stewart, not to rebut anything the Government was doing, but as part of a defense strategy. As Judge Cedarbaum stated in rejecting Stewart's continued efforts to inject insider trading into the case: "[T]he evidence does not make it an insider trading case, and to transform a case of lying to the government into a charge of another crime has not occurred in this trial so far, and I do not seek to permit it to do that. . . . And for us to transform this trial into the trial of a charge which is not made in the Indictment would totally mislead and confuse the jury." (Tr. 3665-66).

Stewart erroneously identifies five points at which she claims the Government opened the door and presented the illegality of Stewart's trade before the jury. Stewart first claims that the Government opened the door because "the superseding indictment contained facts, language, and legal theories that could be relevant only to insider trading." (S.Br. 29). Stewart misreads the Indictment, which contained no allegation that Stewart's trade was illegal. In any event, the allegations about which Stewart complains

(S.Br. 15), were omitted from the redacted Indictment and never seen by the jury.[*] (JA 233-74).

Stewart next claims the Government in its opening statement "put insider trading before the jury." Stewart complains that the Government stated: "This is a case . . . about cheating investors in the stock market." (S.Br. 29). This statement, however, was clearly a reference to the securities fraud charge in Count Nine, not insider trading. The Government was giving the jury a preview of the charges in the case, as is clear from the full statement: "This is a case about obstruction. It is about lying to federal agents. It is about perjury. It is about fabricating evidence, and it's about cheating investors in the stock market." (Tr. 769).

Stewart also complains that the Government stated that Stewart was given a "secret tip that no other investors had" and that investors that did not receive the secret tip lost money after ImClone announced the FDA's negative

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[*] Before trial began, the District Court had informed the defendants that "[t]he indictment cannot prejudice the defendants since the jurors will not have access to it until the end of the trial when they begin their deliberations. Any allegations that are not supported by the evidence or are unfairly prejudicial in light of the evidence will be deleted from the indictment at that time." (JA 198). And early in the trial, the Court expressly advised Stewart that if there was anything in the Indictment suggesting that she engaged in insider trading, "[t]hen I will strike it from the indictment. I will not give it to the jury." (Tr. 2104). So the Indictment could not have opened the door.

decision. (S.Br. 29). This statement too was not an assertion that Stewart's trade was illegal, nor did it open the door. In her *in limine* ruling, Judge Cedarbaum stated that the Government was free to argue and present evidence that Stewart and Bacanovic were "motivated by a fear that they would be accused of trading illegally," but could not present evidence that Stewart's trading was in fact illegal. (JA 319). Although the Government was permitted under this ruling to assert that the defendants were motivated to lie by a fear that they would be prosecuted for insider trading, the Government did not even use the words "insider trading" in its opening, to ensure that the Government came nowhere close to violating the District Court's *in limine* ruling. The Government's opening statement complied fully with that ruling, describing facts that would have motivated Stewart to conceal the truth, such as her knowledge that the tip she received was secret and that people who did not receive the tip lost money when she did not. The jury could infer from these facts that Stewart may have feared what investigators and others would have thought of her trade after receiving this secret information. The District Court repeatedly recognized that the Government's use of the term "secret tip" was both accurate and not violative of the Court's ruling, because the use of the term "secret tip" did not assert that Stewart's trading was in fact illegal. (Tr. 2104 ("A secret tip is different from insider trading"), 2182 ("A secret tip may or may not be inside information"), 4414 ("this was a secret tip even though it was not, in your view, insider trading. It does not matter whether it was insider trading. If somebody gets a secret tip, reasonable human beings may worry that it's not something they should air, that it is not something authori-

ties should know about."). Tellingly, neither defendant objected to the Government's opening. The Government's opening statement did not assert that Stewart's trade was illegal, so it did not open the door.

Stewart also complains that the Government opened the door during the testimony of Merrill Lynch's director of compliance, Luciano Moschetta. (S.Br. 30). Moschetta testified regarding, among other things, Merrill Lynch policies that Bacanovic had certified that he had read. Through this testimony, the Government established that Bacanovic was aware of Merrill Lynch's policies on keeping information about customers' transactions strictly confidential and on the prohibition on sharing material, non-public information. (Tr. 944-57, 984). The Government offered this testimony to show that Bacanovic may have been motivated to lie out of fear that his conduct violated these policies and therefore jeopardized his career. Although Moschetta read aloud portions of the policies, he did not testify that telling Stewart about Waksal's sales violated any of these policies or the law, nor did he in his direct examination apply the language of the policies to the facts of this case.

Stewart complains that Moschetta testified that information about a CEO's sale of his company's stock was material and non-public. Stewart's description of the testimony is not entirely accurate, and Stewart fails to note that the testimony of which she complains was only offered to correct a misimpression created during Stewart's cross-examination. Because only Bacanovic reviewed these policies, the District Court instructed the jury that Moschetta's testimony on Merrill Lynch's policies could

only be considered against Bacanovic and could not be used against Stewart. (Tr. 933). Nonetheless, Stewart cross-examined Moschetta on Merrill Lynch's policies, suggesting that information about Waksal's selling was not material, non-public information as those terms were defined in Merrill Lynch's policies. (Tr. 1008-09). In response to Stewart's cross-examination applying the language of the policies to the facts of the case, the Government on redirect asked Moschetta when information that an executive sold his company's stock becomes available to the public and whether such information is then published in the Wall Street Journal. (Tr. 1025-26). At no point in Moschetta's testimony did he state that Stewart or Bacanovic in fact committed insider trading.

Stewart next complains that SEC attorney Glotzer, in describing the function of the SEC, testified that the SEC "is responsible for protecting investors and maintaining the integrity of the securities markets" (Tr. 2227), and that in insider trading investigations the SEC particularly focuses on industry participants who violate the securities laws (Tr. 2229). (S.Br. 30). This testimony was relevant to establish the scope of the investigation the defendants obstructed. Glotzer did not testify that Stewart had committed insider trading.

Stewart further claims that the Government opened the door through Faneuil's testimony because when asked if he did something illegal while at Merrill Lynch, Faneuil replied that he "told one client what another client was doing and then lied about it to cover up." (S.Br. 30-31). His testimony on this point became clear at the beginning of his cross-examination, when Faneuil stated that his

crime was lying about the reasons for Stewart's ImClone sale. (Tr. 1926). Faneuil later testified that he did not think he did anything wrong when he provided information about Waksal's selling to Stewart. (Tr. 1956). Faneuil did not testify that Stewart committed the crime of insider trading.

Finally, Stewart argues that the Government opened the door in summation by arguing that the defendants concocted the $60 agreement as a cover story because "[t]hey knew it looked as bad as it in fact was." (Tr. 4505). That statement, however, is a far cry from an assertion that Stewart committed the crime of insider trading. When the Government spoke of "it" being bad, the jury plainly understood what the Government argued explicitly, that the defendants' situation was bad because if Merrill Lynch or the SEC learned that Bacanovic gave confidential information about one client's account activity to Stewart and Stewart sold stock after receiving that information, Bacanovic had reason to fear that he would lose his job and Stewart had reason to fear harm to her reputation and the possible loss of her position as CEO. The Government never asserted that Stewart committed the crime of insider trading, and again neither defendant objected to any portion of the Government's summation. Having not objected at the time, nor made any argument below that this statement entitled Stewart to offer evidence of the legality of her trade, Stewart cannot now claim that this statement opened the door or violated her rights to a fair trial.

Because Judge Cedarbaum's determinations that expert testimony on whether Stewart's trade was insider trading

was irrelevant, and was likely to confuse and mislead the jury, and that the Government had not violated her *in limine* ruling and did not open the door to such evidence, cannot be considered "arbitrary and irrational," the District Court's decisions provide no basis for reversal.

D. The District Court Did Not Err In Precluding Cross-Examination Of Faneuil Regarding The Misappropriation Theory

The defendants also argue that Judge Cedarbaum denied them a fair trial because she "prevented Stewart from cross-examining Faneuil *fully* about whether he thought he was violating the law on December 27." (S.Br. 38; B.Br. 35) (emphasis added). This argument is specious. The *only* question Judge Cedarbaum prevented Stewart from asking Faneuil while exploring whether he thought he was violating the law was whether he had heard of the misappropriation theory. (Tr. 1961-63). The objection to that single question was sustained after Stewart had already cross-examined Faneuil on (a) whether he thought he was "doing anything wrong" when he gave information about Waksal's selling to Stewart (Tr. 1956); (b) whether he believed when he gave her information about Waksal's selling that Stewart was "precluded legally from trading" (Tr. 1961-62); (c) whether he believed he had involved himself in an "illegal sale" (Tr. 1962); and (d) whether he was "deliberately attempting to assist two of [his] customers in violating the insider trading laws" (Tr. 1962). Moreover, although Judge Cedarbaum precluded the misappropriation question, Stewart was free to explore Faneuil's state of mind further if she wished without delving into the complexities of various theories of insider

trading. Given this record, it simply cannot be said that Stewart was precluded from cross-examining Faneuil fully about whether he was violating the law on December 27.

Nor can it be said that Judge Cedarbaum abused her discretion when she concluded that while Faneuil's belief on December 27 as to whether he had violated the law was of some relevance, the specific legal theory underpinning Faneuil's belief was not. (Tr. 1975). Whether Faneuil had analyzed the question of whether he was doing something wrong on December 27 by considering the misappropriation theory, the classical theory, or no legal theory at all, had absolutely no bearing on the issue before the jury of whether Martha Stewart and Peter Bacanovic lied to investigators to conceal that she had been provided information about Waksal's selling.

E. The District Court Did Not Err In Precluding Cross-Examination Of Faneuil On His Use Of Marijuana In Jamaica, And Properly Excluded DeLuca's Testimony As Hearsay

Bacanovic raises two additional evidentiary claims: (1) the District Court should have permitted him to cross-examine Faneuil on his use of marijuana in Jamaica after he had signed his cooperation agreement, and (2) DeLuca should have been permitted to testify about a conversation with Faneuil concerning tax loss selling that she claimed occurred in early February 2002 (but which Faneuil testified happened in early January 2002). Both claims are without merit.

Faneuil was cross-examined over the course of three days for more than nine hours. (JA 1731). The District Court permitted a wide-ranging inquiry into Faneuil's credibility. Despite the relentless cross-examination, Bacanovic argues that it was "constitutional error" for the District Court to preclude cross-examination on Faneuil's use of marijuana during a short vacation to Jamaica in April 2003. (B.Br. 41).* Bacanovic claims that this would have provided additional evidence that Faneuil wished to curry favor with the Government to avoid having his cooperation agreement terminated. (B.Br. 36).

The District Court considered this argument at trial, and permitted the defendants to examine Faneuil about his prior drug use, including his use of marijuana in Jamaica, outside the presence of the jury to provide them with an opportunity to show a connection between Faneuil's prior drug use and his credibility. (Tr. 1518-36). With respect to his marijuana use in Jamaica, Faneuil testified that he "did not believe [he] was violating [his] cooperation agreement by smoking marijuana in Jamaica" because he had "assumed it was legal in Jamaica." (Tr. 1532-33). After Faneuil's testimony, the District Court inquired whether the Government or defense counsel knew if marijuana use was illegal in Jamaica, and none of the parties knew at the time. (Tr. 1540-41).

The Government opposed cross-examination on this topic on the ground that it did not view using marijuana in

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* The Government notified the Court and defense counsel of Faneuil's marijuana use in Jamaica in a letter dated January 26, 2004. (GA 33).

Jamaica as a breach of the cooperation agreement (Tr. 1540 ("The United States has never taken the position that drug use outside of our territorial limits constitutes a breach of the cooperation agreement.")), and there was no evidence that Faneuil believed that it was (Tr. 1542-44). Defense counsel argued that Faneuil's use of marijuana in Jamaica was "in violation of the plea agreement, I would argue to the jury, and I think properly, and the government has refused to do anything about that." (Tr. 1539-40). The District Court precluded cross-examination on this topic, pursuant to Fed. R. Evid. 403, because it "is really an attack on the motive of the government." (Tr. 1638).

The District Court acted well within its discretion. The probative value of this evidence was significantly outweighed by the risk of confusing and misleading the jury. The legal status of marijuana use in a foreign country is often not obvious to someone who does not reside in that country (as evidenced by the fact that none of the attorneys involved in this case, nor the District Court, knew whether it was legal in Jamaica), and there was nothing to suggest that Faneuil's belief that it was legal in Jamaica was not in good faith. The Government represented at trial (and continues to represent) that it does not view personal use of marijuana outside the jurisdiction of the United States as a breach of the terms of a cooperation agreement.

Permitting cross-examination of Faneuil on his marijuana use in Jamaica would have required exploration of all of these areas, creating a distracting sideshow about a wholly collateral matter. As the District Court noted, "[w]e are not going to have a minitrial on whether this is legal or illegal in Jamaica, and if it is illegal in Jamaica, whether it

could be prosecuted here or would be prosecuted here." (Tr. 1614). Indeed, because Faneuil's marijuana use in Jamaica is a quintessentially collateral matter, the defendants would have been barred even from introducing extrinsic evidence of its illegality to impeach Faneuil. *See United States* v. *Purdy*, 144 F.3d 241, 245-46 (2d Cir. 1998) ("Extrinsic evidence offered for impeachment on a collateral issue is properly excluded.").

At the same time, the evidence was clearly cumulative of the extensive impeachment evidence that the District Court permitted the defendants to elicit at trial. The District Court afforded the defense great latitude in cross-examining Faneuil on his possible bias in favor of the Government and incentives to implicate Bacanovic and Stewart. For example, defense counsel questioned Faneuil at length about his use of drugs since college. (Tr. 1690-93). Over the Government's objection, the District Court expressly allowed this line of cross-examination under the theory that Faneuil's personal drug use gave him an additional motive to "curry favor with the government" and thereby avoid prosecution for his prior drug use. (Tr. 1638); *see United States* v. *Atherton*, 936 F.2d 728, 733 (2d Cir. 1991). Counsel for both defendants pursued this line of questioning aggressively (Tr. 1690-95, 2026-27, 2041-42), eliciting testimony from Faneuil that he believed that his cooperation agreement, in effect, protected him from prosecution for his prior drug use and that "[he] think[s] it is fair to say [he] would be surprised if [the Government] prosecuted [him] for [his] historical drug use." (Tr. 2041).

Defense counsel were equally aggressive in cross-examining Faneuil on other possible sources of bias. The defendants extensively cross-examined Faneuil on the terms of his cooperation agreement, which "washed aside" all of his felonies in the words of defense counsel (Tr. 2041) and "bound" him to the Government (Tr. 1668-69, 1708-12, 1716-18), and argued that it gave him a clear motive to lie about Stewart and Bacanovic. (Tr. 1704-18, 1992-94, 2038-42). In addition, counsel focused on Faneuil's alleged obsession with and dislike for Stewart (Tr. 1857-84, 1915-16), his false statements to investigators in January and March 2002 (Tr. 1707-08, 1721-23), and prior inconsistent statements (Tr. 1698-1701, 1886-1906), all of which Bacanovic argued proved Faneuil's bias and general lack of credibility. (Tr. 4614-30).

The scope and extent of cross-examination is within the sound discretion of the trial judge, *United States* v. *Lawes*, 292 F.3d 123, 131 (2d Cir. 2002), and Bacanovic fails to explain how the District Court abused its discretion in precluding evidence of marginal relevance that was, at best, entirely cumulative.

Bacanovic further argues that the District Court made a "fundamental error" in excluding DeLuca's testimony about a conversation she allegedly had with Faneuil in early February 2002. (B.Br. 41). Faneuil testified that in early January 2002 DeLuca called him to talk about the ImClone trade. (Tr. 1585-86). DeLuca asked Faneuil "[w]hat the hell is going on with this ImClone trade," and told Faneuil that it had "screw[ed] up" Stewart's year-end tax loss selling plan. (Tr. 1586). Neither defendant ob-

jected to any of this testimony. Similarly, neither defendant cross-examined Faneuil on this testimony.

According to Bacanovic, DeLuca would have testified that "she did not discuss with Faneuil her anger over the ImClone gain until February 2002." (B.Br. 36-37). Unmentioned by Bacanovic in his brief, however, is the fact that the District Court *did* allow DeLuca to testify that the tax loss selling conversation with Faneuil happened in February 2002, not January 2002 as Faneuil had testified. This is precisely the testimony that Bacanovic claims he was not permitted to elicit from DeLuca. The District Court precluded DeLuca from testifying only about the substance of the conversation, but not that the tax loss selling conversation happened in February. (Tr. 3886-88, 3891-92).

DeLuca testified that: (a) she did not say to Faneuil during the January 2002 conversation, contrary to his testimony, that the ImClone sale "screws up [Stewart's] tax loss selling plan" (Tr. 1586), nor did she mention tax loss selling at all (Tr. 3848-49, 3987-88); (b) she would not have been concerned about the gains to the account in early January 2002, because at the time she was under the mistaken belief that the gains were to be allocated prospectively to the 2002, not the 2001, tax year (Tr. 3847-52); (c) the January 2002 conversation "was a pretty normal conversation" (Tr. 3988),[*] in contrast to Faneuil's testimony that she asked "[w]hat the hell is going on with

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[*] Although the Government moved to strike this testimony, the District Court did not strike it from the record. (Tr. 3988).

this ImClone trade?" (Tr. 1586); (d) she first learned in early February 2002 that the ImClone gains should have been allocated to the 2001 tax year and that her prior understanding that the gains were to be allocated to 2002 was in error (Tr. 3853-56); and (e) shortly after learning of the error, she called Faneuil at Merrill Lynch (Tr. 3856).

This testimony was offered to accomplish exactly what Bacanovic claims he was prevented from doing at trial – to impeach Faneuil's recollection of the January 2002 conversation and instead place the conversation in February 2002. Indeed, defense counsel relied on DeLuca's testimony to argue to the jury that Faneuil was wrong, and DeLuca was right, about the date of the conversation concerning the effect of the gains on the tax loss selling plan and that it in fact occurred in February 2002. (Tr. 4716-17).

Stewart's counsel argued in summation that DeLuca's testimony and supporting documents undermined Faneuil's testimony that DeLuca complained in early January about the gains in the account and its effect on the 2001 tax loss selling. (Tr. 4716). Based on DeLuca's testimony, Stewart's counsel argued that February 2002 was "when [DeLuca] call[ed] Doug Faneuil and yell[ed] at him and sa[id], you screwed us up." (Tr. 4716; 4717 ("Well, we know the sequence [of the conversations]. From the Heidi DeLuca statements you know the sequence could not have happened [the] way [Faneuil testified it did], could not have happened that way.")). Stewart's counsel characterized DeLuca's testimony on the sequence of the conversations with Faneuil as "the final nail in that particular part of Douglas Faneuil's recollection." (Tr.

4717). Bacanovic's counsel made essentially the identical argument to the jury (Tr. 4579-81), relying on DeLuca's testimony to claim "[i]t was later, later, in early February [2002], when [DeLuca] got the 1099 [which showed that the gains from the ImClone sale were allocated to the 2002 tax year], that she saw it was a problem and then had a conversation with Mr. Faneuil about it." (Tr. 4580)

The foregoing recitation of DeLuca's testimony and defense counsel's arguments based on that testimony demonstrates that Bacanovic's appellate claim – that he was somehow prejudiced by the District Court's ruling that he could not elicit from DeLuca the substance of the conversation with Faneuil in February – is frivolous. Bacanovic was not hampered in the least by the District Court's ruling.

Bacanovic's claim is also disingenuous. Although he now maintains that he did not seek to offer the substance of DeLuca's conversation with Faneuil in February 2002 for its truth, "i.e., whether in fact DeLuca was upset that the sale resulted in a gain" (B. Br. 41), he conceded below that the substance of the conversation was hearsay, but argued that it was admissible to impeach Faneuil (Tr. 3887-88). Bacanovic and the District Court had it right below: the proposed testimony was hearsay. Accordingly, the District Court correctly precluded it.

F. Any Error Was Harmless

Finally, even if any of these evidentiary rulings could be deemed error, they were harmless. Although the District Court precluded the testimony of the law professor and the testimony of Faneuil on whether he had heard of

the misappropriation theory, Stewart, over the Government's objection, in fact was able to offer significant evidence of facts that could only have been relevant to whether Stewart's sale of ImClone in fact violated the insider trading laws. Stewart offered evidence to suggest that the information Stewart received about Waksal selling ImClone stock was not material, such as evidence that: (a) Waksal had sold ImClone shares before (by participating in a tender offer) (Tr. 897-98); (b) the shares Waksal sought to sell from his Merrill Lynch were a small percentage of the total amount of shares he owned (Tr. 900, 2448-51); (c) all sales by corporate executives are not viewed negatively by the public (Tr. 3026, 3268); and (d) there are many reasons why executives sell their company's stock that have nothing to do with the health of the business (Tr. 3026, 3268). Given the amount of evidence Stewart was able to introduce on the materiality of the information that Waksal was selling, testimony on the ultimate issue of whether Stewart's trade after receiving this information was illegal and on whether Faneuil had heard of the misappropriation theory was "unimportant in relation to everything else the jury considered on the issue," and therefore the preclusion of that evidence was harmless. *See Rea*, 958 F.2d at 1220.

With respect to Bacanovic's claims concerning Faneuil's marijuana use in Jamaica and the purported preclusion of DeLuca's testimony about the February 2002 conversation, any error was harmless in light of the cumulative nature of the drug and other impeachment evidence, and the fact that DeLuca was able to testify that her conversation with Faneuil regarding tax loss selling happened in February 2002.

The evidentiary rulings of which Stewart and Bacanovic complain must also be deemed harmless because, as Judge Cedarbaum recognized, "overwhelming . . . evidence supports the verdict." (JA 1723, 1755-57). With respect to the counts of conviction pertaining to the defendants' false statements regarding Stewart being provided information about Waksal's selling, the jury was able to consider, among other things, Faneuil's testimony that he provided this information to Stewart at Bacanovic's direction and that Bacanovic pressured him to lie to investigators about Stewart's sale, telling Faneuil that he and Stewart were "on the same page" and "telling the same story." (Tr. 1645-46). In assessing Faneuil's credibility, the jury was able to consider that there was no logical reason for Faneuil to confess in June 2002 that he had lied to federal investigators and provided information about Waksal's selling to Stewart – admissions that would lead to a criminal conviction, the loss of his job, and a lifetime ban from the securities industry – other than the reason he gave, that there simply "came a point in time where [he] just couldn't continue to lie." (Tr. 1649). The jury learned that Faneuil had no reason to fear that anyone from law enforcement wished to re-interview him or was questioning the statements he had given, and so had no conceivable motive to falsely implicate himself, Stewart and Bacanovic. The only reason Faneuil imperiled himself by revealing what actually happened on December 27 and during the investigation was that it was the truth.

Although the circumstances of Faneuil's confessions gave great weight to his testimony, the Government's case went far beyond Faneuil. The jury also considered phone records showing that Bacanovic left his message for

Stewart only minutes after learning the Waksals were selling; the testimony of Ann Armstrong that Bacanovic's message for Stewart after learning the Waksals were selling was that he "thinks ImClone is going to start trading downward," coupled with Bacanovic's false testimony regarding the content of that message; the email from Bacanovic to Faneuil on the afternoon of December 27 asking if ImClone had released any news yet, coupled with Bacanovic's false testimony indicating that he was surprised to learn that ImClone had released negative news; the testimony of Emily Perrett and the phone records establishing that after hearing the information from Faneuil about Waksal's selling, Stewart immediately called Waksal's office demanding to know what was going on with ImClone; the phone records of Tom Reese, proving that Faneuil called Bacanovic from Reese's cell phone from the office of Merrill Lynch, corroborating Faneuil's testimony that he used a cell phone because he feared that his conspiratorial conversations with Bacanovic about the SEC's inquiry would be recorded; the testimony of Faneuil and his lawyer Jeremiah Gutman that Faneuil retained counsel because he had lied to the SEC about Stewart's trade; the email evidence showing that Stewart retained counsel on "ImClone issues" days before anyone asked to speak with her; and evidence that, four days before meeting with investigators, Stewart temporarily altered Bacanovic's phone message from "Peter Bacanovic thinks ImClone is going to start trading downward" to "Peter Bacanovic re imclone," and then lied about whether there was a record of that message. In considering the charges that Stewart lied about being provided information about Waksal's selling, the jury was

also able to consider the testimony of Mariana Pasternak that Stewart told her she was provided that information. The evidence on these counts was so overwhelming that Stewart's counsel in summation acknowledged for the first time that, just as Faneuil testified, Stewart learned of the Waksal sales from Faneuil prior to selling her ImClone stock on December 27, 2001. (Tr. 4728, 4762).

With respect to the convictions on counts pertaining to the defendants' false statements about the message Bacanovic left for Stewart on December 27, 2001, the jury was able to consider, among other things, the testimony of Ann Armstrong about the message Bacanovic really left for Stewart and about Stewart's alteration of that phone message. With respect to the convictions on counts pertaining to the defendants' communications about the investigation, the jury was able to consider, among other things, Faneuil's testimony that Bacanovic expressly told him that he communicated with Stewart about the investigation, and the evidence that just before Bacanovic told Faneuil that, Bacanovic had asked to meet with Stewart alone and had met with her alone.

Because of the minimal value of the precluded evidence and the overwhelming proof of the defendants' guilt, there is adequate assurance that the jury's inability to hear Stewart's expert opinion on the legality of her trade; whether Faneuil had heard of the misappropriation theory; whether Faneuil used marijuana in Jamaica; and DeLuca's testimony about what Faneuil said in their February 2002 conversation "did not substantially influence the jury," and "was 'unimportant in relation to everything else the jury considered on the issue in question, as revealed in the

record.'" *United States* v. *Rea*, 958 F.2d at 1220. Thus, any error in precluding that evidence was harmless, and the defendants' convictions should be affirmed.

POINT II

The District Court Properly Instructed The Jury

Stewart and Bacanovic further contend that they were denied a fair trial because the District Court did not instruct the jury that the defendants were not charged with insider trading and that the jury "may not conclude that the government should have charged Ms. Stewart with Insider Trading and convict her of anything else in place of a charge that was not filed by the government and charged by the grand jury because it appeals to your sense of fairness and justice or what have you." (JA 334; S.Br. 28-37; B.Br. 35, 39). Although Stewart makes the District Court's failure to give this instruction the centerpiece of her appeal, in fact after including this proposed instruction as Request Number 17 in her Requests to Charge at the beginning of the case, Stewart never mentioned it again. Stewart did not refer to this proposed instruction at the charge conference, nor did she object to its omission from Judge Cedarbaum's draft charge or her ultimate charge to the jury. Bacanovic never requested this instruction. Having made the tactical decision below that by the end of the case this instruction was unnecessary or even harmful to their interests, Stewart and Bacanovic cannot now complain that they were denied a fair trial by its omission.

In any event, it was well within the District Court's discretion to decline to give this instruction to the jury.

The jury was properly instructed on the elements of the offenses with which they were charged. There is no basis for concluding that the proposed instruction was necessary to ensure that the jurors would not violate their oaths, ignore the court's instructions, and convict the defendants because of a belief that they committed the uncharged crime of insider trading.

A. Relevant Facts

At the beginning of the trial, on January 30, 2004, Stewart submitted her Requests to Charge, which included 21 proposed instructions. Request Number 17 asked that the District Court instruct the jury as follows:

> Neither Martha Stewart nor Peter Bacanovic has been charged with Insider Trading in this case. Your deliberations are limited to the facts that have been proved in court during the course of this trial. Thus, you may only consider that which was presented in court in relation to the charges in the Indictment.
>
> You may consider Insider Trading only insofar as it pertains to motive for the obstruction charge. The government contends that information about the Waksal sales was believed by Ms. Stewart to constitute inside information. Ms. Stewart vigorously denies that she so believed or that it was her intention to violate the law by trading on this type of information. You may not, and I caution you strongly against this, you may

> not conclude that the government should have charged Ms. Stewart with Insider Trading and convict her of anything else in place of a charge that was not filed by the government and charged by the grand jury because it appeals to your sense of fairness or justice or what have you. You may not convict Martha Stewart unless there is sufficient evidence independent of Insider Trading to support a conviction on the charge in question.

(JA 334). Bacanovic did not include this or a similar instruction in his Requests to Charge, and neither party requested this instruction during the trial.

After the close of evidence, the District Court distributed a draft jury charge that did not include this instruction. At the beginning of the charge conference, Judge Cedarbaum stated: "I have reviewed everybody's requests, and I have, although with my own language, covered most everything that has been requested. So, if we focus on the language of the charge, I will hear any request or objection." (Tr. 4231).

At no point during the charge conference did Stewart object to the District Court's failure to include her proposed instruction on the fact that insider trading was not charged, nor did Stewart at the charge conference request that her insider trading instruction be given, make any argument as to why such an instruction was necessary, or refer in any way to the District Court's omission of her proposed insider trading instruction. (Tr. 4231-4387).

After Judge Cedarbaum and the parties completed their discussion of the jury charge, there was a discussion of the anticipated length of summations and what the lawyers could and could not argue. (Tr. 4389-4436). Although there was lengthy debate on what the Government could argue were the defendants' motives and whether the Government would be allowed to argue that the defendants feared that others might believe Stewart's ImClone trade was insider trading,* Stewart did not ask the District Court to instruct the jury that insider trading was not charged, nor did Stewart object to the omission of Stewart's proposed insider trading objection. (Tr. 4404-28).

Although the District Court did not include the instruction Stewart requested, the Court's charge identified the specific charges against each defendant and properly instructed the jury on exactly what elements it must find in order to convict each defendant on each count (Tr. 4851-77), that the jury's verdict must be not guilty if the Government fails to prove each of those elements beyond a reasonable doubt (Tr. 4886-87), and that its verdict must only be a product of the application of the Court's instructions to the evidence: "Your function is to weigh the evidence in the case and to reach a verdict based solely upon the evidence and the instructions that I have and will give you." (Tr. 4886). The District Court further instructed the jury as follows:

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* Pursuant to Stewart's urging, the District Court ruled that the Government could not use the words "insider trading" in summation. (Tr. 4412, 4414).

> It is your duty to accept these instructions and apply them to the facts as you determine them. The result will be the verdict. . . . It is not your function to consider the wisdom of any rule that I state. Regardless of any opinion that you may have as to what the law is or what the law ought to be, it would violate your sworn duty to base a verdict upon any other view of the law than that which I give you.

(Tr. 4848-49).

After the District Court completed the charge, Stewart asked if there would be an opportunity to take exceptions to the charge. (Tr. 4890). The District Court responded that the objections raised at the charge conference were preserved. (Tr. 4890-91). Neither defendant raised any objection to the District Court's omission of Stewart's requested insider trading instruction from the charge.

B. Applicable Legal Principles

An appellant challenging a jury instruction faces a heavy burden; he or she must establish both that the defense requested a charge that "accurately represented the law in every respect and that, viewing as a whole the charge actually given, he was prejudiced." *United States* v. *Smith*, 198 F.3d 377, 386 (2d Cir. 1999). This Court has stated that it "will not find reversible error unless a charge either failed to inform the jury adequately of the law or misled the jury as to the correct legal rule." *United States* v. *Alfisi*, 308 F.3d 144, 148 (2d Cir. 2002). In reviewing jury instructions, the Court does not look only to particular

words or phrases, but must "examine the entire charge to see if the instructions as a whole correctly comported with the law." *United States* v. *Jones*, 30 F.3d 276, 283 (2d Cir. 1994) (citing *California* v. *Brown*, 479 U.S. 538, 541 (1987)).

A defendant is not entitled to "have the exact language he proposes read to the jury;" rather, the trial court has substantial discretion to fashion the language of jury instructions, so long as it is fair to both sides and adequately states the law. *United States* v. *Russo*, 74 F.3d 1383, 1393 (2d Cir. 1996); *see also United States* v. *Han*, 230 F.3d 560, 565 (2d Cir. 2000); *United States* v. *Alkins*, 925 F.2d 541, 550 (2d Cir. 1991).

"'A conviction will not be overturned for refusal to give a requested charge . . . unless that [requested] instruction is legally correct, represents a theory of defense with basis in the record that would lead to acquittal, and the theory is not effectively presented elsewhere in the charge.'" *United States* v. *Holland*, 381 F.3d 80, 83 (2d Cir. 2004) (quoting *United States* v. *Han*, 230 F.3d at 565). "'[I]f the substance of a defendant's request is given by the court in its own language, the defendant has no cause to complain.'" *Han*, 230 F.3d at 565 (quoting *United States* v. *Taylor*, 562 F.2d 1345, 1364 (2d Cir. 1977)).

Even if there is error in the giving of a particular charge and an objection is interposed below, reversal is not warranted if the error was harmless. *United States* v. *Amuso*, 21 F.3d 1251, 1260-61 (2d Cir. 1994). A heightened standard applies where the defendant fails to object to a proposed charge in the district court. Pursuant to Rule 30 of the Federal Rules of Criminal Procedure, a defen-

dant seeking to challenge any portion of a district court's instructions to the jury is required to state his objection with sufficient precision and particularity before the jury retires to deliberate.* *See*, *e.g.*, *United States* v. *Locascio*, 6 F.3d 924, 942 (2d Cir. 1993); *United States* v. *Pimental*, 979 F.2d 282, 287 (2d Cir. 1992). The objection must direct the trial court's attention "to the precise contention [concerning the charge] now being urged upon appeal." *United States* v. *Lanza*, 790 F.2d 1015, 1021 (2d Cir. 1986). It is well established that "a defendant's 'requested instructions do not substitute for specific objections to the court's instructions.'" *United States* v. *Locascio*, 6 F.3d at 942 (quoting *United States* v. *Tannenbaum*, 934 F.2d 8, 14 (2d Cir. 1991)); *see also United States* v. *Birbal*, 62 F.3d 456, 459 (2d Cir. 1995).

Where, as here, a defendant fails to object below, Rule 52(b) provides that this Court may review the charge only for "plain error." *See* Fed. R. Crim. P. 52(b). Plain error "is a 'very stringent' standard requiring a 'serious injustice' or a conviction in 'a manner inconsistent with fairness and integrity of judicial proceedings.'" *United*

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* Rule 30 provides in pertinent part:

> No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which that party objects and the grounds of the objection.

States v. *Walsh*, 194 F.3d 37, 53 (2d Cir. 1999) (quoting *United States* v. *Ramirez*, 973 F.2d 102, 105 (2d Cir. 1992)). This Court has held that "the plain error doctrine is to be used sparingly," *United States* v. *Torres*, 901 F.2d 205, 228 (2d Cir. 1990), and that to warrant reversal, the claimed error must go the "very essence of the case." *United States* v. *Calfon*, 607 F.2d 29, 31 (2d Cir. 1979) (internal quotation marks omitted); *United States* v. *Smith*, 918 F.2d 1032, 1038 (2d Cir. 1990). "A 'plain' error is 'an error so egregious and obvious as to make the trial judge and prosecutor derelict in permitting it, despite the defendant's failure to object." *United States* v. *Gore*, 154 F.3d 34, 43 (2d Cir. 1998). "To establish plain error, a court must find 1) an error, 2) that is plain, 3) that affects substantial rights." *United States* v. *Keigue*, 318 F.3d 437, 441 (2d Cir. 2003) (citations and internal quotation marks omitted); *accord United States* v. *Olano*, 507 U.S. 725, 732-37 (1993). If an error meets all three initial requirements, then the appellate court may exercise its discretion to notice a waived error, but only if the alleged error "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Keigue*, 318 F.3d at 445 (citations and internal quotation marks omitted); *accord United States* v. *Cotton*, 535 U.S. 625, 632-33 (2002). Under the plain error standard, "[i]t is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." *United States* v. *Olano*, 507 U.S. at 734.

Relief is discretionary even where plain error affecting substantial rights has been established, *see id*. at 735 ("Rule 52(b) is permissive, not mandatory"), and appellate courts should exercise such discretion only "'in those

circumstances in which a miscarriage of justice would otherwise result,'" *id*. at 736.

C. Discussion

The defendants' suggestion that they were denied a fair trial because the District Court failed to give Stewart's proposed insider trading instruction is baseless. Contrary to the impression she creates in her brief on appeal, Stewart made her request for a limiting instruction only once, in her Requests to Charge.[*] Stewart never requested the limiting instruction during the trial, presumably concluding that the proposed instruction, which explicitly refers to insider trading and implicitly suggests that some may consider Stewart's trade to have been criminal, was unnecessary and contrary to Stewart's interests, given that the Government never argued or presented evidence that Stewart was motivated to lie by a fear of being prosecuted for insider trading and that the District Court had precluded the Government from even using the term "insider trading" during summation. Accordingly, her claim of error is reviewed not *de novo*, as she suggests (S.Br. 33),

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[*] Stewart pretends to have requested a limiting instruction during the trial by stating that the District Court gave reasons for not giving the instruction during the trial. (S.Br. 35-36). Stewart mischaracterizes the record. The discussions she cites are instances in which the District Court affirmed its reasons for precluding *evidence* that Stewart had not committed insider trading. The District Court never gave reasons for not giving a limiting instruction because it was never asked to give one, during trial or during the charge conference.

but for plain error. *See Locascio*, 6 F.3d at 942 (requesting instruction does not preserve objection to instructions for *de novo* review).

The District Court's decision not to include Stewart's proposed insider trading instruction was correct and certainly not plain error. The record clearly demonstrates that the instruction was both inaccurate and unnecessary. It was inaccurate in that it stated that "[t]he government contends that information about the Waksal sales was believed by Ms. Stewart to constitute inside information." (JA 334). The Government made no such argument, nor did it need to. The Government simply argued to the jury that Stewart felt there was something about her trade that she needed to conceal. The Government did not assert, nor did it have any burden to assert, that Stewart believed that information about the Waksal sales was "inside information."

Stewart's proposed instruction was also unnecessary because the substance of Stewart's proposed instruction – that the jury should only convict Stewart if the Government sustains its burden of proof on the elements of the crimes she was charged with and not because the jury thinks Stewart engaged in insider trading – was included in Judge Cedarbaum's instructions that the jury should only convict a defendant of a count if it finds that the Government has proved the elements; that the jury's verdict can only be based on an application of the Court's instructions to the facts; and that the jury must put aside any opinion as to what the law is or what the law ought to be. It is well established that "juries are presumed to follow their instructions." *Zafiro* v. *United States*, 506

U.S. 534, 540 (1993). No juror who followed Judge Cedarbaum's instructions could have been confused as to whether the defendants were charged with insider trading or whether he or she was permitted to convict the defendants because he or she believed the defendants should have been charged with insider trading or for any reason other than a finding that the Government proved each of the elements of the offense beyond a reasonable doubt.[*]

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[*] As support for her claim that the proposed insider trading instruction was necessary, Stewart cites to statements made by juror Chappell Hartridge which Stewart contends show that Hartridge "appeared to have believed that he voted to convict Stewart for insider trading." (S.Br. 37 n.13). As an initial matter, as discussed *infra* at 181-189, Stewart's reliance on off-the-cuff remarks by a juror after the verdict to impeach the jury's verdict violates Fed. R. Evid. 606(b). In any event, Stewart quotes Hartridge out of context. The complete text of Hartridge's statements after the verdict demonstrates that he was not confused about the charges of conviction. Hartridge stated: "I guess the cover-up began when Merrill Lynch started to do their internal investigation and Peter realized that oh, boy I better start covering things up. And then when Doug kept questioning him about what they did, it was don't worry about it, we're all on the same page, Martha and I we're all on the same page. So this is the story, it was a tax loss. That was around the beginning of it. . . ." (GA 29). And, when asked what he thought was the worst thing Stewart did, Hartridge responded in a way that made clear that he understood the charges were lying to investigators and not insider trading:

Stewart fails to cite a single case suggesting that it is reversible error for a trial court not to instruct the jury as

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> If she probably would have been straightforward with her answers when she had the meeting with the SEC she might not have been convicted. She should have just said, "I wasn't sure I was breaking a rule, I was on vacation, my mind was on other things, I didn't think straight," then maybe it would have been different. But she started to tell things, she concealed certain pieces of information, and she just carried it all the way through maybe thinking that she was untouchable.

Similarly, when asked by a reporter what he would say to Stewart if he had the opportunity, Hartridge answered: "If she just would have told the truth during her interview with the SEC she probably wouldn't be in the situation she's in now." (GA 26).

Although Stewart correctly notes that Hartridge said that the verdict may make investors "a little more comfortable that they can invest in the market," Stewart failed to disclose that he made this statement only in response to the question, "what message does this send to investors?" (GA 29). When later asked about this statement, Hartridge stated that any message sent by the verdict did not "affect us in our decision. So it didn't matter who the defendants were in this case, whether it was Martha Stewart or John Doe. We just listened to the evidence and made our decision based on that." (GA 25).

to what crimes the defendants are not charged with. There is no reason to believe such an instruction was required here. Contrary to the defendants' claim, the Government did not argue to the jury or present any evidence that Stewart in fact committed insider trading. It was Stewart, not the Government, who again and again attempted to bring the issue of whether she had committed insider trading before the jury. *See supra* at 44-50.

Even if the defendants were able to establish that Judge Cedarbaum had erred in not including Stewart's requested insider trading instruction, they certainly cannot show that such error was plain error or even that it was not harmless. "Failure to give limiting instructions is generally held not to be plain error." *United States* v. *Bermudez*, 526 F.2d 89, 97 (2d Cir. 1975); *see also United States* v. *Zagari*, 111 F.3d 307, 318 (2d Cir. 1997) (failure to give limiting instruction on the purpose for which evidence was admitted deemed harmless error); *United States* v. *Jones*, 958 F.2d 520, 521 (2d Cir. 1992) (failure to give limiting instruction on the purpose for which evidence was admitted deemed not plain error); *United States* v. *Pittman*, No. 03-1812, __ F.3d __, 2004 WL 2567901, at *3 (7th Cir. Nov. 12, 2004) (failure to give defense requested limiting instruction with respect to evidence of prior drug dealing admitted under Fed. R. Evid. 404(b) deemed harmless error)*; United States* v. *Brothers*, 955 F.2d 493, 496 (7th Cir. 1992) (failure to give limiting instruction with respect to evidence admitted under Fed. R. Evid. 404(b) to show motive and intent deemed not plain error). As discussed, the jury was instructed that they could only convict the defendants if they found each element of the offense they were considering beyond a reasonable doubt, so there was

no danger that they would convict the defendants for any reason other than that the Government had satisfied its burden of proof.

The defendants also cannot show any prejudice from the omission of Stewart's proposed instruction, because the instruction could not possibly have altered the verdict. Stewart's argument as to why the instruction was necessary suffers from a fatal flaw in logic. The premise of Stewart's argument is that an instruction was necessary to ensure that the jury did not convict the defendants because the jury concluded that she committed the uncharged crime of insider trading. The only evidence, however, that could possibly have raised any questions in any juror's mind about the propriety of Stewart's trade was the evidence that Faneuil told her that Waksal was selling. A juror could therefore only have reached the belief that Stewart's trade was improper if the juror first found that Faneuil had in fact provided information to Stewart about Waksal's selling. If the juror reached the conclusion that Faneuil gave Stewart information about Waksal's selling, that same finding would have led to the finding that Stewart also lied about being provided that information and would have resulted in her conviction on the merits. Since the jury could only have reasonably concluded that Stewart committed insider trading if they also concluded that she lied to investigators, there could be no possible prejudice from the District Court's failure to give her requested instruction.

Finally, the jury's verdict, which acquitted each of the defendants of certain counts, shows that this was not a jury overtaken with emotion and prejudice by Stewart's trade

such that it would render a guilty verdict even if it believed that the Government failed to sustain its burden of proof. *See United States* v. *Diaz*, 922 F.2d 998, 1007 (2d Cir. 1990) (acquittal on one count shows that jury did not misuse evidence and therefore there was no harm from failure to give limiting instruction); *United States* v. *Casamento*, 887 F.2d 1141, 1153 (2d Cir. 1989) (verdicts of acquittal on certain counts show no significant spillover effect occurred).

Because the defendants made the tactical decision not to request Stewart's proposed insider trading instruction at any time after including it in Stewart's Requests to Charge at the beginning of the case, because the substance of the instruction was nonetheless included in the District Court's charge, and because the absence of the requested instruction did not prejudice the defendants, the defendants have failed to sustain their burden of showing that omission of the instruction was plain error and resulted in a "miscarriage of justice," as required to justify reversal on this ground.

POINT III

The Admission Of Each Defendant's Statements To Investigators Against The Other Did Not Violate The Confrontation Clause

Each defendant argues that the admission of statements made by the other to investigators violated his or her Sixth Amendment right to confront his or her accusers, as recently articulated by the Supreme Court in *Crawford* v. *Washington*, 124 S. Ct. 1354 (2004). The defendants focus

on the language of *Crawford* that the introduction of "testimonial" hearsay statements violates a defendant's Sixth Amendment rights, and rely upon the fact that the statements were made by the defendants to investigators and, in Bacanovic's case, under oath. The defendants' argument fails, however, because it ignores that the Supreme Court in *Crawford* clearly stated that the introduction of statements by a defendant's co-conspirator in furtherance of the conspiracy, which are not hearsay, does not violate the Confrontation Clause. The Supreme Court has long recognized that a co-conspirator is not an "accuser" and so the defendant's Sixth Amendment rights are not implicated. It is undisputed that the statements about which the defendants now complain were all nonhearsay co-conspirator statements made in furtherance of the charged conspiracy.

Because the statements of both defendants were admitted on grounds and for purposes entirely consistent with the requirements of the Constitution and the Federal Rules of Evidence, the District Court did not commit error in admitting these statements, much less the plain error that the defendants must show where, as here, they failed to raise at trial a Confrontation Clause objection to any of the statements.

A. The Confrontation Clause Does Not Apply To Co-Conspirator Statements And Other Nonhearsay

Because each defendant's statements to investigators were introduced against the other defendant as nonhearsay co-conspirator statements in furtherance of the charged conspiracy, the defendants' Sixth Amendment rights to

confront their accusers were not violated. Hearsay is "evidence of a declarant's out-of-court statement to prove the truth of what is asserted in the statement." *United States* v. *Reyes*, 18 F.3d 65, 69 (2d Cir. 1994); *see* Fed. R. Evid. 801(c). Conversely, evidence of a statement that is offered to prove something other than the truth of that statement is, by definition, nonhearsay, and thus not restricted by the hearsay rules. *See, e.g.*, *United States* v. *Bellomo*, 176 F.3d 580, 586 (2d Cir. 1999). Federal law also recognizes that a statement, irrespective of whether it is offered for its truth, nonetheless is *not* hearsay if it is offered against a party and is, for example, (i) "the party's own statement," Fed. R. Evid. 801(d)(2)(A), or (ii) "a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy," Fed. R. Evid. 801(d)(2)(E); *see, e.g.*, *United States* v. *Rivera*, 22 F.3d 430, 435-36 (2d Cir. 1994).[*]

It is well settled that the Sixth Amendment's right of confrontation does not extend to nonhearsay statements, notwithstanding the declarant's unavailability or the lack of a prior opportunity to cross-examine the declarant. *See, e.g.*, *Bourjaily* v. *United States*, 483 U.S. 171, 182-84 (1987) (admission of co-conspirator statements made during the course and in furtherance of the conspiracy does not run afoul of the Confrontation Clause under any circumstances)*; Tennessee* v. *Street*, 471 U.S. 409, 413–14

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[*] These categories of out-of-court nonhearsay statements are, of course, distinct from hearsay statements that may nevertheless be admissible under one of the hearsay exceptions set forth in Fed. R. Evid. 803 and 804.

(1985) (the Confrontation Clause does not extend to out-of-court statements that are not offered for their truth); *United States* v. *Moran*, 759 F.2d 777 (9th Cir. 1985) (Confrontation Clause does not apply to defendant's own out-of-court admissions); *United States* v. *Rios-Ruiz*, 579 F.2d 670, 676-77 (1st Cir. 1978) (same). This principle is obvious with respect to a defendant's own admissions offered against him at trial, as the Sixth Amendment does not confer on the defendant a right to cross-examine himself.

It is equally evident that the Confrontation Clause does not apply to co-conspirator statements. As the Supreme Court explained in *United States* v. *Inadi*, 475 U.S. 387, 395-96 (1986), a co-conspirator statement "often will derive its significance from the circumstances in which it was made" and those circumstances cannot be reliably replicated at a criminal trial of the co-conspirators. *Id.* at 395-96 ("[I]t is extremely unlikely that in-court testimony will recapture the evidentiary significance of statements made when the conspiracy was operating in full force."). Concluding in its seminal decision in *Bourjaily* v. *United States* that "co-conspirators' statements, when made in the course and in furtherance of the conspiracy, have a long tradition of being outside the compass of the general hearsay exclusion," the Supreme Court held that co-conspirator statements admissible under Fed. R. Evid. 801(d)(2)(E) also satisfy the requirements of the Confrontation Clause. 483 U.S. at 182-83.

The Supreme Court's recent decision in *Crawford* v. *Washington*, 124 S. Ct. 1354 (2004), does not disturb its prior holdings and the case law of every federal Circuit

that the Sixth Amendment's right of confrontation does not apply to nonhearsay statements. In *Crawford*, the Supreme Court revised its Confrontation Clause jurisprudence to hold that admission of "testimonial" hearsay statements is permitted only if the declarant is unavailable and if the defendant has had a previous opportunity to confront and cross-examine the declarant. *Crawford*, 124 S. Ct. at 1374. "Testimonial" hearsay statements are those akin to "a formal statement to government officers," *id.* at 1364, including "interrogations by law enforcement officers," *id.* at 1365. However, consistent with its decisions in *Street*, *Inadi* and *Bourjaily*, *Crawford* specifically reaffirmed that the Confrontation Clause does not apply to nonhearsay statements, including statements not offered for their truth, *see Crawford*, 124 S. Ct. at 1369 n.9, and co-conspirator statements made in furtherance of a conspiracy, *see id.* at 1367 & 1369 n.9.[*] Although the Court overruled in part *Ohio* v. *Roberts*, 448 U.S. 56 (1980),

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[*] Indeed, the *Crawford* Court also indicated that, not only were nonhearsay statements outside the purview of the Confrontation Clause, but even some hearsay statements that fall within a hearsay exception under Rule 803 are also exempt from the clause's requirements. *See id.* at 1367 (the Confrontation Clause does not apply to business records); *id.* at 1378 (Rehnquist, C.J., concurring in the judgment) ("To its credit, the Court's analysis of 'testimony' excludes at least some hearsay exceptions, such as business records and official records."); *cf. id.* at 1367 n.6 (noting that dying declarations, which are hearsay exceptions under Rule 804, may also be exempt from Confrontation Clause requirements).

which had previously governed the admissibility of hearsay statements under the Confrontation Clause, the *Roberts* framework did not apply to nonhearsay statements in the first place. *See Roberts*, 448 U.S. at 63-66. The inapplicability of the *Roberts* framework, and more generally the Confrontation Clause, to nonhearsay was made unambiguous in *Street*, 471 U.S. at 413-14, and *Bourjaily*, 483 U.S. at 182-83. Far from overruling *Street* and *Bourjaily*, the Crawford Court cited both decisions with approval. *See Crawford*, 124 S. Ct. at 1368 & 1369 n.9.

Furthermore, that the rule announced in *Crawford* applies only to *hearsay* evidence is clear from the opinion itself and also from the Second Circuit's interpretation and application of *Crawford*. *See*, *e.g.*, *United States v. Morgan*, 385 F.3d 65, 77-78 (2d Cir. 2004) (stating *Crawford* holding as "testimonial hearsay is inadmissible under the Confrontation Clause of the Sixth Amendment if the declarant is unavailable for cross-examination"); *United States* v. *Saget*, 377 F.3d 223, 226–27 (2d Cir. 2004) (declarant's hearsay statements to a confidential informant, whose status as an informant is unknown to the declarant at the time the declarant made the statements, are nontestimonial within the meaning of *Crawford*). In short, at least since the Supreme Court's decisions in *Street* and *Bourjaily*, which are unaffected by *Crawford*, no federal court has held that nonhearsay statements offered against a defendant must conform to the requirements of the Confrontation Clause to be admissible at trial.

Since the Supreme Court issued *Crawford* in March 2004, every federal Court of Appeals to have considered

the issue has recognized that the longstanding rule permitting the admission of nonhearsay statements, and specifically co-conspirator statements, without regard to the Confrontation Clause survives *Crawford* intact. *See, e.g.*, *United States* v. *Cianci*, 378 F.3d 71, 101-02 (1st Cir. 2004) (*Crawford* does not apply to co-conspirator statements made in furtherance of the conspiracy); *United States* v. *Robinson*, 367 F.3d 278, 291-92 & 292 n.20 (5th Cir. 2004) (same); *United States* v. *Reyes*, 362 F.3d 536, 540-41 & 541 n.4 (8th Cir. 2004) ("[T]he Confrontation Clause does not give the defendant the right to cross-examine a person who does not testify at trial and whose statements are introduced under the co-conspirator hearsay exclusion."); *cf. United States* v. *Silva*, 380 F.3d 1018, 1019 (7th Cir. 2004) (holding that statements otherwise inadmissible under *Crawford* may have been admissible as co-conspirator statements pursuant to Fed. R. Evid. 801(d)(2)(E)).

That false statements are made in testimonial settings does not alter their nature as co-conspirator statements made in furtherance of the conspiracy. Where the objects of the conspiracy are to provide false testimony and make false statements to law enforcement, the fact that the crime was by definition perpetrated in a testimonial setting is irrelevant to the analysis required by *Inadi*, *Bourjaily*, and Fed. R. Evid. 801(d)(2)(E). If co-conspirators make statements in testimonial settings and those statements are designed in some way to deceive the listener or conceal material facts in furtherance of the conspiratorial scheme, the statements are nonhearsay co-conspirator statements. This Circuit recognizes that "there is no requirement [under Fed. R. Evid. 801(d)(2)(E)] that the person to

whom the [co-conspirator] statement is made . . . be a member [of the conspiracy]." *United States* v. *Beech-Nut Nutrition Corp*., 871 F.2d 1181, 1199 (2d Cir. 1989). It is a settled principle of law that statements made in testimonial settings designed to further a conspiracy are no different from co-conspirator statements made in any other setting. *See, e.g.*, *Glenn* v. *Bartlett*, 98 F.3d 721, 728-29 (2d Cir. 1996) (upholding state court's determination that a co-conspirator's statements to law enforcement officers were designed to further a drug trafficking conspiracy, and holding that because the statements would be nonhearsay under Fed. R. Evid. 801(d)(2)(E), the Confrontation Clause did not apply); *United States* v. *Williams*, 272 F.3d 845, 858-60 (D.C. Cir. 2001) (holding that various false statements made by co-conspirator to law enforcement officers that were designed to conceal a drug trafficking conspiracy were co-conspirator statements under Fed. R. Evid. 801(d)(2)(E)); *United States* v. *Lim*, 984 F.2d 331, 336 (9th Cir. 1993) (pre-arrest statement made by co-conspirator that was designed to conceal the conspiracy was nonhearsay co-conspirator statement under Fed. R. Evid. 801(d)(2)(E)).

This principle excluding co-conspirator statements from the requirements of the Confrontation Clause makes abundant sense, given that *Crawford* and its predecessors understood that the Confrontation Clause's purpose is to ensure the ancient "right to confront one's *accusers*." *Crawford*, 124 S. Ct. at 1359 (emphasis added) (noting that right of confrontation has its roots in Roman times). Statements of an accuser against the accused are the "core testimonial statements that the Confrontation Clause plainly meant to exclude." *Id.* at 1371. In the context of a

conspiracy to make false statements and commit perjury, however, the co-conspirators' statements to law enforcement or under oath are intended to *assist* the declarants and their co-conspirators in achieving the goals of the conspiracy, and are not "testimonial" in the sense that term is used in *Crawford*. *See id.* at 1367 (statements in furtherance of a conspiracy "by their nature [are] not testimonial"). As such, a co-conspirator who makes statements in furtherance of the conspiracy, no matter the context in which he or she makes those statements, cannot be viewed as an accuser against his or her confederates. Thus, a co-conspirator's statements made in furtherance of the conspiracy stand in marked contrast to the types of statements of which the *Crawford* court disapproved. *See id.* at 1371-72 (noting that accomplice confessions implicating the accused and plea allocutions used to establish existence of a conspiracy do not survive the rule announced in *Crawford*). Far from intending to implicate their co-conspirators, these statements are meant to exonerate themselves and their co-conspirators, even if, in the end, the statements do not have their intended effect.[*]

Stewart's statements to investigators were introduced against Bacanovic, and Bacanovic's statements to investigators were introduced against Stewart, as co-conspirator statements made in furtherance of the conspiracy. *See* JA

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[*] Indeed, if this were not the case, it would be impossible to prosecute anyone for conspiring with another person to commit perjury or make false statements, because the perjurious testimony or false statements would be inadmissible against the co-conspirator.

338 ("The Government also offers Bacanovic's testimony as statements in furtherance of the charged conspiracy to obstruct justice, commit perjury, and make false statements, under Rule 801(d)(2)(E).")). Neither defendant ever objected to, or sought a limiting instruction regarding, the admission of any statement made by the other to investigators. Nor does either defendant now challenge on appeal that the other's statements to investigators were co-conspirator statements under Rule 801(d)(2)(E). Because it is undisputed that each defendant's statements were nonhearsay co-conspirator statements against the other, their introduction did not violate the defendants' Sixth Amendment rights to confront their accusers. Nor can the defendants now claim otherwise. Because the defendants did not object below to the admission of each other's statements to investigators as co-conspirator statements under Fed. R. Evid. 801(d)(2)(E) and do not now dispute that the statements were co-conspirator statements, they have permanently waived any challenge to that conclusion. *See United States* v. *Greer*, 285 F.3d 158, 170 (2d Cir. 2002) (argument raised for first time in reply brief is waived); *United States* v. *Gigante*, 39 F.3d 42, 50 n.2 (2d Cir. 1994) (same).

B. The Defendants' Statements Were Co-Conspirator Statements Under Fed. R. Evid. 801(d)(2)(E)

Even if they could claim otherwise, each defendant's decision not to challenge that the other's statements to investigators were co-conspirator statements under Fed. R. Evid. 801(d)(2)(E) was certainly correct. The charges against the defendants consisted of the substantive of-

fenses of making false statements to federal investigators, perjury, and obstruction of justice, and conspiracy to commit these offenses. As proof of the conspiracy and the substantive charges, the Government offered, among other evidence, the statements of the conspiracy's chief players – Bacanovic, Stewart, and Faneuil. There is no dispute that each defendant's own statements were admissible against him or her as nonhearsay party admissions pursuant to Fed. R. Evid. 801(d)(2)(A).

The statements of each defendant were also admissible against the other as co-conspirator statements under Fed. R. Evid. 801(d)(2)(E). To qualify as a co-conspirator statement under the rule, the following requirements must be satisfied by a preponderance of the evidence: (1) there was a conspiracy; (2) the declarant and the party against whom the statement is offered were members of the conspiracy; and (3) the statements were made in the course and in furtherance of the conspiracy. *See, e.g.*, *United States* v. *Alameh*, 341 F.3d 167, 176 (2d Cir. 2003); *see also Bourjaily*, 483 U.S. at 175-76. In determining whether statements were made in furtherance of the conspiracy, courts are to consider whether the statements "in some way [were] designed to promote or facilitate achievement of the goals of that conspiracy, as by, for example, providing information or reassurance to a conspirator, seeking assistance from a conspirator, or *by communicating with a person who is not a member of the conspiracy in a way that is designed to help the co-conspirators to achieve the conspiracy's goals*." *Rivera*, 22 F.3d at 436 (emphasis added).

Those criteria were easily satisfied in this case, where the Government presented overwhelming evidence that Bacanovic, Stewart, and Faneuil conspired to conceal the true events of December 27. The false statements, half-truths, and outright fabrications peddled by the co-conspirators to investigators were the vehicle of the conspiracy.*

Because the evidence showed that the defendants' intent in speaking to investigators was to further their scheme to cover up the true events of December 27, and because the defendants needed to appear forthcoming and answer all the questions posed by investigators in order to further that conspiracy, all of their statements at the interviews were made in the course and in furtherance of the conspiracy. Any inconsistencies in the defendants' statements to investigators, either because they did not know the questions they would be asked or because they did not anticipate how one's answers might contradict or be inconsistent with the other's answers, do not alter the analysis. The law is settled that a co-conspirator's intent in making the statement controls, not whether the statement in fact furthered the conspiracy. *See, e.g.*, *Beech-Nut Nutrition Corp.*, 871 F.2d at 1199 ("The principal question in the 'in furtherance' issue is whether the statement

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* Because none of the statements was challenged by either defendant on evidentiary or constitutional grounds, the District Court had no need or occasion to make a specific finding that the Government had satisfied the requirements of Fed. R. Evid. 801(d)(2)(E) as to each statement. It is clear from the evidence at trial, however, that the Government satisfied its burden.

promoted, *or was intended to promote*, the goals of the conspiracy." (emphasis added)); *United States* v. *Reyes*, 798 F.2d 380, 384 (10th Cir. 1986) (holding that intention to further conspiracy is all that is required by Fed. R. Evid. 801(d)(2)(E), and rejecting "defendant's proposition that the statements must *actually* further the conspiracy to be admissible" (emphasis in original)); *United States* v. *Hamilton*, 689 F.2d 1262, 1270 (6th Cir. 1982) ("Rule 801(d)(2)(E) explicitly says statements need be 'in furtherance of the conspiracy,' not that they 'further the conspiracy.' It is enough that they be intended to promote the conspiratorial objectives."); *cf. United States* v. *Downing*, 297 F.3d 52, 57 (2d Cir. 2002) (co-conspirators need not have knowledge of all details of the scheme, or even know all the other members of the conspiracy); *Rea*, 958 F.2d at 1214 (coconspirators need not have agreed on the details of the conspiracy, so long as they agreed on the essential nature of the plan).

C. Stewart's Specific Statements That Are The Subject Of Bacanovic's Appeal Were Nonhearsay And Therefore Did Not Violate Bacanovic's Sixth Amendment Rights

As discussed above, all of Stewart's statements in her interviews were properly admitted against Bacanovic as co-conspirator statements, and Bacanovic never challenged their admission against him. And, significantly, Bacanovic does not challenge on appeal the vast majority of Stewart's statements to investigators that were received against him. Because all of these statements were co-conspirator statements in furtherance of the conspiracy, it

is unnecessary to analyze separately the specific statements Bacanovic refers to in his appeal. Nonetheless, a statement by statement analysis yields the same conclusion, that each of the statements was nonhearsay and therefore their introduction did not violate Bacanovic's Sixth Amendment rights. Bacanovic's appeal complains about only three of Stewart's statements: (a) that she did not discuss ImClone stock with Bacanovic during the week prior to December 27, 2001 (Tr. 2255, 2504); (b) that Bacanovic told her that the SEC had questioned Merrill Lynch about ImClone transactions (Tr. 2255, 2507); and (c) what Bacanovic characterizes as Stewart's "denials" that she learned of the Waksal sales from a member of the Waksal family.

It is not Bacanovic's contention that Stewart's statements should not have been admitted at trial; there is no dispute that they were admissible, at a minimum, against Stewart (which Stewart herself does not contest). Instead, Bacanovic argues that admission of these statements was improper as to him because he did not have an opportunity to cross-examine Stewart on the statements. At most, then, Bacanovic's argument is that the absence of a limiting instruction – which Bacanovic did not seek – directing the jury to consider these three statements only with respect to Stewart requires that the Court vacate his conviction. A limiting instruction with respect to these statements, however, was not required by *Crawford* for two principal reasons: first, all three statements were nonhearsay co-conspirator statements made in furtherance of the conspiracy; and second, none of the statements was offered by the Government for its truth.

With respect to the first statement, Bacanovic argues that the Government used the inconsistency between Bacanovic's and Stewart's statements about the date they purportedly agreed to the $60 agreement against Bacanovic. This is true, but Bacanovic fundamentally mischaracterizes the purpose for which the Government offered Stewart's statements against him. The Government consistently argued that *both* defendants were lying about the existence of the $60 agreement. The Government highlighted the discrepancies in the defendant's statements about the $60 agreement, not to show that Stewart was right and Bacanovic was wrong (or vice versa), but as evidence that Stewart and Bacanovic could not get their stories straight and that neither version was truthful. (Tr. 4513-19). Far from arguing the truth of Stewart's statements, as Bacanovic alleges on appeal, the Government argued that her statements were equally *false*, and that the discrepancies between the versions suggested that both defendants were lying.

Bacanovic attempts to evade this conclusion by divorcing one statement made by Stewart – that, contrary to Bacanovic's statement to the SEC, she did not speak to Bacanovic about her ImClone stock the week prior to December 27, 2001 – from its context to argue that the Government offered the statement for its truth. (B.Br. 47-48). In context, however, what Stewart actually said was that she and Bacanovic had agreed on the $60 price *prior* to that week, specifically in late October or early November 2001. (Tr. 2250, 2502-03). The Government did not argue that Stewart was being truthful about not speaking to Bacanovic about ImClone the week of December 20; quite the contrary, the Government's position was that

Stewart never spoke to Bacanovic about the $60 price agreement on or prior to December 27.

At best, then, Stewart's denial that she spoke to Bacanovic about the $60 agreement the week of December 20, as opposed to earlier in the year when Stewart said that she had spoken to him about the agreement, was a half-truth that served to conceal the fact that there was no $60 agreement at all. *See Crawford*, 124 S. Ct. at 1369 n.9 (the Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted"). As such, the statement was intended to further the conspiracy's goal to conceal the true reasons for Stewart's sale.

Suffering from the same fatal flaw is Bacanovic's second claim respecting Stewart's statement that Bacanovic told her that the SEC had asked Merrill Lynch questions about ImClone transactions. Again, Bacanovic removes the statement from its context to foster the misimpression that the Government offered this statement for its truth. However, trial testimony showed that Stewart told investigators that "Mr. Bacanovic had told her that the SEC was asking Merrill Lynch some questions about trading in ImClone, but that *he didn't tell her whether he had been asked any questions or whether any of the questions involved her at all*." (Tr. 2255 (emphasis added), 2507). The Government argued that this entire statement was false and concealed the fact that Stewart and Bacanovic had discussed the SEC's investigation into Stewart's stock sale, including the SEC's January 7 interview of Bacanovic. (Tr. 4537-39). There is no doubt that the jury understood that the Government was not offering Stew-

art's statement for its truth, as that very statement was included as part of a false statement specification in Count Three of the Indictment. (JA 130). Moreover, like Stewart's half-truth concerning not speaking to Bacanovic about ImClone the week prior to December 27, this, too, was a statement in furtherance of the conspiracy in that it was intended to conceal the fact that Stewart and Bacanovic had discussed the SEC investigation and agreed to obstruct the investigation.

The final "statement" that Bacanovic claims violated the Confrontation Clause is not even a statement at all. Bacanovic asserts that Stewart told investigators that she did not learn of the Waksal sales or the FDA's rejection of Erbitux from Waksal prior to her sale on December 27. (B.Br. 44). This statement appears nowhere in the record citations relied on by Bacanovic in his brief,(Tr. 2248, 2253, 2276-77, 2500-01, 2503-04, 2506-07, 2511-12), nor is there evidence of such a statement elsewhere in the record. In any event, Bacanovic's argument is disingenuous at best. Bacanovic's defense was never that Waksal informed Stewart about the Waksal sales or the Erbitux rejection on December 27. Indeed, such a "defense" would directly contradict what Bacanovic told investigators and contended at trial, *i.e.*, that he left a message at Stewart's office with the price of ImClone, and Stewart sold the stock pursuant to a preexisting agreement to sell if it fell to $60 per share. There was no evidence presented at trial by any party that Waksal told Stewart about the Waksal sales (or the rejection of Erbitux) prior to her sale.

D. Bacanovic's Specific Statements That Are The Subject Of Stewart's Appeal Were Nonhearsay And Therefore Did Not Violate Stewart's Sixth Amendment Rights

Stewart never challenged the admission of any of Bacanovic's testimony against her as co-conspirator statements in furtherance of the conspiracy. Nor does she take a contrary position on appeal. Accordingly, there is no dispute that all of Bacanovic's statements to the SEC were co-conspirator statements under Fed. R. Evid. 801(d)(2)(E), and there is no need to analyze each of his statements separately.

Nonetheless, a statement-by-statement analysis of the statements now raised on appeal as violating *Crawford* shows that each statement was nonhearsay and therefore did not implicate or impair Stewart's rights under the Confrontation Clause in any way. Stewart contends on appeal that admission of the following statements by Bacanovic abridged her right of confrontation: (a) the description of Stewart's ImClone stock as "loyalty stock"; (b) Stewart's reluctance to sell the ImClone stock because she believed the company had a great drug that was about to be approved; (c) conversations Bacanovic had with Stewart in January 2002; (d) that Faneuil spoke to Stewart and handled her trade on December 27; (e) that Faneuil was on the line when Bacanovic left a message for Stewart with Stewart's assistant on December 27, 2001; (f) that Bacanovic spoke to Heidi DeLuca about gains in Stewart's account that resulted from selling Stewart's ImClone stock at a profit some time after he returned from Christmas

vacation; and (g) that Bacanovic did not speak to DeLuca about the purported $60 agreement between himself and Stewart. (S.Br. 43-49). Stewart does not argue that Bacanovic's statements were inadmissible, but that her failure to seek a limiting instruction that the statements were to be considered only as to Bacanovic entitles her to a new trial.

1. Bacanovic's Statements Were In Furtherance Of The Conspiracy

All of the statements Stewart identifies were statements made in furtherance of the conspiracy. Bacanovic's statements concerning Stewart's reluctance to sell her ImClone stock prior to December 27 and her view of the stock as "loyalty stock," were intended to explain, among other things, why the purported $60 agreement was an informal price target, rather than a limit order that would have automatically executed the trade when the stock hit $60 per share. (JA 488-89). Bacanovic's statements about his conversations with Stewart in January 2002 were expressly designed to conceal the fact that he and Stewart had discussed the SEC's investigation into Stewart's sale, contrary to what both he and Stewart told investigators, for the purpose of convincing investigators that the two had a shared recollection of why Stewart sold the stock on December 27, rather than a shared cover story.

Bacanovic's statements in February 2002 that Faneuil handled Stewart's trade on December 27 were also in furtherance of the conspiracy. Bacanovic had learned by February 11, 2002, about two days before his testimony to the SEC, that the SEC had subpoenaed records from Merrill Lynch, including phone records that would conclusively show that Faneuil had handled Stewart's order that

day. (Tr. 1214-17). Bacanovic therefore knew by February 13, 2002 that sticking to the lie that he had handled the trade would be difficult to get by investigators and might expose the conspiracy. (Tr. 4504-05).

For similar reasons, Bacanovic's statements about his discussions with DeLuca were also in furtherance of the conspiracy. When Bacanovic was asked about his conversations with DeLuca, he knew that he had never spoken to DeLuca about the $60 agreement, because there was no such agreement. In his view as of February 2002, however, it furthered the conspiracy to strictly limit the number of persons with supposed knowledge of the "informal" $60 agreement prior to December 27 to himself and Stewart. Because Bacanovic had not brought DeLuca into the conspiracy as of February 2002, and evidently did not know that Stewart had (Tr. 3916-17), he could not deny that DeLuca had called to complain about the gains without running the risk that DeLuca would contradict him on this point and undermine the $60 story.

Unlike the declarant's statements in *Crawford* that were intended to implicate and shift blame to the defendant, Stewart does not claim that Bacanovic's statement that he had never spoken to DeLuca about the $60 agreement was an effort to implicate or shift suspicion to Stewart, or otherwise undermine her version of events. Nor does she allege that it was a confession of even the most veiled variety, and so it does not violate *Crawford*'s prohibition on the admission of co-defendant's confessions. Instead, her argument is that any inconsistency between statements made by co-conspirators, even if those statements were intended by the speaker to further the

conspiracy, renders those statements inadmissible against the other co-conspirator. This has never been the law, *see Beech-Nut Nutrition Corp*., 871 F.2d at 1199; *Rea*, 958 F.2d at 1214; *Downing*, 297 F.3d at 57, and *Crawford* did not hold that admission of inconsistent co-conspirator statements, made with the intent to further the conspiracy, violates the Confrontation Clause, *see Cianci*, 378 F.3d at 101-02; *Robinson*, 367 F.3d at 291-92 & 292 n.20; *Reyes*, 362 F.3d at 540-41 & 541 n.4.

2. Stewart Made A Tactical Decision To Use Bacanovic's Statements In Her Own Defense

Stewart's failure to object to admission of any of these statements at trial is particularly telling in light of the fact that she used most of these statements in her defense.[*] *See United States* v. *Coonan*, 938 F.2d 1553, 1561 (2d Cir. 1991) (defendant is not entitled "to evade the consequences of an unsuccessful tactical decision"). For example, in an effort to explain why she and Bacanovic had not

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[*] It is clear from the record that Stewart made a tactical decision not to challenge the admission of any of Bacanovic's statements to the SEC, because she viewed them as helpful to her defense. For example, Bacanovic moved to admit the entirety of his SEC testimony into evidence on the theory that it was all admissible pursuant to the doctrine of completeness. (JA 351). The Government objected on the ground that hearsay rules prohibited Bacanovic from offering his own statements into evidence. (JA 337). Stewart, however, raised no objection whatsoever to Bacanovic's motion.

formalized the purported $60 agreement, Stewart's counsel argued in summation that Stewart had been reluctant to sell her ImClone stock prior to December 27 out of "loyalty" to Waksal. (Tr. 4728-29 ("[The ImClone stock] was sort of a symbol of her loyalty to Sam Waksal. And she actually did regret it a little bit when she sold it. . . . . She sold 3900 shares and she's kind of feeling guilty about it, because those are the last shares that she owns in her friend Sam's company.")). In making this argument, Stewart's counsel relied heavily on Bacanovic's description of Stewart's reluctance to sell ImClone and his conversations with her about the stock, the very statements that Stewart now claims were detrimental to her defense. (Tr. 4718-19, 4729-30). Similarly, Stewart ignores the fact that her *own* statements to investigators were consistent with Bacanovic's on these points. (Tr. 2248, 2500-01). The same is true with respect to Bacanovic's statement that he spoke to Stewart on several occasions in January 2002 (JA 478-81) – Stewart's own statements to investigators on this topic were entirely consistent with Bacanovic's (Tr. 2507 ("Ms. Stewart said that she had spoken to Peter Bacanovic on two or three occasions since her sale of ImClone . . .")).

Stewart also claims Bacanovic's statement that Faneuil was on the telephone when Bacanovic left a message for Stewart on the morning of December 27 "limit[ed] Stewart's ability to challenge Faneuil's assertions that he knew what was said." (S.Br. 49). This is a particularly dubious argument, however, because Faneuil testified that he did *not* know what was said during that conversation. (Tr. 1504) ("Q: Do you recall what message [Bacanovic] left? A: I don't."). The record is no kinder to Stewart's claim

that she was prejudiced by Bacanovic's eventual acknowledgment that Faneuil, not Bacanovic, spoke to Stewart and handled her trade on December 27. Stewart's counsel conceded in his opening statement that Stewart spoke to Faneuil and placed the trade through him (Tr. 842), and there was never any dispute at trial on this issue.

Stewart's principal allegation is that her Confrontation Clause rights were violated when the jury heard Bacanovic's statement to the SEC that he had not spoken to DeLuca about a plan to sell Stewart's ImClone stock if it fell to $60 per share. (S.Br. 43; JA 520-21). Again, however, Stewart neglects to mention that she used the very inconsistency that she now asserts was harmful to her case to argue to the jury that there was no conspiracy. Stewart's counsel argued in summation that the inconsistencies between aspects of Stewart's and Bacanovic's recollections of events demonstrated conclusively that they did not conspire to lie to investigators, but were telling the truth. (Tr. 4695-704; 4698 ("It's a conspiracy of dunces."); 4704 ("To believe the government's story, you have got to believe in Jimmy Breslin's The Gang That Couldn't Shoot Straight.")). Indeed, the inconsistency between Stewart's and Bacanovic's recollections of whether DeLuca knew of the $60 agreement was the centerpiece of this defense. (Tr. 4698-99).

3. Bacanovic's Denial That He Spoke To DeLuca About The $60 Agreement Was Impeachment Material Under Fed. R. Evid. 806

In challenging the admissibility of Bacanovic's denial that he spoke to DeLuca about the $60 agreement, Stewart

also fails to explain that DeLuca's testimony about Bacanovic's statements to her about "setting a floor of 60 or 61" were received into evidence in the defense case as a *hearsay exception* for Bacanovic's state of mind in early November 2001. These statements to DeLuca were offered by the defense to prove that Bacanovic later acted in accordance with his stated intent, pursuant to Fed. R. Evid. 803(3). (Tr. 3805, 3772-73 ("Mr. Apfel: We are introducing [DeLuca's conversation with Bacanovic] with his state of mind with respect to ImClone. And his state of mind with respect to his intent, his intent as to what he was going to do . . . . I think it should come in – I believe the rule is 803(3)")). Although admissible for limited purposes, statements received under Fed. R. Evid. 803(3) nevertheless remain hearsay. *United States* v. *Best*, 219 F.3d 192, 198 (2d Cir. 2000) (hearsay admitted under Fed. R. Evid. 803(3) "may be introduced to prove that the declarant thereafter acted in accordance with the stated intent"); *see also United States* v. *Cicale*, 691 F.2d 95, 103 (2d Cir. 1982) (same).

The Government was entitled to impeach Bacanovic's hearsay with inconsistent statements he made during his testimony before the SEC in accordance with Fed. R. Evid. 806. *See United States* v. *Trzaska*, 111 F.3d 1019, 1024 (2d Cir. 1997). Specifically, when asked in February 2002 "[d]id you talk to Heidi at all about, you know, 'Martha Stewart told me that once the stock hits 60, I should sell'?," Bacanovic stated that he did not "get into that level of detail with Heidi." (JA 520 ("Q: So, the issue of the stock at $60 didn't come up with Heidi?; A: No.")). These statements in February 2002 tended to impeach Bacanovic's hearsay statements to DeLuca made in early

November 2001, when he purportedly said that he wanted to set a floor on ImClone at $60 or $61. *See Trzaska*, 111 F.3d at 1024 n.1 (pursuant to Fed. R. Evid. 806, the hearsay declarant "may be impeached by an inconsistent statement that was made prior to or subsequent to the hearsay declaration"). Because Bacanovic's hearsay statements were expressly offered to prove that he spoke to Stewart about the $60 agreement prior to December 27, 2001 in conformance with his intent as of early November 2001, his inconsistent statement in February 2002 that he said *nothing* to DeLuca about the $60 agreement tended to rebut that he had ever had that intention.*

Stewart concedes in her brief on appeal that Bacanovic's hearsay, as recounted by DeLuca, was part of her own defense, particularly to the extent the hearsay corroborated the existence of the purported $60 agreement. (S.Br. 43-48 (characterizing DeLuca as "the *defense's* star witness")). Thus, Stewart is foreclosed from contending

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* Bacanovic's statement denying that he spoke to DeLuca about the $60 agreement was also admissible to impeach DeLuca's credibility. *See United States* v. *Benedetto*, 571 F.2d 1246, 1250 (2d Cir. 1978) ("Once a witness . . . testifies as to any specific fact on direct testimony, the trial judge has broad discretion to admit extrinsic evidence tending to contradict the specific statement, even if such statement concerns a collateral matter in the case."). Here, it cannot even be said that DeLuca's testimony about her conversation with Bacanovic related to a collateral matter – the alleged conversation was central to her testimony.

that only Bacanovic offered Bacanovic's hearsay against the Government. Indeed, as Stewart admits in her brief, "Stewart's counsel relied significantly on [DeLuca's testimony about her conversation with Bacanovic] during his closing argument." (S.Br. 44). Accordingly, the Government was well within its rights under Fed. R. Evid. 806 to impeach the hearsay offered by both defendants with Bacanovic's own inconsistent statements to the SEC. As is true of every statement that Stewart now challenges on appeal, she failed to raise any objection to the admission of Bacanovic's inconsistent statement at trial.*

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* Bacanovic, in contrast, did raise an objection to this statement during the Government's case-in-chief. Bacanovic argued that admitting the statement was premature because it was anticipatory rebuttal of DeLuca's expected testimony in the defense case. (Tr. 3521-22). The Government argued that the statement should be admitted as an admission of Bacanovic, pursuant to Fed. R. Evid. 801(d)(2)(A), and also that it was relevant as to Stewart, who had informed investigators that she, DeLuca, and Bacanovic all shared the same recollection about the $60 agreement. (Tr. 3523, 3529-30).

Although she now raises a Confrontation Clause challenge on appeal, during the entire colloquy at trial concerning the admissibility of Bacanovic's inconsistent statement, Stewart did not object a single time and never sought a limiting instruction. This was consistent with Stewart's tactical decision to use these inconsistencies between the co-conspirators' recollections to argue that there was no conspiracy. In any event, Bacanovic's

Crawford does not proscribe the use of a declarant's inconsistent statements to impeach hearsay offered by a party at trial. Rule 806 specifically provides that "[w]hen a hearsay statement . . . has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by *any* evidence which would be admissible for those purposes if declarant had testified as a witness." Fed. R. Evid. 806 (emphasis added). Rule 806 further permits admission of impeachment evidence irrespective of whether the declarant is afforded an opportunity to explain or deny the inconsistent statement. *See id*. Thus, Rule 806 permits the party against whom a hearsay statement has been admitted to impeach that statement with, for example, an inconsistent statement made by that same declarant, regardless of whether the declarant is available to testify. *See, e.g.*, *United States* v. *Rosario*, 111 F.3d 293, 295-96 (2d Cir. 1997); *United States* v. *Vegas*, 27 F.3d 773, 782 (2d Cir. 1994). Nowhere in *Crawford* did the Supreme Court suggest that this bedrock evidentiary principle, authorizing the opposing party to impeach hearsay with inconsistent statements made by the same hearsay declarant, was affected by the rule announced in that decision. *See Bourjaily*, 483 U.S. at 180 (citing Fed. R. Evid. 806 for the proposition that "[i]f the opposing party is unsuccessful in keeping [out-of-court declarations] from the factfinder, he still has the opportunity to attack the probative value of the evidence as it relates to the substantive issue in the case").

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inconsistent statements were not published to the jury until after DeLuca had testified on behalf of the defense. (Tr. 4224-25).

E. The District Court Did Not Commit Plain Error In Admitting The Defendants' Statements

Even assuming *arguendo* that admission of these statements was erroneous in light of *Crawford*, that error was not plain and would not warrant reversal.[*] The admission of these statements is reviewed only for plain error. *See United States* v. *Bruno*, 383 F.3d 65, 78 (2d Cir. 2004) (applying plain error review to Confrontation Clause claim raised for first time on appeal). To preserve a Confrontation Clause claim, a defendant must invoke the Confrontation Clause or Confrontation Clause case law, or otherwise "put a trial court on notice that Confrontation Clause concerns are implicated." *United States* v. *Dukagjini*, 326 F.3d 45, 60 (2d Cir. 2003). If no objection based upon the Confrontation Clause is articulated in the trial court (as opposed to an objection on other grounds, such

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[*] Stewart argues that the Government bears the burden of persuasion as to prejudice because *Crawford* represented a supervening decision that altered settled law. (S.Br. 50-51). *See United States* v. *Viola*, 35 F.3d 37, 42 (2d Cir. 1994). The reasoning in *Viola* was effectively rejected by the Supreme Court in *Johnson* v. *United States*, 520 U.S. 465, 467-70 (1997), however. No other Court of Appeals has adopted a similar modified burden-shifting approach before or after *Johnson*. *See, e.g.*, *United States* v. *Kramer*, 73 F.3d 1067, 1074, n.17 (11th Cir. 1996) (collecting cases, and rejecting the rationale of *Viola* by declining to excuse a defendant's "burden of compliance").

as hearsay), then on appeal the claim is reviewed only for plain error.

Here, even if admission of the statements was error, which it clearly was not, that error was certainly not plain in light of the Supreme Court's continued affirmation in *Crawford* and its predecessors that co-conspirator statements made in furtherance of the conspiracy under Fed. R. Evid. 801(d)(2)(E) are not within the purview of the Confrontation Clause. *See Crawford*, 124 S. Ct. at 1367.*

In determining whether the alleged error affected substantial rights, *i.e.*, whether the error was harmless, appellate courts should evaluate a "host of factors," including "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the government's case." *Delaware* v. *Van Arsdall*, 475 U.S. at 684. Applying these factors, any error here was patently harmless. Almost all of the statements that the defendants charge were admitted against them in error relate solely to

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* Moreover, *Crawford* did not suggest that impeachment material admissible under Fed. R. Evid. 806 was barred by the Confrontation Clause. Thus, any error in admitting Bacanovic's denial of speaking to DeLuca about the $60 agreement for impeachment purposes under Fed. R. Evid. 806, which was a basis for admitting the evidence independent of Fed. R. Evid. 801(d)(2)(E), also was not plain.

the $60 agreement, and neither defendant was convicted of any charge that he or she lied about the existence of the agreement to sell ImClone at $60 per share. The defendants were convicted only on counts relating to their false statements about (i) whether Stewart was informed of the Waksal sales prior to selling her ImClone shares, (ii) the message that Bacanovic left for Stewart in the morning of December 27, 2001, and (iii) the communications between Stewart and Bacanovic about the investigation of Stewart's ImClone sale. As discussed *supra* 73-75, there was overwhelming evidence of the defendants' guilt on these counts.*

Moreover, as discussed above, it is evident from the defendants' tactical decision not to object to the admission of the statements at trial and to make affirmative use of the statements in their own defense, that they suffered no prejudice sufficient to affect their substantial rights. In light of the overwhelming evidence of guilt, the defendants cannot meet their burden to show plain error from the admission of the challenged statements, even assuming *arguendo* that *Crawford* would bar their admission.

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* In addition, as to Stewart's central claim that admission of Bacanovic's statements undermined DeLuca's credibility, any error was harmless because DeLuca's credibility was thoroughly undermined on cross-examination for other, unrelated reasons. *See supra* at 28-31.

POINT IV

Bacanovic Was Not Entitled To A Severance

Bacanovic argues that his conviction should be reversed because he was prejudiced by being tried together with Stewart and because the securities fraud charge in Count Nine was not severed from the other counts of the Indictment. Bacanovic claims that his joint trial with Stewart and the District Court's refusal to sever Count Nine resulted in spillover prejudice from the testimony of Mariana Pasternak, the admission of various news articles, and the admission of Stewart's statements in her interviews with investigators. (B.Br. 22-33). These contentions have no merit. In light of the well-established preference for joint trials, and in the absence of any sound reason for severance, the District Court acted entirely within its discretion in denying Bacanovic's severance motion.

A. Relevant Facts

Before trial Bacanovic moved to have his trial severed and, in the alternative, to have Count Nine, the securities fraud count against Stewart alone, severed from the rest of the charges in the Indictment. Stewart did not move for a severance of Count Nine. Bacanovic's motion for a severance of his trial from Stewart's was based solely on his assertion that Stewart's "celebrity status would make it all but impossible for Mr. Bacanovic to receive a fair trial if tried together with her." Bacanovic did not raise any concern about evidentiary spillover. Bacanovic's motion for severance of Count Nine was based on a claim of improper joinder, because he claimed that the securities fraud charge was "entirely unrelated" to the other counts,

that he had no awareness or involvement in the conduct alleged in Count Nine, and that there was a danger of prejudicial spillover from evidence that was offered only in connection with Count Nine.

The District Court denied Bacanovic's motions for severance, reasoning as follows:

> [W]hether Mr. Bacanovic is tried with or without Ms. Stewart, the charges against him inextricably associate him with Ms. Stewart. Separate trials cannot change that. As in all criminal cases, we will carefully select jurors who will listen to the evidence and deliberate fairly, dispassionately, and without improper reference to anything that they might have heard outside the courtroom. Accordingly, the motion to sever is denied.
>
> Mr. Bacanovic also moves in the alternative to sever Count 9 from the rest of the indictment. Joinder of offenses in an indictment charging more than one defendant is appropriate, as long as the alleged criminal acts are unified by some substantial identity of facts or participants or arise out of a common scheme or plan.
>
> Severance of one count of a multi-count indictment is extremely inefficient. Severance is appropriate only where the joinder of a particular count would unfairly prejudice a defendant.

> Count 9 charges that Ms. Stewart made false statements about conversations she had with Mr. Bacanovic. While Mr. Bacanovic is not charged with securities fraud, he is alleged to have participated in the underlying events and is charged with conspiring to make similar false statements about the same subject. Count 9 is thus closely factually related to the other eight counts.
>
> Mr. Bacanovic argues that the trial of Count 9 at the same trial as the counts in which he is named as a defendant will unfairly prejudice him. I am confident that the jury will be able to make separate assessments of each defendant and each count of the indictment. Accordingly, severance of Count 9 is not warranted.

(JA 190-91).

B. Applicable Legal Principles

Rule 8(b) of the Federal Rules of Criminal Procedure sets forth the standard which governs when joinder both of offenses and defendants is permitted. *United States* v. *Turoff*, 853 F.2d 1037, 1043 (2d Cir. 1988). This Court has interpreted Rule 8(b) to allow joinder of offenses and defendants where two or more persons' criminal acts are "'unified by some substantial identity of facts or participants' or 'arise out of a common plan or scheme.'" *United States* v. *Feyrer*, 333 F.3d 110, 114 (2d Cir. 2003) (quoting *United States* v. *Attanasio*, 870 F.2d 809, 815 (2d Cir. 1989)). *See, e.g., United States* v. *Cervone*, 907 F.2d 332

(2d Cir. 1990) (proper joinder of eighteen defendants in a 102-count indictment with a variety of labor racketeering charges, as well as related charges of obstruction of justice, bribery, and making false statements); *United States* v. *Weisman*, 624 F.2d 1118 (2d Cir. 1980) (proper joinder of charges and defendants where ten defendants charged with a variety of offenses relating to creation, operation, and bankruptcy of a theater). The propriety of joinder under Rule 8 is reviewed *de novo*. *United States* v. *Feyrer*, 333 F.3d at 113. If this Court determines that Rule 8 did not permit joinder, reversal is not required if the error was harmless. *United States* v. *Tubol*, 191 F.3d 88, 94 (2d Cir. 1999).

Even with proper joinder under Rule 8, Rule 14 of the Federal Rules of Criminal Procedure provides that a district court may nonetheless grant a severance or "provide whatever other relief justice requires" "[i]f it appears that a defendant . . . is prejudiced by a joinder of offenses or of defendants in an indictment . . . or by such joinder for trial together." The Supreme Court has instructed that district courts should only grant a severance under Rule 14 when "there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Zafiro* v. *United States*, 506 U.S. 534, 539 (1993). As this Court has stated, "well-recognized is the proposition that joint trials serve the public interest in economy, convenience, and the prompt trial of the accused." *Turoff*, 853 F.2d at 1039. The Supreme Court has stated:

> It would impair both the efficiency and the fairness of the criminal justice system to require . . . that prosecutors bring separate proceedings, presenting the same evidence again and again, requiring victims and witnesses to repeat the inconvenience (and sometimes trauma) of testifying, and randomly favoring the last-tried defendants who have the advantage of knowing the prosecution's case beforehand. Joint trials generally serve the interests of justice by avoiding inconsistent verdicts and enabling more accurate assessment of relative culpability – advantages which sometimes operate to the defendant's benefit. Even apart from these tactical considerations, joint trials generally serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts.

Richardson v. *Marsh*, 481 U.S. 200, 210 (1987). For this reason, the Supreme Court has instructed that even where the risk of prejudice is high, less drastic measures – such as limiting instructions – often suffice as an alternative to granting a Rule 14 severance motion. *Zafiro* v. *United States*, 506 U.S. at 539; *see also Feyrer*, 333 F.3d at 114. Indeed, courts have repeatedly recognized that any potential prejudice caused by a joint trial can be effectively mitigated by instructions to the jury that it must consider separately each individual defendant and each charge, and consider only the evidence that has been admitted against each defendant. *See Zafiro*, 506 U.S. at 540-41; *United States* v. *Hernandez*, 85 F.3d 1023, 1029-30 (2d Cir.

1996); *United States* v. *Romero*, 54 F.3d 56, 60 (2d Cir. 1995).

The decision whether to sever a defendant's case from those of his co-defendants under Rule 14 is "confided to the sound discretion of the trial court," *Feyrer*, 333 F.3d at 114 (citations omitted), and the trial court's exercise of that discretion is "virtually unreviewable" on appeal. *United States* v. *Yousef*, 327 F.3d 56, 150 (2d Cir. 2003). A defendant challenging the denial of a severance motion faces an "extremely difficult burden." *United States* v. *Casamento*, 887 F.2d 1141, 1149 (2d Cir. 1989) (quotations and citations omitted). It is not sufficient for a defendant to show that he suffered some prejudice, or that he would have had a better chance for acquittal at a separate trial. *Zafiro*, 506 U.S. at 540. Instead, the defendant must show that he suffered prejudice so substantial that a "miscarriage of justice" occurred and that the denial of his motion constituted an abuse of the district court's discretion. *United States* v. *Yousef*, 327 F.3d at 150.

C. Discussion

Measured against these standards, the District Court's decision that Count Nine was properly joined with the rest of the charges in the Indictment under Rule 8 was correct. And, the District Court's decision to deny Bacanovic a severance under Rule 14 fell well within the Court's discretion, and certainly came nowhere close to resulting in prejudice so substantial that a "miscarriage of justice" occurred. Bacanovic's appeal on this ground should be rejected.

1. Count Nine Was Properly Joined With The Rest Of The Charges In The Indictment

Bacanovic does not dispute that a joint trial with Stewart was proper under Rule 8. He does, however, maintain that Count Nine, the securities fraud charge against Stewart, was not properly joined with the rest of the charges. Bacanovic's appeal from Judge Cedarbaum's decision to deny severance of Count Nine from the rest of the Indictment rests on the faulty premise that it was "unrelated" to the other eight counts and because Count Nine did not allege that he had "awareness of or involvement in" the conduct. (B.Br. 31-32). As Judge Cedarbaum recognized, however, Count Nine was "closely factually related to the other eight counts," in that it charged Stewart with making the exact same false statements to the investing public about the reasons for her December 27 sale of ImClone that she was charged with making to Government investigators in the other counts. Each of the counts of the Indictment, including Count Nine, required proof of the same facts – what happened on December 27, the real reasons for Stewart's stock sale on that day, and the falsity of the defendants' statements about what happened and the reasons for Stewart's stock sale. Indeed, the false statements at issue in Count Nine were largely a repetition of the false and misleading statements that were charged as Counts One, Three and Four of the Indictment, statements that Stewart and Bacanovic conspired to make. Clearly, the counts were properly joined under either prong of the *Attanasio* test because these criminal acts are "unified by some substantial identity of facts or participants" and

"arise out of a common plan or scheme." *United States* v. *Attanasio*, 870 F.2d at 815.

The two district court decisions upon which Bacanovic relies, (B.Br. 33), are entirely distinguishable. In *United States* v. *Killeen*, 1998 WL 760237 at *3 (S.D.N.Y. 1998), the district court found joinder improper where there was "not any sort of nexus" between the scheme in which the movant was charged and the other unrelated charges. Although there were some common participants in *United States* v. *Kouzmine*, 921 F. Supp. 1131, 1133 (S.D.N.Y. 1996), there was no "substantial" identity of facts or participants. To the contrary, two members of one conspiracy had a falling out with other members and began an entirely separate immigration fraud. These two district court cases are not remotely similar to the situation here, where the factual issues are clearly intertwined and there is an overwhelming overlap of proof for the offenses. Accordingly, the District Court's determination that Count Nine was properly joined was correct.

2. Bacanovic Was Not Denied A Fair Trial As A Result Of Spillover Prejudice

a. Bacanovic Did Not Suffer Spillover Prejudice From Pasternak's Testimony

Nor did the District Court err, much less abuse its discretion, in denying Bacanovic's Rule 14 severance motion. Bacanovic's claim that he was severely prejudiced by Pasternak's testimony – which was properly received against Stewart – fails for three reasons. First, to the extent

that there was any potential prejudice to Bacanovic from this evidence, that prejudice was cured by the District Court's thorough instruction both during Pasternak's testimony and at the close of the case. *See, e.g., Zafiro*, 506 U.S. at 539 ("less drastic measures, such as limiting instructions, often will suffice to cure any risk of prejudice"); *United States* v. *DeVillio*, 983 F.2d 1185, 1192-93 (2d Cir. 1993) (trial judge's "explicit limiting instruction to the jurors that [the] testimony [concerning the attempted murder] could not be used as evidence against either [defendant]" was sufficient to protect against potential prejudice of trying defendants together).

With Pasternak still on the witness stand, the District Court instructed the jury as follows:

> Testimony about what Ms. Stewart told Ms. Pasternak is received in evidence only with respect to Martha Stewart. None of the statements of Martha Stewart to Ms. Pasternak that you heard yesterday afternoon are received in evidence against Peter Bacanovic, and is not evidence against Peter Bacanovic. So that remember I told you at the beginning of the trial that guilt is personal, that you must separately consider each defendant and each charge. In considering the charges against Peter Bacanovic, you may not consider the testimony about those statements of Martha Stewart to Ms. Pasternak in any respect. They have no bearing as to Peter Bacanovic.

(Tr. 3452).

At the end of the case, the jury was reminded that it was required to follow the District Court's limiting instructions to consider evidence admitted against one defendant only against that defendant and not the other. (Tr. 4880-81). In addition, the District Court again stressed the importance of considering the charges against each defendant separately. (Tr. 4850-51). *See United States* v. *Spinelli*, 352 F.3d 48, 55 (2d Cir. 2003) (judge's instructions to afford each defendant separate consideration, among other things, leads to finding of no unfair spillover prejudice).

In support of his claim that Pasternak's testimony denied him a fair trial notwithstanding the District Court's limiting instruction, Bacanovic relies heavily on *United States* v. *Jones*, 16 F.3d 487 (2d Cir. 1994), a case that is easily distinguishable. In *Jones*, the defendant's first trial on bank robbery charges resulted in a mistrial, with ten jurors voting to acquit. The defendant was then charged in a superseding indictment, which added two new charges of being a felon in possession of a firearm. Jones moved to have the felon in possession charges tried separately from the original charges so the jury, when considering the original counts, would not learn and be influenced by the fact that he was a convicted felon. The district court denied the motion with respect to one of the felon in possession charges, and at his second trial Jones was convicted on all counts. This Court reversed the conviction on the felon in possession charge, however, because the government had failed to prove one element of that offense, that the firearm had traveled in interstate commerce. 16 F.3d at 492. Comparing the results of the two trials, this Court further concluded that Jones was entitled

to a new trial on the original charges as well because the second jury had likely been influenced by the evidence – relevant only to the unproven count – that Jones was a convicted felon. *Id.* at 493. The effect of Pasternak's testimony, and the ability of Judge Cedarbaum's limiting instruction to cure any potential prejudice resulting from it, cannot credibly be compared with the obvious impact that the evidence that Jones was a convicted felon had on that jury.

Second, Bacanovic cannot show that Pasternak's testimony resulted in severe and unfair prejudice to him because the testimony was in fact admissible against him. At trial, Bacanovic objected to Pasternak's testimony about Stewart's statements, contending that the statements were hearsay as to Bacanovic because they were not made in furtherance of the conspiracy. (Tr. 3390, 3395). The Government at the time agreed that the statements were not in furtherance of the conspiracy and did not seek to admit the statements against Bacanovic. (Tr. 3395).

In fact, however, the statements were admissible against Bacanovic because they fell within another hearsay exception as statements that "tended to subject the declarant to civil or criminal liability." Fed. R. Evid. 804(b)(3). Under Rule 804(b)(3), inculpatory statements made to a friend, like Stewart's admission to Pasternak that her broker had provided her information about the Waksals' selling and that upon hearing this news sold her own stock, are admissible against a non-declarant co-defendant who is implicated by the statement, even if the statements were not made in furtherance of a conspiracy. *See United States* v. *Sasso*, 59 F.3d 341, 348-49 (2d Cir. 1995) (declarant's

pre-arrest statement to his girlfriend, which implicated himself and defendant equally in the crime, was admissible against non-declarant defendant); *United States* v. *Matthews*, 20 F.3d 538, 545-46 (2d Cir. 1994) (same); *United States* v. *Bakhtiar*, 994 F.2d 970, 977-78 (2d Cir. 1993) (declarant's statements to co-conspirator-turned-CI in which he tried to come up with a cover story was admissible against non-declarant defendant); *United States* v. *Kusek*, 844 F.2d 942, 950-51 (2d Cir. 1988) (conversations between cooperator and declarant who was not on trial were admissible as statements against penal interest); *United States* v. *Stratton*, 779 F.2d 820, 828-29 (2d Cir. 1985) (conversations between cooperator and declarant-codefendant were admissible as statements against penal interest against other defendants); *see also United States* v. *Westmoreland*, 240 F.3d 618, 626 (7th Cir. 2001) (declarant's confession to his own son, which likewise implicated defendant, was admissible against non-declarant); *United States* v. *Boone*, 229 F.3d 1231, 1232 (9th Cir. 2000) (conversation between declarant and his girlfriend, in which he implicated himself and defendant was admissible against non-declarant defendant); *United States* v. *Robbins*, 197 F.3d 829 (7th Cir. 1999) (in a marijuana distribution case, testimony that declarant told witness that "for a living he sold pot with Gordon Robbins" was admissible against Robbins).[*]

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[*] The Supreme Court's decision in *Crawford* v. *Washington* does not alter this analysis. In *Crawford*, the Supreme Court provided several examples of hearsay statements that are not testimonial, and therefore do not implicate the Sixth Amendment's "core concern[]" of

In *United States* v. *Sasso,* statements by the non-testifying codefendant, Armienti, were admitted at trial against defendant Sasso during the testimony of Armienti's girlfriend. The girlfriend testified that Armienti told her that Armienti was "running guns" for Sasso. *Id.* The *Sasso* Court held that Armienti's statements were admissible against Sasso. *Id.* at 349-50.

Pasternak's testimony regarding Stewart's statements that implicated both Stewart and her broker are on the same footing as the testimony of the girlfriend in *United States* v. *Sasso*. Both were admissible against the non-declarant co-defendant. Especially in light of the fact that Pasternak's testimony was in fact admissible against Bacanovic, its admission, with the extensive limiting instruction given by the District Court, certainly cannot be considered so prejudicial as to constitute a "miscarriage of justice."

Third, Pasternak's testimony was not inconsistent with Bacanovic's defense. The significance of Pasternak's testimony was that it corroborated Faneuil's testimony that he told Stewart about the Waksal selling. Although powerful evidence against Stewart, Pasternak's testimony

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confrontation. 124 S. Ct. at 1364. An "off-hand, overheard remark," for example, "bears little resemblance to the civil-law abuses the Confrontation Clause targeted." *Id.* Similarly, "a person who makes a casual remark to an acquaintance" does not "bear[] testimony." *Id.* Because Stewart's statement to Pasternak was not "testimonial," *Crawford* does not limit its admissibility. *See United States* v. *Saget*, 377 F.3d 223, 226–27 (2d Cir. 2004).

was hardly "devastating" evidence against Bacanovic. (B.Br. 24). Bacanovic never disputed that Faneuil provided that information to Stewart, but only denied that he had directed Faneuil to provide this information to Stewart. Pasternak's testimony offered nothing on the issue Bacanovic disputed. Thus, it is not correct to state, as Bacanovic does, that Pasternak's testimony "arguably linked Bacanovic to knowledge of what Faneuil had told Stewart regarding Waksal's attempted ImClone sale." (B.Br. 24). Indeed, Bacanovic could easily have defused the supposed prejudicial impact of Pasternak's testimony by pointing out that Stewart never mentioned Bacanovic in her conversation with Pasternak. It was not necessary to do so, however, in light of the District Court's limiting instruction.

There was, moreover, a wealth of evidence corroborating Faneuil's testimony that Bacanovic directed him to tell Stewart about Waksal's selling, including the fact that phone records established that Bacanovic contacted Stewart only minutes after Bacanovic learned that the Waksals were selling; the content of Bacanovic's message that he left minutes after learning the Waksals were selling, that he "thinks ImClone is going to start trading downward;" that Bacanovic lied in testimony when asked about the content of that message; that Bacanovic sent an email to Faneuil on December 27 asking if ImClone had released "any news yet," and then lied in his testimony about being surprised that ImClone's news came out; that Faneuil used Tom Reese's cell phone, rather than one of Merrill Lynch's office phones, to call Bacanovic on January 3; the testimony of Zeva Bellel that Faneuil told her on January 4 that his boss had directed Faneuil to tell

Stewart about Waksal's selling; and the testimony of Eden Werring that Faneuil told her in April 2002 that something happened at work and he had to lie for his boss.*

Because of the District Court's clear and extremely thorough limiting instruction, because Pasternak's testimony would have been properly admitted against Bacanovic and because it was not inconsistent with Bacanovic's defense, Bacanovic has failed to meet his burden of showing that his joint trial resulted in a "miscarriage of justice."

b. Bacanovic Did Not Suffer Spillover Prejudice From Stewart's News Articles

The second of the three pieces of evidence Bacanovic claims caused him severe prejudice was a series of news articles offered by Stewart to show the mix of information available to the public when Stewart made the public statements in June 2002 that were the subject of Count Nine. These articles caused no prejudice to Bacanovic. At the time Stewart offered them, the District Court instructed the jury that "this evidence is not relevant to the charges against Mr. Bacanovic," (Tr. 3065), and that they "were

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* To demonstrate the claimed importance of Pasternak's testimony to the jury's consideration of the charges against him, Bacanovic cites to a statement made by one juror in a televised interview. (B.Br. 29). As discussed *infra* at 181-189, Bacanovic's reliance on a juror's post-verdict statement is improper under Fed. R. Evid. 606(b).

not being offered to establish the truth of the content of these clippings. It is only being offered as evidence that such publicity appeared at the time in question." (Tr. 3046-47). The District Court repeated the latter instruction thrice more. (Tr. 3140 ("Again I want to remind the jury that what the article says is not evidence. It is only the fact of the publicity that is evidence."), Tr. 3155 (same), Tr. 3201 (same).

In his brief Bacanovic focuses his complaint on the fact that two of the articles, Stewart Exhibits XX127 and XX161, reported that Stewart and Bacanovic had told inconsistent stories about when they reached the agreement to sell ImClone at $60 per share. (JA 524-27). The stories reported that Bacanovic stated that the agreement was put in place in mid-December 2001, while Stewart stated that they agreed in late November. It was, however, undisputed during the trial that Bacanovic and Stewart differed on when they supposedly reached their agreement to sell Stewart's ImClone shares. And, in any event, the articles were stricken after the District Court dismissed Count Nine. Because the news articles of which Bacanovic complains were not ultimately before the jury and offered no information beyond what was already in evidence and undisputed, the articles could not have resulted in any prejudice to Bacanovic, so any error in denying severance of Count Nine, to which Stewart's news articles were relevant, was harmless.

c. Bacanovic Did Not Suffer Spillover Prejudice From The Admission Of Stewart's Statements To Investigators

Bacanovic's claim that he was also prejudiced by the joint trial because of the admission of Stewart's statements to investigators fares no better. Bacanovic was charged in a conspiracy with Stewart to make false statements, commit perjury, and obstruct the SEC's investigation. As discussed *supra* at 99-106, Stewart's false statements to investigators were clearly statements in furtherance of that conspiracy and therefore were admissible against Bacanovic even if he had not been tried jointly with Stewart.

d. The Jury's Verdict Demonstrates The Lack Of Spillover Prejudice

Finally, the jury's verdict acquitting Bacanovic on Count Five and of multiple specifications in other counts eliminates any claim of spillover prejudice. *See United States* v. *Morales*, 185 F.3d 74, 83 (2d Cir. 1999) *(*"Partial acquittal of a defendant strongly indicates that there was no prejudicial spillover."); *Spinelli*, 352 F.3d at 55 (verdicts of acquittal on certain counts show no significant spillover effect occurred). For all of these reasons, Bacanovic's argument that the District Court erred in denying his motion for severance fails.

POINT V

Sufficient Evidence Supported The Jury's Conviction Of Bacanovic On Count Two And The Jury Was Properly Instructed

Bacanovic's next argument is that there was insufficient evidence to support his conviction on Specification Two of Count Two of the Indictment. Specification Two of Count Two charged that "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." (JA 128). The record is clear that the Government presented overwhelming evidence of Bacanovic's guilt on this Specification, which was charged in the Indictment as both an affirmative false statement and a statement concealing material facts under 18 U.S.C. § 1001. Bacanovic also argues that the jury was improperly instructed on the unanimity requirement with respect to Count Two, which he claims, for the first time on appeal, was duplicitous. This claim is waived for all purposes and may not be reviewed on appeal, as the Indictment unambiguously charged Specification Two of Count Two as both a false statement and a concealment under § 1001. Furthermore, Bacanovic failed to object to the jury instruction on unanimity as given. Accordingly, to the extent that the claim is not waived in its entirety, it is reviewed under the plain error standard. Bacanovic cannot make this showing at the threshold because § 1001 defines different means of committing the same offense, not separate offenses, and there is no requirement in the law

that the jury be unanimous on the means by which a defendant commits a violation of § 1001.

A. Applicable Legal Principles

The standard of review for an insufficiency of the evidence claim is familiar and highly deferential to the jury's verdict:

> A defendant challenging a conviction based on a claim of insufficiency of the evidence bears a heavy burden. The evidence presented at trial should be viewed in the light most favorable to the government, crediting every inference that the jury might have drawn in favor of the government. . . . Accordingly, we will not disturb a conviction on grounds of legal insufficiency of the evidence at trial if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

United States v. *Dhinsa*, 243 F.3d at 648-49 (citations and internal quotation marks omitted).

B. Discussion

1. The Evidence Was Sufficient To Prove A False Statement

Helene Glotzer of the SEC testified that she asked Bacanovic during his January 7, 2002 interview "what he knew about [Stewart's] trades," in response to which Bacanovic said "that day ImClone stock price was dropping, and he called her, he told her it was falling below $60 a share, and she sold it." (Tr. 2241). Glotzer's testi-

mony that Bacanovic told the SEC that he, not Faneuil, spoke to Stewart on December 27, 2001, was corroborated by Brian Schimpfhauser, a compliance officer at Merrill Lynch. (Tr. 1115). Schimpfhauser's notes of Merrill Lynch's interview with Bacanovic on January 7, 2002 prior to Bacanovic's first interview with the SEC confirmed Schimpfhauser's testimony that Bacanovic said that he (not Faneuil) spoke to Stewart on December 27. (Tr. 1162-63). Furthermore, Stewart's false statements to investigators on February 4, 2002 that she had spoken to Bacanovic, not Faneuil, on December 27 was powerful proof that Glotzer's and Schimpfhauser's recollections of Bacanovic's statements were accurate. Stewart's similar false statement, which was intended to further the conspiracy, was also significant proof that Bacanovic had intended to lie to the SEC in early January, and that this was not simply a misuse of a pronoun as Bacanovic contended to the District Court, the jury, and now on appeal.

Bacanovic argues that his statement that "he" spoke to Stewart on December 27 was immaterial to the SEC because, prior to Bacanovic's January 7, 2002 interview, Faneuil told the SEC that he (Faneuil) had spoken to Stewart and handled the trade, and Bacanovic eventually told the SEC the same thing. Bacanovic's argument misconceives the materiality requirement under § 1001. Bacanovic's false statement was material if it had "a natural tendency to influence, or [is] capable of influencing," a governmental function. *United States* v. *Gaudin*, 515 U.S. 506, 509 (1995) (internal citation and quotation marks omitted). "A fact is material if it could have influenced the government's decisions or activities. However, proof of actual reliance is not required." 2 L. Sand, et al.,

Modern Federal Jury Instructions, Instrs. 36-4, 36-9 (2003). In addition, "[a] false statement's capacity to influence the fact finder must be measured at the point in time that the statement was uttered." *United States* v. *Sarihifard*, 155 F.3d 301, 306 (4th Cir. 1998). Thus, even where a defendant specifically recants a prior false statement, that recantation does not negate the false statement's materiality. *See United States* v. *Sebaggala*, 256 F.3d 59, 64 (1st Cir. 2001) (subsequent correction or amendment of an earlier false statement is not a defense to a prosecution under § 1001).

Bacanovic's false statement in Specification Two certainly "could have influenced the government's decisions or activities." *See* L. Sand, et al., *Modern Federal Jury Instructions,* Instrs. 36-4, 36-9 (2003). Coming as it did at the very beginning of the investigation, it could have, for example, caused investigators to turn their attention away from Faneuil, and conclude that since the broker and the client shared the same explanation for the sale, the explanation was true.

Nor is Bacanovic's argument that there was insufficient proof of intent persuasive. Bacanovic argues that he could not have intended to lie because he knew it would be inconsistent with what Faneuil told the SEC and what he said to Judy Monaghan of Merrill Lynch. There is no evidence in the record, however, that Faneuil ever told Bacanovic that he had informed the SEC or Monaghan that he alone spoke to Stewart on December 27. (Tr. 1580 ("[Bacanovic] said, what did you say [to the SEC]? I said, I just told [the SEC] that Martha asked for a quote and sold her stock. And he said, good.")). Faneuil's statement

to the SEC that Stewart asked for a quote and she sold the stock does not necessarily mean that Bacanovic did not also speak to Stewart. There was, therefore, no reason for Bacanovic to believe that the SEC would necessarily view his statement to be in such tension with Faneuil's that it would raise suspicions. As for Monaghan, she did not attend Bacanovic's SEC interview and, therefore, was not present to contradict what Bacanovic said to the SEC.

The context in which the January 7, 2002 interview occurred is also significant in assessing Bacanovic's intent. Faneuil had told Bacanovic that "they [the SEC] really don't focus on Martha at all, they mostly asked about Sam." (Tr. 1580). This was consistent with the testimony of Merrill Lynch employees and Glotzer that the primary focus at the early stage of the investigation was on the Waksal sales. (Tr. 1201, 2418). Accordingly, it would not have been inconsistent for Bacanovic to believe that his lie about the Stewart trade would go unchallenged by the SEC. In addition, the evidence at trial showed that Faneuil was a much less dependable member of the conspiracy in its early stages than he was later on. (Tr. 1573-1601). The jury was entitled to conclude on this evidence that Bacanovic intended to lie so that he could minimize Faneuil's involvement.

This context is also relevant to Bacanovic's acknowledgment during his SEC testimony on February 13, 2002 that Faneuil spoke to Stewart. As the evidence at trial showed, Bacanovic knew by that date that the investigation was focused on both the Waksal sales *and* Stewart's sale. Not only had Stewart been interviewed about her trade on February 4, 2002, Bacanovic had also learned by

February 11 that the SEC had subpoenaed documents from Merrill Lynch, including phone records that would undermine his claim to have spoken to Stewart that day. (Tr. 1214-17). Furthermore, by that point Bacanovic had spoken to Faneuil to reassure him that "everyone's telling the same story," and Faneuil had given no indication that he intended to come forward with the truth to investigators, increasing Bacanovic's confidence that Faneuil would continue to tell the same story. (Tr. 1609-10). The jury was entitled to conclude, based on all the evidence including Stewart's similar false statement on February 4, 2002, that Bacanovic intentionally lied on January 7 but abandoned that lie on February 13 to avoid the risk of incurring further suspicion from investigators and because he was more convinced that Faneuil was on board the conspiracy. *See, e.g.*, *United States* v. *Meuli*, 8 F.3d 1481, 1486 (10th Cir. 1993) (affirming a § 1001 conviction despite the defendant's claim that he filed amended forms with the IRS prior to being put on notice that he was the subject of an IRS investigation, where there was sufficient evidence to suggest that the defendant knew of the IRS investigation before he filed the amended forms); *United States* v. *Fern*, 696 F.2d 1269 (11th Cir. 1983) (evidence at trial suggested that the defendant only changed his story after the IRS became suspicious).

2. The Evidence Was Sufficient To Prove Concealment

The Government also presented overwhelming evidence that this statement concealed the fact that Faneuil spoke to Stewart on December 27 and informed her of the Waksal sales at Bacanovic's instruction. Faneuil's testi-

mony on this point, corroborated by, among other things, phone records, emails, and other documentary evidence, and Faneuil's prior consistent statements made to friends and confidants in the days and weeks after the trade, stood at the heart of the case. The evidence that Faneuil spoke to Stewart and told her of the Waksal sales was so overwhelming that Stewart's counsel conceded the point in his summation (Tr. 4762), and Bacanovic's counsel did not contest it. Moreover, this evidence of concealment lent substantial support to the false statement aspect of Specification Two by explaining why Bacanovic would deliberately lie, rather than simply misspeak, about who spoke to Stewart on December 27.

In the face of this evidence of concealment, Bacanovic argues that the Government failed to prove that he was under a duty to disclose the information that he had instructed Faneuil to inform Stewart of the Waksal sales. This Court has made it clear that a defendant may be convicted of concealment under 18 U.S.C. § 1001 where the speaker had no pre-existing affirmative duty to disclose the information. In *United States* v. *Stephenson*, 895 F.2d 867 (2d Cir. 1990), this Court addressed a situation in which the defendant, after learning that he was under investigation by the FBI, informed investigators that he had been offered a bribe by a foreign businessman. *Id.* at 874. In making this voluntary statement to investigators, the defendant concealed the fact that he had requested the bribe from the businessman. *Id.* at 870-71. The defendant argued that his statement was not actionable as a concealment under § 1001 because it was literally true that he had been offered a bribe by the businessman, he had "no duty to disclose" that he had requested the bribe, and "the fifth

amendment precludes his being forced to reveal it." *Id.* at 874.

This Court rejected these arguments out of hand, holding that the defendant's arguments "skirt the essential issue: whether [the defendant] 'knowingly and willingly falsifie[d], conceal[ed] or cover[ed] up' under Section 1001." *Id.* The Court pointed out that the defendant "was not simply reporting his conversation with [the businessman] to [the investigator]; he was actively seeking to mislead [the investigator], a federal official, into believing that [the businessman], and not he, was responsible for the attempted bribery." *Id.* The Court held that this evidence was sufficient for the jury to conclude that the defendant had "falsified, concealed, and covered up by trick, scheme, or device material facts" concerning his solicitation of a bribe. *Id.*

As was true of the defendant in *Stephenson*, Bacanovic *voluntarily* provided the false and misleading information to investigators in an effort to conceal the truth. Glotzer testified that she informed Bacanovic at the beginning of the interview on January 7, 2002 that "he was speaking with us voluntarily, he can end the interview anytime he wanted, and if he was going to speak to us, to please remember to be truthful." (Tr. 2239). Despite these warnings, Bacanovic decided to proceed with the interview and to cover up the true events of that day. The law is clear that where the defendant voluntarily agrees to speak to investigators and elects to answer their questions, he operates under a legal duty to be truthful under § 1001. *See Stephenson*, 895 F.2d at 874; *see also Bryson* v. *United States*, 396 U.S. 64, 72 (1969) (upholding a

conviction under § 1001 and stating that "[o]ur legal system provides methods for challenging the Government's right to ask questions – lying is not one of them. A citizen may decline to answer the question, or answer it honestly, but he cannot with impunity knowingly and willfully answer with a falsehood."); *United States* v. *LeMaster*, 54 F.3d 1224, 1230 (6th Cir. 1995); *United States* v. *Cisneros*, 26 F. Supp.2d 24, 42-43 (D.D.C. 1998).

Bacanovic also argues that there was insufficient evidence of what questions he was asked by investigators, proof that he claims is required to support a conviction for concealment under § 1001. The trial record contradicts this assertion. Glotzer testified that she "asked [Bacanovic] about what he knew about [Stewart's] trades." (Tr. 2241). Bacanovic responded that "he and [Stewart] had decided that if ImClone stock fell below 60, they would sell it if it fell below $60 a share. . . . And [on December 27, 2001] ImClone stock price was dropping, and he called her, he told her that it was falling below $60 a share, and she sold it." (Tr. 2241). Glotzer's question asking what Bacanovic "knew about" the ImClone trade was clear and unambiguous, as was Bacanovic's answer which, while betraying no confusion about Glotzer's simple question, deliberately concealed that Stewart sold after learning of the Waksal sales from Faneuil at Bacanovic's specific instruction. A conviction for concealment under § 1001 requires no more. *See Stephenson*, 895 F.2d at 874.

Moreover, Bacanovic did not lie about some collateral or tangential matter; nor did he decline to respond to the question or tell Glotzer that she should speak to Faneuil or Stewart. Instead, Bacanovic lied about the very thing the

SEC specifically inquired of him – what he "knew about" Stewart's ImClone sale. Instructing his assistant to violate Merrill Lynch policy and divulge confidential client information to another client was not, as Bacanovic argues on appeal, a mere "detail." (B.Br. 65-66). The evidence at trial showed that this "detail" was the reason for Stewart's sale on December 27. (JA 1752).

The purely voluntary nature of Bacanovic's statements to investigators, the clarity of the questions asked and answers given, the overwhelming evidence that Bacanovic deliberately concealed that Stewart had learned of the Waksal sales prior to selling her own ImClone stock, Bacanovic's affirmative false statements that he spoke with Stewart and the reason for her sale was that the price of the stock had fallen below $60 per share, and the materiality of the concealed information to the SEC's investigation, readily distinguish this case from the inapposite decisions cited by Bacanovic in support of his claim that there was insufficient evidence to support a concealment charge under § 1001. *See United States* v. *Aarons*, 718 F.2d 188, 189-90 (6th Cir. 1988) (insufficient evidence to support § 1001 conviction of a defendant who was alleged to have caused others to make false statements, but where there was no evidence that defendant took overt acts relating to the making of the false representations by the other people involved in the scheme); *United States* v. *London*, 550 F.2d 206, 213-14 (5th Cir. 1977) (to prove concealment under § 1001, the Government must allege more than that the defendant "passively failed to disclose" material facts and must present evidence that the defendants "committed affirmative acts constituting a trick, scheme, or device by which they sought to conceal

material facts"); *United States* v. *Vesaas*, 586 F.2d 101, 103-04 (8th Cir. 1978) (reversing a § 1001 conviction and dismissing the indictment because the indictment was so poorly drafted and confusing that the Court concluded that "[i]t is extremely difficult for this court to discern from the plain wording of the indictment how the alleged misrepresentations are false," and because the questions asked by the prosecutor were so leading that the defendant's "yes" or "no" responses were insufficient as a matter of law to support the charge); *United States* v. *Crop Growers Corp.*, 954 F. Supp. 335, 344-48 (D.D.C. 1997) (no duty to disclose uncharged criminal conduct in SEC filings where federal campaign finance and securities laws did not require disclosure of the information, and silence in response to open ended questions that appeared on SEC forms could not constitute falsity absent a duty to speak).

3. Bacanovic Waived Any Challenge To Count Two As Duplicitous

Bacanovic argues that making a false statement and concealing a material fact are different offenses under § 1001, and that it was error for the Court not to instruct the jury that they must be unanimous, not only on which statement violated the statute, but also on whether the statement was either false or concealed material facts. Bacanovic's claim is that this instruction was necessary because Specification Two of Count Two is duplicitous. He raises this claim for the first time on appeal.

This claim is waived and cannot be raised on appeal because Bacanovic failed to challenge Count Two as duplicitous prior to trial. *See United States* v. *Viserto*, 596 F.2d 531, 538-39 (2d Cir. 1979) (claim that indictment is

duplicitous must be raised before trial). The sole exception to this rule is if the alleged defect is not apparent on the face of the indictment. *See United States* v. *Sturdivant*, 244 F.3d 71, 76 (2d Cir. 2001). Here, the Indictment was explicit in charging Specification Two of Count Two as both a false statement and as a concealment. Paragraph 24(b) of the Indictment alleged as follows in Count One:

> 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*.

(JA 114) (emphasis added). This allegation was specifically realleged by reference in ¶42 of Count Two. (JA 42). Furthermore, the precatory language of Count Two alleged that Bacanovic "made the following false statements and *concealed and covered up* facts that were material to the SEC's investigation." (JA 128) (emphasis added). Included amongst the statements that were false and concealed material facts was Specification Two. (JA 128). The Superseding Indictment contained the same language. (JA 243; 256-57).

It is also evident that Bacanovic has always recognized that Specification Two charged both falsity and concealment. Proposed Instruction No. 21 of Bacanovic's own requests to charge reads, "Count Two charges that Mr. Bacanovic knowingly and willfully falsified, concealed, and covered up material facts by trick, scheme, and device," and his proposed Instruction No. 22 then defined these terms. (GA 41-42). Thus, Bacanovic's assertion that Specification Two charged "only a false representation" is wholly untenable. (B.Br. 67).

4. Bacanovic Failed To Object To The District Court's Unanimity Instruction, And There Was No Error Because The Jury Was Properly Instructed On Unanimity

Even if his claim that Specification Two was duplicitous were not waived in its entirety, Bacanovic failed even to object to the District Court's instruction on unanimity. Although Bacanovic objected to charging the jury on concealment at the charging conference, he did not object to the instruction on unanimity as given. This is insufficient to preserve the claim. *See United States* v. *Crowley*, 318 F.3d 401, 411-16 (2d Cir. 2003). Thus, to the extent the claim is not waived for all purposes, it must still be reviewed for plain error.

Bacanovic cannot show plain error because the District Court's instruction was not, in fact, erroneous. The Court instructed the jury that,

> [A]ll the jurors must agree that, for the count you are considering the defendant you

> are considering made at least one of the statements or concealed one of the material facts charged in the count, and all the jurors must agree on the same specification. In addition, you may not find the defendant you are considering guilty of making false statements or concealing material facts unless you all agree, unanimously, that the particular statement was false or concealed a particular material fact. It is not enough that you all find that some statement made by a defendant was false or concealed a material fact. That is, you may not find the defendant you are considering guilty if some of you think that one particular statement is false or concealed a material fact, and the rest of you think that a different statement is false or concealed a material fact. In order to convict the defendant you are considering of making false statements, there must be at least one specific statement in the count you are considering that all of you believe was false or concealed a material fact.

(Tr. 4856). Bacanovic argues that the Court should have instructed the jury that it needed to be unanimous, not only on which specification in a count they agreed was false or concealed material facts, but also on whether the statement was false or, alternatively, concealed a material fact.

Addressing the exact argument that Bacanovic makes here, the Ninth Circuit held almost three decades ago that the jury need not be unanimous on whether the statement

they all agree violated § 1001 did so because it was false or because it concealed material facts. *See United States* v. *UCO Oil Co.*, 546 F.2d 833, 837-38 (9th Cir. 1976). In *UCO Oil*, an opinion that goes entirely unmentioned in Bacanovic's brief, the Ninth Circuit held that "Congress, in enumerating several different types of fraudulent conduct in Section 1001, did not create separate and distinct offenses." *Id.* at 838. Thus, the Court of Appeals concluded, "[p]roof of any one of the allegations will sustain a conviction" and that it is "not a valid objection . . . that the jury, in arriving at a unanimous verdict, may not agree on the particular means by which the offense was committed." *Id.* at 838. This Court has cited the reasoning of *UCO Oil* with approval. *See, e.g.*, *United States* v. *Murray*, 618 F.2d 892, 896 (2d Cir. 1980).

Support for the Ninth Circuit's analysis – that § 1001 defines different *means* of committing the same offense, not separate *offenses*, and therefore the jury need not be unanimous on the means of committing the offense, so long as it is unanimous about which statement was a violation of the statute – is widespread. For example, a plurality of the Supreme Court explained in *Schad* v. *Arizona*, 501 U.S. 624 (1991) (plurality opinion), a case that addressed whether it was unconstitutional for a state law not to require that a jury be unanimous on whether the defendant committed premeditated murder or felony murder to be found guilty of first-degree murder, that,

> We have never suggested that in returning general verdicts in such cases the jurors should be required to agree upon a single means of commission, any more than the

> indictments were required to specify one alone. In these cases, as in litigation generally, different jurors may be persuaded by different pieces of evidence, even when they agree upon the bottom line. Plainly there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict.

Id. at 631-32 (citation and internal quotation marks omitted). In *Schad*, a majority found that the state statute at issue did not violate the Constitution and a plurality that it did not do so because the state law defined premeditated murder and felony murder as different means of committing the same offense. *See id.* at 643. The Supreme Court has reaffirmed the principle that unanimity is not required from the jury in deciding which means was committed to commit a single offense. *See Richardson* v. *United States*, 526 U.S. 813, 817 (1999).

This Court hews closely to the distinction between different means and separate offenses in determining whether jury unanimity is required. In *United States* v. *Crisci*, 273 F.3d 235 (2d Cir. 2001), the Court considered whether an indictment was duplicitous in charging violations of 18 U.S.C. §§ 1344(1) and (2) in the same count. As the Court explained, the question was whether the bank fraud statute, which prohibits a scheme to defraud a financial institutions in § 1344(1), and prohibits a scheme to obtain a financial institution's money "by means of false or fraudulent pretenses, representations, or promises" in § 1344(2), described "two distinct crimes" or "two ways of committing the single crime of bank fraud." *Id.* at 239.

This Court held that "a single count of an indictment may charge bank fraud under both subsections (1) and (2) and that proof of the violation of either subsection is sufficient to support a conviction." *Ibid.* The Court further explained that "[b]ecause the two subsections of section 1344 are written in the disjunctive," § 1344 "defin[es] different ways in which a defendant may commit the offense of bank fraud." *Ibid.*

The Government is not aware of any court that has held that the false statement and concealment provisions of § 1001 define separate offenses, rather than different means of committing the same offense, as the terms "offenses" and "means" are used in cases like *Schad*, *Richardson*, *UCO Oil*, and *Crisci*. The cases cited by Bacanovic certainly do not do so. For example, the Fifth Circuit in *United States* v. *Gipson*, 553 F.2d 453 (5th Cir. 1977), held that the federal statute that prohibits the sale or receipt of stolen vehicles, 18 U.S.C. § 2313, defines two distinct general offenses, housing stolen vehicles and marketing stolen vehicles, with respect to which the jury had to be unanimous. *See id.* at 458. The Fifth Circuit made this determination by grouping similar means of committing the crime set forth in the statute into two distinct categories of offenses. *See id.* Whatever persuasive authority *Gipson* may have is highly attenuated, however, because the plurality opinion in *Schad* expressly disapproved of the analysis in *Gipson*. *See Schad*, 501 U.S. at 634-36. In fact, the plurality stated that "[w]e are not persuaded that the *Gipson* approach really answers the question," and found that opinion's "notion of 'distinct conceptual groupings' [] simply too conclusory to serve as a real test." *Id.* at 635.

Bacanovic also relies on *United States* v. *Diogo*, 320 F.2d 898 (2d Cir. 1963), to argue that § 1001 defines two separate "offenses," as that term is used in determining whether a count is duplicitous. In *Diogo*, this Court held that a prosecution for making false statements or concealment under § 1001 could not stand where the charged falsehood was not, in fact, false. Specifically, the indictment charged that the defendants were part of a sham marriage and had falsely informed immigration officials that the marriages were valid. *See* 320 F.2d at 901. After the defendants were convicted under § 1001, the Court reversed because the marriages that were alleged to be shams were, in fact, valid under state law. *See id.* at 903-05.

Bacanovic points to *dicta* in the opinion that says § 1001 "encompasses within its proscription two distinct offenses, concealment of a material fact and false representations." *Id.* at 902. The analysis in *Diogo* did not turn in any way on this language, however, because the Court found that the statements at issue were not false and the Government had failed to charge them under the concealment theory. *See id.* at 905, 909. The *Diogo* Court did not specify what it meant by the term "offenses," nor did it distinguish between "offenses" and "means," as courts do in the context of analyzing duplicitous counts.

As the Ninth Circuit noted in *UCO Oil*, the fairest reading of *Diogo*'s use of the term "offenses" is that it "goes no further than to indicate that the different means of violating section 1001 involve different elements of proof." *UCO Oil*, 546 F.2d at 835 n.2. Were it otherwise, *Diogo* would stand for a rule that "the government could

base two counts on the making of a single false statement, charging a false statement in one and concealment in the other." *Id*. The Ninth Circuit declined to read *Diogo* in this fashion because such an interpretation of its *dicta* would place the decision in irreconcilable conflict with the rule against multiplicity in indictments. *See id.*

By the same token, *Diogo* appeared to recognize that the Government could have charged falsity and concealment with respect to a single statement without offending the rule against duplicitous counts. The Government argued in *Diogo* that the convictions should stand because the evidence, even if it did not prove actual falsity, nevertheless satisfied the concealment theory of § 1001. *See id.* at 909. The Court rejected this argument, because the indictment did not make reference to concealment, the Government did not argue concealment, and the trial court did not instruct the jury on concealment. *See id.* at 909 & n.10. The Court did not suggest, however, that the rule against duplicitous counts would have barred the Government from charging concealment and falsity with respect to a single statement. Accordingly, it does not follow, as Bacanovic contends, that the *Diogo* Court understood that falsity and concealment were distinct "offenses" as that term is used by courts in cases such as *UCO Oil*, *Crisci*, and *Schad*.[*]

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[*] The remaining cases cited by Bacanovic also do not support his argument. *See United States* v. *Payseno*, 782 F.2d 832 (9th Cir. 1986) (finding genuine risk of juror confusion based on instruction that jurors could find any one of three separate extortionate actions, directed at

There was no error in the instruction the District Court gave the jurors on unanimity, much less plain error in light of the fact that the weight of authority overwhelmingly favors an interpretation of falsity and concealment as different means of committing the single offense set forth in § 1001.*

POINT VI

The Jury Was Properly Instructed On Application Of The Two-Witness Rule

Bacanovic argues that the District Court erred in instructing the jury that it could consider as two separate pieces of evidence for purposes of the two-witness rule the testimony of Ann Armstrong on her recollection of a telephone conversation with Bacanovic and a message that Armstrong wrote recording the specific message he left for Stewart. The law of this Circuit does not require that the source of the two pieces of evidence necessary to support a perjury conviction be two different witnesses. Rather,

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different victims and occurring at different times and places, to convict the defendant of a single count of violating 18 U.S.C. § 894); *United States* v. *Stern*, 2003 WL 22743897, at *2 (S.D.N.Y. Nov. 20, 2003) (denying motion to dismiss indictment as duplicitous noting that the court would instruct the jury that it had to be unanimous on at least one false statement charged in a single count to convict the defendant).

* Nor did any error affect Bacanovic's substantial rights. As explained *supra* 138-47, there was overwhelming evidence to support the conviction under either theory.

perjury can be proven by a single witness, so long as that witness' testimony is corroborated by an additional piece of evidence that is independent of the witness' *recollection*, though it need not be independent of the witness herself.

Because the message log recording Bacanovic's message for Stewart was independent of Armstrong's recollection of her conversation with Bacanovic and her testimony concerning that recollection, it satisfied the independence requirement of the two-witness rule.

A. Relevant Facts

At trial, Armstrong testified about her recollection of events on the morning of December 27, 2001. Relevant to this issue was her testimony concerning a telephone conversation she had with Bacanovic that morning:

> Q: Did you answer a call from Mr. Bacanovic that day?
>
> A: Yes.
>
> Q: Do you have a *recollection* of approximately what time of day that call was?
>
> A: Sometime between 10 a.m. and 11 a.m..
>
> Q: *Can you tell us what you remember about that call*.
>
> A: *Peter asked to speak to Martha*, and I explained that she was on her way to Mexico, she was on an airplane on her way to Mexico. *He asked if we could call her on the plane*. I told him it wasn't

a very instant process. . . . *He said he needed to speak to her regarding ImClone. Then he gave me a message, which I took down, to tell her when I heard from her that he thought ImClone was going to start trading downward.*

Q: Did you write down that message?

A: I started – I mean, when I realized it was Peter, I started writing in one of my little blue books. When I realized he was going to give me a specific message that day, I typed it in – I mean I turned to my keyboard and I typed it in.

* * *

Q: Ms. Armstrong, can you explain to the jury when in the course of your conversation with Mr. Bacanovic on December 27, 2001, you wrote ["Peter Bacanovic thinks ImClone is going to start trading downward"] and you typed ["Peter Bacanovic thinks ImClone is going to start trading downward"]?

* * *

A: I didn't realize Peter was going to leave a specific message until the end of our conversation. So sometime in the middle of the conversation. I mean, I'm always just sort of poised to write. So sometimes in the middle I was just — I mean,

I knew the gist of it before I knew the details of it.

* * *

Q: At what point in the conversation did you type ["Peter Bacanovic thinks ImClone is going to start trading downward"]?

A: At the end of the conversation, *Peter said he thought ImClone was going to start trading downward*.

Q: So what did you write?

A: I turned to my keyboard and I typed it in.

Q: *During this conversation, did Mr. Bacanovic say what the price of ImClone stock was*?

A: *No*.

(Tr. 2109-11) (emphasis added).

As is clear from the record, this testimony was based entirely on Armstrong's own recollection of the conversation. It is equally clear from the record that the message log, which read "Peter Bacanovic thinks ImClone is going to start trading downward," and which was introduced into evidence without objection as a business record, was not used to refresh Armstrong's recollection or otherwise

assist her testimony about the conversation.* In other words, Armstrong did not rely on the message that she took down to assist her memory of the substance of the conversation. Bacanovic's counsel did not cross-examine Armstrong on this testimony, nor did he argue to the jury or present other evidence to suggest that Armstrong's recollection of the conversation depended in any way on the message log.

During deliberations, the jury returned a note asking whether "testimony of one witness and the document produced in the normal course of business by that same witness at a different time and place [can] be considered as two separate pieces of evidence?" (Tr. 4922). The jury then sent a clarifying note that read, "We are referring to Annie Armstrong's testimony and the phone logs she kept in the normal course of business at MSLO. Can the phone logs be used to corroborate her testimony?" (Tr. 4924-25). The District Court instructed the jury that it could use the phone logs to corroborate Armstrong's testimony. (Tr. 4945).

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* Armstrong did not, contrary to Bacanovic's claim in his brief, testify that she knew Bacanovic did not mention the price of ImClone because it was not reflected in the message log. Armstrong testified about this conversation from her own recollection, without assistance of the message log. It was only *after* testifying based on her recollection that she *also* testified that she would have written the price down in the message log if Bacanovic had mentioned it. (Tr. 2111-12).

B. Applicable Legal Principles

In *United States* v. *Weiner*, 479 F.2d 923 (2d Cir. 1973), this Court explained that the two-witness rule "is satisfied by the direct testimony of a second witness or *by other evidence of independent probative value, circumstantial or direct, which is of a quality to assure that a guilty verdict is solidly founded*." *Id.* at 926 (citations and internal quotation marks omitted) (emphasis added). The *Weiner* Court held that the independent corroborative evidence must be "inconsistent with the innocence of the defendant," which "mean[t] no more than that such evidence must tend to substantiate that part of the testimony of the principal prosecution witness which is material in showing that the statement made by the accused under oath was false." *Id.* at 927-28. "This is to say that the two-witness rule is satisfied by corroborative evidence of sufficient content and quality to persuade the trier that what the principal prosecution witness testified to about the falsity of the accused's statement under oath was correct." *Id.* at 928. *See also Weiler* v. *United States*, 323 U.S. 606, 610 (1945) ("Two elements must enter into a determination that corroborative evidence is sufficient: (1) that the evidence, if true, substantiates the testimony of a single witness who has sworn to the falsity of the alleged perjurious statement; (2) that the corroborative evidence is trustworthy.").

The analysis in *Weiner* is instructive in determining whether corroborative evidence is independent from the direct testimony of the principal witness. In *Weiner*, the defendant was convicted of perjury for lying under oath that he had never met or spoken to a man named Philip

Peltz, other than on one occasion in which they met in February or March 1966, and possibly a late night phone call on April 15, 1966, of which the defendant had only a hazy recollection. 479 F.2d at 924. Peltz testified at trial to a number of other meetings, letters, and telephone conversations with the defendant. *Id.* at 924-25. In finding that this testimony was supported by sufficient independent corroborative evidence to satisfy the two-witness rule, the Court also explained that certain evidence, although relevant and admissible, would not have satisfied the two-witness rule. *Id.* at 929. This evidence included a notation that Peltz made in his diary that the defendant had called him on April 9, 1966, which the Court explained "was not *independent* corroboration of that call." *Id.* (emphasis in original). The Court explained that the diary notation was not "independent" evidence because "Peltz admitted that he had no *independent* recollection of the date of that call, but his memory had been *refreshed* by a notation in his personal diary." *Id.* at 925 (emphasis added). Thus, Peltz's testimony concerning the phone call was based on, and inseparable from, the diary notation of the call. The Court held, in essence, that the testimony and the notation were a single piece of evidence. The Court did not hold or suggest that the diary notation could under no circumstances be considered independent evidence because its source was the same witness.

C. Discussion

Armstrong's testimony regarding the substance of her conversation with Bacanovic (including that he never told her the price of ImClone during their conversation on December 27) and the business record prepared by

Armstrong that read "Peter Bacanovic thinks ImClone is going to start trading downward," together satisfy the two-witness rule.

The message is "independent" evidence because it was neither the basis for, nor was it used to refresh, Armstrong's recollection or testimony on the substance of her conversation with Bacanovic on December 27. Armstrong's testimony is clearly based solely on her own recollection. (Tr. 2109-12). The phone log containing the message "Peter Bacanovic thinks ImClone is going to start trading downward," was not shown to Armstrong during her direct testimony until after she had already testified about the substance of her conversation with Bacanovic. (Tr. 2110). She did not use it to refresh her recollection, nor did she indicate in any way that her recollection of the conversation depended on the message. Significantly, for example, Armstrong recalled that the message was left some time between 10 a.m. and 11 a.m. on December 27, despite the fact that the phone log itself makes no reference to the time the message was left. (Tr. 2109). Furthermore, she remembered the substance of the conversation, much of which was not even recorded in the message. (Tr. 2109). Finally, in response to the question "[d]uring this conversation, did Mr. Bacanovic say what the price of ImClone stock was," Armstrong unequivocally said: "No." (Tr. 2111). This testimony, too, was based solely on her own recollection. The defendants had a full opportunity to cross-examine Armstrong on this testimony, but neither

defendant chose to do so. In fact, Bacanovic's counsel chose to ask *no* questions of Armstrong at all. (Tr. 2210).*

Moreover, the message log was admitted into evidence without objection by either defendant as a business record kept and maintained in the ordinary course of business by MSLO. (Tr. 2110). As a business record, it could have been offered through a custodian of records from MSLO, had Armstrong been unavailable to testify. This further distinguishes the message log from the diary notation mentioned in *Weiner*, which appears to have been nothing more than a personal record of the principal witness and certainly not a business record admissible under Fed. R. Evid. 803(6).

This Court approved of evidence similar to the message log as independent corroborative evidence in *United States* v. *Maultasch*, 596 F.2d 19 (2d Cir. 1979). In *Maultasch*, the defendants were charged with perjury for lying under oath to the SEC about paying for automobiles

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* In service of his argument that Armstrong, contrary to her testimony, did not have a recollection of the conversation independent of the message log, Bacanovic inappropriately speculates about matters that are not before the Court, specifically that Armstrong "undoubtedly reviewed [the message log] many times in preparation for her testimony." (B.Br. 54). Armstrong's preparation for her testimony is wholly outside the record of this case. In any event, having made a strategic decision at trial not to conduct any cross-examination of Armstrong, Bacanovic cannot now ask this Court to speculate as to the answers to questions he chose not to ask.

they had purchased by executing stock transactions in the name of the owner of an automobile dealership. *Id.* at 22. The owner of the dealership testified on behalf of the Government about these transactions, stating that the defendants had set up a securities account in his name and that he had received payment for the cars he sold to the defendants in the form of proceeds from the stock transactions. *Id.* at 22 & 25. The Government offered as corroborative evidence to satisfy the two-witness rule the letter agreement that was prepared by the owner of the dealership himself, and that set forth the terms of the parties' understanding that the balance on the purchase price of the cars would be paid for from the profits on the stock transactions. *Id.* at 25-26. This Court noted that the letter agreement prepared by the owner of the dealership was corroborative evidence that was independent of the owner's testimony on the same topic. *Id.* at 26.

As the *Maultasch* Court explained, the Second Circuit's pre-*Weiner* decision in *United States* v. *Freedman*, 445 F.2d 1220 (2d Cir. 1971), did not announce a contrary rule. The *Maultasch* Court pointed out that in *Freedman* a single witness testified to two separate transactions, one that the Court believed was sufficiently corroborated by a letter agreement and a check written by the witness for the benefit of the defendant's wife, and a second that the Court believed was insufficiently corroborated by a single check written by the witness for the benefit of the defendant's wife. *See Maultasch*, 596 F.2d at 25-26. The *Maultasch* Court explained that "this court reversed the conviction [in *Freedman*] because the trial judge had instructed the jury that it could convict solely on the basis of the uncorroborated transaction." *Id. See also Freedman*,

445 F.2d at 1225-26. The Fifth Circuit has interpreted *Freedman* similarly: "We do not read [*Freedman*] as holding that the independent corroboration may not be tied in any way to the testimony of the original witness . . . ." *United States* v. *DeLeon*, 474 F.2d 790, 792 (5th Cir. 1973).

These cases stand for the proposition that corroborative evidence that was created by the witness herself and that concerns the same subject as the witness' testimony may be independent of that testimony for purposes of the two-witness rule, so long as the corroborative evidence does not serve as the basis for the witness' testimony and is not otherwise used to refresh the witness' recollection of events. In other words, the mere fact that the witness created the corroborative evidence does not render that evidence insufficient under the two-witness rule.

The message log was powerful evidence of Bacanovic's perjury before the SEC, and it was independent of Armstrong's testimony describing her conversation with Bacanovic. The message log corroborated Armstrong's testimony in all relevant respects. It further served as independent evidence of the falsity of Bacanovic's testimony that he left a message "to please call us back, and also to please advise [Stewart] that ImClone stock was at whatever the price was at that time," and that he did not say that ImClone stock was dropping, but that "[w]e just gave her the price of the stock." The message log is also a business record, not an entry in a diary or a self-serving document whose reliability would be difficult to assess. In short, the message log is consistent with the kind of independent corroborative evidence that has long been

approved by the Second Circuit as satisfying the two-witness rule. *See Maultasch*, 596 F.2d at 25-26.

The cases cited by Bacanovic are not to the contrary. For example, in *United States* v. *Rose*, 215 F.2d 617 (3d Cir. 1954), the single witness testified from his own records, which included invoices and checks, on the subject of how much money he was paid by the defendant, who was charged with perjury for lying about how much he had paid the witness from proceeds received by the defendant from G.I. schools. *Id.* at 624. The Government introduced the witness' records into evidence, and argued that the records were independent corroboration of the witness' testimony in satisfaction of the two-witness rule. *Id.* The Third Circuit rejected this argument, holding that the "records were not admissible because they had been used from the very beginning of his testimony to 'refresh' his memory." *Id.* at 625. Thus, *Rose* stands for the same essential proposition set forth in *Weiner*: evidence is not "independent" of the witness' testimony if it is used merely to refresh the witness' recollection and lacks independent weight of its own beyond that testimony. *Rose* does not hold, as Bacanovic suggests, that the independent corroborative evidence must come from a source other than the witness. Indeed, the Fifth Circuit has rejected the reading of *Rose* urged by Bacanovic. *See United States* v. *DeLeon*, 474 F.2d 790, 792 (5th Cir. 1973) ("We do not read [*Rose*] as holding that the independent corroboration

may not be tied in any way to the testimony of the original witness.").*

Bacanovic also contends that the message log was insufficiently corroborative of Armstrong's testimony to satisfy the two-witness rule. In this regard, Bacanovic claims that the message "confirmed the thrust of Bacanovic's testimony." (B.Br. 56). However, even a cursory review of the message – "Peter Bacanovic thinks ImClone is going to start trading downward" – demonstrates that the message directly and irreconcilably conflicted with Bacanovic's SEC testimony in at least two fundamental ways: first, Bacanovic specifically *denied* that he left a message with Armstrong that the ImClone's stock price was dropping ("Q: And you specifically told [Armstrong] that ImClone stock was dropping? A: No. We just gave her the price of the stock."); and second, Bacanovic claimed that he informed Armstrong *only* what the stock price was at the time ("We just gave her the price of the stock. . . . . I said, "I would like to speak with her, if possible, today and regarding ImClone and the current price of the stock is."). Bacanovic attempts to get around these unmistakable contradictions by arguing that "the obvious inference from the message log would be that

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* Bacanovic's reliance on *United States* v. *Diggs*, 560 F.2d 266 (7th Cir. 1977), is misplaced. In *Diggs*, the Court of Appeals affirmed a perjury conviction supported by three witnesses. The Cour had no occasion to address whether a business record that was not used to refresh the witness' recollection and was not the basis for the witness' testimony, satisfies the two-witness rule.

Armstrong simply interpreted the purpose of his call . . . and wrote her own interpretation down." (B.Br. 56). Not only is this inference not "obvious," it is insupportable in light of Bacanovic's own testimony.

Bacanovic testified that he told Armstrong only the stock price *at the time of the call*; he denied saying anything that would have suggested that the price was falling. There would have been no way for Armstrong to draw the conclusion that Bacanovic "thinks ImClone is going to start trading downward," based solely on the price of the stock at the time Bacanovic called. This is because, of course, the stock price alone would be insufficient to permit an inference by Armstrong or anyone else that the price was increasing, decreasing, or remaining steady.

The message log was powerful independent corroboration of Armstrong's testimony because it supported her recollection that (a) Bacanovic told her that "he thought ImClone was going to start trading downward" (Tr. 2109-11), and (b) he never mentioned ImClone's stock price, the statements that were charged as perjury in Specification One of Count Six. Accordingly, it "tend[ed] to substantiate that part of the testimony of the principal prosecution witness which is material in showing that the statement made by the accused under oath was false." *Weiner*, 479 F.2d at 927-28.*

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* This distinguishes the facts here from those at issue in *United States* v. *Chestman*, 903 F.2d 75 (2d Cir. 1990), *rev'd on other grounds*, 947 F.2d 551 (2d Cir. 1991). In *Chestman*, a Government witness testified at trial that he spoke to the defendant prior to 10:30 a.m. on November

POINT VII

There Were No Grounds For An Evidentiary Hearing Into Alleged Juror Misconduct

The defendants moved for a new trial based on the alleged misconduct of one juror, Chappell Hartridge, who, the defendants claimed, provided false answers to certain questions posed in the jury questionnaire prepared by the parties, and who allegedly considered against Bacanovic Mariana Pasternak's testimony that Stewart remarked to her in late December 2001, "Isn't it nice to have brokers who tell you those things?" The District Court rejected both claims, finding that the defendants had failed to make a showing that an evidentiary hearing was needed as to either claim. (JA 1096, 1119).

The District Court was correct to deny the motions without an evidentiary hearing. With respect to allegations that Hartridge gave false answers to questions posed in the jury questionnaire, the District Court correctly held that the defendants could not satisfy the two-part showing

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26, 1986, which the defendant had denied in testimony before the SEC that was charged as perjurious. The Government offered as independent corroboration of the witness' testimony a message left by the witness for the defendant at 8:58 a.m. asking that the defendant return his call. The Court found that this message was insufficient for purposes of the two-witness rule because the message established only that the witness had attempted to reach the defendant, not that the witness was successful. *Id.* at 81.

required to warrant a new trial based on alleged juror misconduct at voir dire.

As for Bacanovic's claim that Hartridge (and other jurors) improperly considered Pasternak's testimony against Bacanovic in violation of the District Court's limiting instruction that the testimony was received only as to Stewart, Rule 606(b) of the Federal Rules of Evidence bars inquiry into whether the jury failed to follow the Court's limiting instruction on Pasternak's testimony.

A. The Juror's Purportedly False Answers At Voir Dire Do Not Warrant An Evidentiary Hearing

1. Background

The defendants claim that, in response to certain questions contained in the jury questionnaire distributed to prospective jurors at voir dire, Hartridge allegedly failed to disclose, among other things, that (i) he had been arrested for assault seven years ago; (ii) his son was convicted of burglary, (iii) he allegedly embezzled funds from a little league while serving in a voluntary capacity as treasurer of the league, and may have been dismissed from his job at Citibank for drug-related misconduct; and (iv) he had civil judgments entered against him in 1990, 1991 and 1997, and his wife had two judgments against her. The defendants claim that Hartridge deliberately answered these questions falsely, and did so because he was biased against Stewart because she is a woman and because he wished to be seated on the jury.

2. Applicable Legal Principles

Courts strongly disfavor post-verdict inquiries into juror conduct. As the Supreme Court explained: "[a]llegations of juror misconduct, incompetency, or inattentiveness, raised for the first time . . . after the verdict, seriously disrupt the finality of the process. Moreover, full and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople would all be undermined by a barrage of postverdict scrutiny of juror conduct." *Tanner* v. *United States*, 483 U.S. 107, 120-21 (1987). Accordingly, this Court has erected high barriers to such inquiries. A trial court should permit post-verdict questioning of jurors "only when reasonable grounds for investigation exist." *United States* v. *Moon*, 718 F.2d 1210, 1234 (2d Cir. 1983). Reasonable grounds do not exist unless there is "clear, strong, substantial and incontrovertible evidence . . . that a specific, nonspeculative impropriety has occurred which could have prejudiced the trial of a defendant." *Ibid.*

The Supreme Court has set forth a two-part test for obtaining a new trial where a juror is alleged to have given an untruthful answer to a question on voir dire: "a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause." *McDonough Power Equip., Inc.* v. *Greenwood*, 464 U.S. 548, 556 (1984). This Court has repeatedly made it clear that a new trial may not be granted under *McDonough* unless the defendant shows *both* deliberate dishonesty by the juror at voir dire *and* a

valid challenge for cause based on the accurate answer. *See United States* v. *Greer*, 285 F.3d 158, 170 (2d Cir. 2002); *United States* v. *Shaoul*, 41 F.3d 811, 815-16 (2d Cir. 1994). Deliberate dishonesty at voir dire by itself is insufficient to warrant a new trial under *McDonough*.

In deciding whether a defendant can satisfy the second prong of the *McDonough* test, it is irrelevant whether a party would have used a peremptory challenge to strike the juror; instead, the Court must determine whether an accurate response at voir dire would have *required* that the juror be excused for cause had a challenge been raised. *See Shaoul*, 41 F.3d at 816. The Supreme Court noted in *McDonough* that a juror's "motives for concealing information may vary, but only those reasons that affect a juror's *impartiality* can truly be said to affect the fairness of a trial." *McDonough*, 464 U.S. at 556 (emphasis added). This Court has expanded on this analysis to explain that a court is to examine whether an accurate response on voir dire would have demonstrated bias on the juror's part sufficient to sustain a challenge for cause. *Greer*, 285 F.3d at 171; *United States* v. *Torres*, 128 F.3d 38, 47 (2d Cir. 1997). Thus, if the defendant cannot show that an accurate answer would have established the juror's bias, the Court may not grant a new trial even if the juror is found to have deliberately lied in response to questioning at voir dire.

This Court has expressly recognized that a juror's deliberate concealment of prior arrests does not justify a new trial. *See United States* v. *Langford*, 990 F.2d 65, 67, 69-70 (2d Cir. 1993) (juror's deliberate failure to disclose at voir dire her prior arrests for various crimes, including larceny and prostitution, and two prior non-felony convic-

tions for prostitution, did not warrant a new trial). The Government is also aware of no case in which a juror's concealment of civil judgments or other similar involvement in court proceedings was deemed sufficient to sustain a challenge for cause. Indeed, the case law is precisely the opposite, denying new trial motions where a juror failed, for example, to disclose at voir dire prior involvement by the juror or family members in civil or criminal court proceedings and investigations by law enforcement authorities. *See, e.g.*, *United States* v. *North*, 910 F.2d 843, 903-904 (D.C. Cir.) (*per curiam*) (denying new trial motion where juror failed to disclose that her brothers had been charged with criminal conduct and that she herself had testified before the grand jury investigating a robbery allegedly committed by one of her brothers), *opin. withdrawn & superseded on other grounds by* 920 F.2d 940 (D.C. Cir. 1990) (*per curiam*); *cf. Chase Manhattan Bank* v. *T&N plc*, 1997 WL 221203, at *9-11 (S.D.N.Y. Apr. 28, 1997) (Koeltl, J.) (denying new trial motion where juror failed to disclose, among other things, various bankruptcy and other civil litigation in which she and her family members had been involved).

Indeed, this Court has refused to grant a new trial even where the juror concealed information far more indicative on its face of bias than prior arrests or involvement in civil litigation, including where a juror in a narcotics trial concealed at voir dire that he had been approached by a third party prior to the trial who wanted to ensure that the defendant had a "sympathetic ear" on the jury, *Greer*, 285 F.3d at 166, 170-71, and where a juror in a criminal case in the Southern District of New York failed to disclose

that he was related by marriage to a federal prosecutor in the Southern District, *see Shaoul*, 41 F.3d at 816.

3. Discussion

As the District Court pointed out, "no verdict in the Second Circuit has been overturned on the basis of juror nondisclosure under the *McDonough* test." (JA 1101). The defendants failed to allege facts sufficient under *McDonough*'s stringent test to warrant an evidentiary hearing, much less a new trial, based on Hartridge's alleged misstatements at voir dire. The District Court denied the defendants' request for an evidentiary hearing, not because the Court "speculated" about why Hartridge did not disclose the information as the defendants contend, but because the defendants offered nothing except speculation as to how any of the undisclosed information reflected bias.

Hartridge's prior arrest could not have by itself required his dismissal for cause – *Langford* establishes that prior arrests, and even misdemeanor convictions, are not alone a valid basis for a challenge for cause. *See* 990 F.2d at 69-70. Here, the defendants articulated no defensible or legitimate basis to challenge Hartridge merely because he was arrested for assault in 1997 – a charge which shortly thereafter was dismissed and sealed in state court. (JA 1105-06).[*] An arrest for assault would have no evident

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[*] As the Court pointed out, New York State law deems Hartridge's arrest a "nullity" and provides broad protection against its disclosure. (JA 1105-06). Stewart moved in state court to have the records of Hartridge's

bearing on a prosecution for false statements, obstruction of justice, and securities fraud. Nothing about the arrest would have indicated that Hartridge was biased against Stewart, or that he was likely to have formed opinions about the case prior to trial. As the Eighth Circuit has pointed out, if there is any inference about bias to be drawn from the mere fact that a juror was previously arrested, it would be that the juror "might well be biased in *favor* of defendants in general." *United States* v. *Ross*, 263 F.3d 844 (8th Cir. 2001) (emphasis added).*

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arrest unsealed, which was denied as not in the interests of justice by the New York County Supreme Court. *See In re Matter of Chappell Hartridge*, No. 30059/04 (N.Y. Sup. Ct. Apr. 28, 2004).

* The record suggests that Stewart herself believed this at voir dire. The District Court noted that Stewart "vigorously" opposed the Government's challenge to a prospective juror who did not disclose in the jury questionnaire that she had been the target of a securities fraud investigation by the SEC and the U.S. Attorney's Office. (JA 1106-07). In addition, Stewart failed to challenge for cause at least fifteen prospective jurors who disclosed prior charges or court appearances on charges, including one who reported that he had been in court for domestic violence, another who was charged with assault, another with obstruction of justice, another reported that he pleaded guilty to forgery charges, and another who faced charges for contributing to the delinquency of a minor. *See* Gov't Opposition To Defendants' Motion For A New Trial, dated April 7, 2004, pp. 12-14.

The Court expressly held that "[e]ven if Hartridge deliberately concealed his arrest and arraignment, defendants have not shown that [the prior arrest] would have provided a sufficient basis for a challenge for cause." (JA 1106). In other words, even if they could present facts sufficient for purposes of *McDonough*'s first prong, the defendants had failed to satisfy *McDonough*'s second prong.[*] This was so because the defendants did not present any reliable evidence suggesting that Hartridge's prior arrest biased him against the defendants or that he withheld the information so that he could serve on the jury. (JA 1104-07). The only "bias" the defendants could conceive of – that the arrest for assault was a "gender-related incident," and therefore Hartridge was biased against Stewart because she is a woman – was pure speculation. The District Court discussed some of the numerous fatal deficiencies in the defendants' proffer of bias, not the least of which was that "defendants ask this court to presume that Hartridge is guilty of the assault despite the fact that the charges were dropped." (JA 1107).

On appeal, the defendants offer no new facts or theories that would suggest that Hartridge was biased

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[*] The District Court rightly expressed doubts about whether the defendants had made a threshold showing that Hartridge's nondisclosure of the prior arrest was deliberate. (JA 1105). (noting that the relevant questions were "ambiguous," did not "ask specifically about arrests and arraignments," and were open to different interpretations). However, this was not the basis of the Court's denial of the defendants' Rule 33 motions.

against women, other than to quote from an interview of Hartridge's ex-girlfriend conducted by a New York City tabloid in which she is purported to have said, "[Hartridge] used to tell me he thought women were below him." (S.Br. 84-85). As the District Court recognized, hurling accusations of misogyny at jurors based on dismissed assault charges and the hearsay of interested third parties was not what the Supreme Court had in mind in *McDonough*. The purely speculative nature of the defendants' charges of bias against Hartridge readily distinguishes the facts of this case from those of cases relied on by the defendants in which courts found substantial, rather than speculative, evidence of bias in the undisclosed information. *See, e.g.*, *Green* v. *White*, 232 F.3d 671, 672 (9th Cir. 2000) (granting new trial where juror concealed his prior felony conviction which would have precluded him from serving on the jury at all); *Dyer* v. *Calderon*, 151 F.3d 970 (9th Cir. 1998) (finding that juror who concealed, among other things, that her brother was murdered "in a way that [the juror] knew was very similar to the way [the defendant] was accused of killing his victims," was impliedly biased); *United States* v. *Colombo*, 869 F.2d 149, 150-51 (2d Cir. 1989) (remanding for an evidentiary hearing where juror alleged that another juror had said that she deliberately concealed at voir dire that her brother-in-law was a government lawyer and that she had some familiarity with the facts of the case, because she wished to sit as a juror on the case).

Nor have the defendants explained how civil judgments against Hartridge and his wife or his son's conviction could possibly bear on Hartridge's bias or have led to a successful challenge for cause. It was a mystery in the

defendants' Rule 33 motions, and remains so on appeal, what relevance these matters would have had in determining whether Hartridge would be biased against the defendants in a trial for false statements, obstruction of justice, and securities fraud. In holding that this "information would not have supported a for-cause challenge," the District Court explained that "defendants offer no explanation as to how the fact that a court has entered a judgment against a prospective juror supports an inference that the individual would be biased in a completely unrelated case." (JA 1113).*

The defendants' final set of accusations against Hartridge – that he embezzled funds while serving in a voluntary capacity for a little league, and that he was fired from a job at Citibank because of a drug problem – does not satisfy even *McDonough*'s first prong. There is no claim that Hartridge was ever formally accused of embezzlement, charged with embezzlement, sued by the league, or appeared in court. Nor have the defendants identified a

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* Again, the defendants inaccurately claim that the District Court denied their motions based on factual determinations regarding whether Hartridge deliberately concealed this information. (S.Br. at 79-80). The District Court noted that it was not at all clear that Hartridge had deliberately withheld information regarding judgments against him and his wife, but denied the defendants' motions on their failure to make a threshold showing for purposes of *McDonough*'s second prong. (JA 1113). The District Court rejected the defendants' claims concerning the son's conviction on the same ground. (JA 1114-15).

single question in the jury questionnaire that would have required Hartridge to disclose these accusations. The most the defendants offer is that Question 43(e), asking whether the juror had ever "[b]een accused of wrongdoing on the job," called for Hartridge to disclose the alleged embezzlement. A voluntary position with a little league, however, is rarely considered a "job." (JA 1115). Moreover, "defendants' evidence consists almost entirely of affidavits containing hearsay statements from individuals with no personal knowledge of the facts." (*Id*.)

Stewart's final charge against Hartridge, that he was dismissed from his Citibank job for wrongdoing and drug problems, is based on a call from an unknown person who refused to be identified and who claimed to have learned this information from an unidentified source. (JA 1116) ("Defendants do not explain how such a tenuous and unverifiable source of information could possibly justify further inquiry."). This is plainly insufficient to raise even a cognizable claim. *See King* v. *United States*, 576 F.2d 432, 438 (2d Cir. 1978).

In none of the affidavits submitted by the defendants against Hartridge, which otherwise report every imaginable rumor and innuendo against Hartridge, did a single person state or imply that he or she had personal knowledge that Hartridge concealed this information about his background so that he could sit on the jury or for some other improper purpose. An evidentiary hearing on alleged juror misconduct must be more than a "fishing expedition" for bias, *see United States* v. *Moten*, 585 F.2d 654, 667 (2d Cir. 1978), or a forum for personal attacks on a juror. The defendants failed to allege facts sufficient to raise even an

inference that Hartridge was motivated by bias against Stewart or a desire to sit on the jury in allegedly concealing information about his past. Accordingly, the District Court did not abuse its discretion in denying the defendants' request for an evidentiary hearing.

B. Fed. R. Evid. 606(b) Prohibits Inquiry Into Whether The Jurors Followed The Court's Limiting Instruction

On the basis of a comment made by Hartridge on a television program about Mariana Pasternak's testimony and purported head nods from a few other jurors, Bacanovic argues that he was deprived of a fair trial. Specifically, Bacanovic claims that Hartridge disregarded the District Court's instruction that Pasternak's testimony should be considered only as to the charges against Stewart. Rule 606(b), however, bars inquiry into whether the jury followed or appropriately applied the District Court's jury instructions. Bacanovic attempts to evade this bar by mischaracterizing the alleged failure to follow instructions as evidence that the jury was exposed to extraneous prejudicial information. Pasternak's testimony, however, was *not* extraneous to the trial within the meaning of Rule 606(b), and therefore does not fall into the rule's limited exception permitting juror testimony on outside influences.

1. Applicable Legal Principles

Fed. R. Evid. 606(b) flatly prohibits a juror from testifying "as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions

as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith." *See, e.g.*, *Anderson* v. *Miller*, 346 F.3d 315 (2d Cir. 2003) (Rule 606(b) "broadly prohibits accepting into evidence juror testimony regarding the course of a jury's deliberations"); *Jacobson* v. *Henderson*, 765 F.2d 12, 14-15 (2d Cir. 1985) (denying habeas corpus relief where the petitioner submitted juror affidavits alleging "screaming, hysterical crying, fist banging, name calling, [...] the use of obscene language" and chair throwing during deliberations). The sole exception to this broad prohibition is "that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." Fed. R. Evid. 606(b). This exception for inquiries into extraneous or extra-record information is a very narrow one, however, and no inquiry may be made "into 'the degree upon which the extra-record information was used in deliberations and the impression which jurors actually had about it.'" *Greer*, 285 F.3d at 173 (quoting *United States* v. *Calbas*, 821 F.2d 887, 897 (2d Cir. 1987)). Thus, the effect the information actually had on the jurors is irrelevant, and not a proper subject of a post-verdict hearing. *See Greer*, 285 F.3d at 173 ("[T]he District Court asked jurors whether the extra-record information impacted their ability to be fair and impartial. Because this was a post-verdict hearing, that line of questioning was improper."). Such post-verdict hearings "should be avoided whenever possible." *United States* v. *Ianiello*, 866 F.2d 540, 543 (2d Cir. 1989).

It is well settled that "[t]he possibility that the jury misunderstood or even intentionally misapplied the law" is not a valid basis for an inquiry under Rule 606(b), because it amounts to "an attempt to expose the jury's collective mental process to judicial scrutiny." *United States* v. *D'Angelo*, 598 F.2d 1002, 1003 (5th Cir. 1979); *see also Campbell* v. *City of New York*, 2003 WL 660847, at * 1-2 (S.D.N.Y. Feb. 27, 2003) (statements of some jurors indicating that they misunderstood the law or did not follow the Court's instructions were not evidence that the jury was exposed to extraneous prejudicial information); *United States* v. *Pabon-Cruz*, 255 F. Supp.2d 200, 217 (S.D.N.Y. 2003) ("Whether any individual juror felt confused or reluctant, or later decided that he or she had misunderstood some legal point, are all precisely the sort of matters that Rule 606(b) shields from disclosure."); *United States* v. *Delano*, 825 F. Supp. 534, 547-49 (W.D.N.Y. 1993) ("Whether or not the jury misunderstood the Court's instructions is not a question to be reexamined after the verdict has been rendered."), *rev'd in part on different grounds by* 55 F.3d 720 (2d Cir. 1995); *United States Football League* v. *National Football League*, 644 F. Supp. 1040, 1043-45 (S.D.N.Y. 1986) (post-verdict statements of jurors indicating juror confusion about the jury instructions were not evidence of extraneous influence on the jury). The Fifth Circuit has further explained that:

> A jury has an obligation to follow the law as it is given by the trial court, but it is a peculiar facet of the jury institution that once a verdict is rendered, *no judicial inquiry is permitted into the jury's deliberative pro-*

> *cess to determine if in fact the court's instructions were properly followed.*

D'Angelo, 598 F.2d at 1004 (emphasis added); *see also Peterson* v. *Wilson*, 141 F.3d 573, 578 (5th Cir. 1998) (reversing trial court's order granting a new trial based on discussion with jurors that indicated they had disregarded the court's instructions and holding that "receiving testimony from the jurors after they have returned their verdict, for the purpose of ascertaining that the jury misunderstood its instructions, is absolutely prohibited by F.R.E. 606(b)").

The Supreme Court's discussion of the legislative history of Rule 606(b) in *Tanner* v. *United States*, 483 U.S. 107 (1987), is also instructive. As noted by the Supreme Court, the legislative history demonstrated that the rule was intended to preserve the common law principle prohibiting juror testimony on the jury's internal deliberations and mental processes, including testimony that the jury failed to follow the Court's instructions. *Id.* at 124-25. The *Tanner* Court cited with approval the following portions of the Senate Report on Rule 606(b), which criticized an alternative, and ultimately rejected, version of the rule that would have permitted inquiry into juror conduct during deliberations:

> [The alternative version of Rule 606(b)] would have the effect of opening verdicts up to challenge on the basis of what happened during the jury's internal deliberations, for example, *where the juror alleged that the jury refused to follow the trial judge's instructions* or that some of the jurors did not

> take part in deliberations. Permitting an individual to attack a jury verdict based upon the jury's internal deliberations has long been recognized as unwise by the Supreme Court.

Id. (quoting S. Rep. No. 93-1277, pp.13-14 (1974), U.S. Code Cong. & Admin. News 1974, p. 7060) (emphasis added); *see also Robles* v. *Exxon Corp.*, 862 F.2d 1201, 1204-05 (5th Cir. 1989) ("the legislative history of [Rule 606(b)] unmistakably points to the conclusion that Congress made a conscious decision to disallow juror testimony as to the jurors' mental processes or *fidelity to the court's instructions*." (emphasis added)).

2. Discussion

Bacanovic attempts to recharacterize the purported failure of certain jurors to follow the District Court's instructions as evidence that the jury considered "extra-record" information in reaching its verdict. Pasternak's testimony was not "extraneous" to the trial, however, but was part of the trial record and admitted into evidence against Stewart. The Court instructed the jury not to consider Pasternak's testimony against Bacanovic (Tr. 3452), but that limiting instruction did not render the testimony "extraneous" within the meaning of Rule 606(b). There is abundant authority, for example, that Rule 606(b) prohibits inquiries into allegations that jurors disregarded a court's instructions not to consider a defendant's failure to testify, right to appeal, or the sentence he might receive, matters which are, of course, inadmissible.

The Eighth Circuit in *United States* v. *Rodriguez*, 116 F.3d 1225 (8th Cir. 1997), addressed whether Rule 606(b) permitted an inquiry into whether jurors impermissibly discussed the defendant's failure to testify at trial. The defendant in *Rodriguez* put forth an argument similar to Bacanovic's in this case that "since [the defendant's] failure to testify was not evidence and should not have been considered, it should be considered an 'outside influence' about which the jurors should be allowed to testify." *Id.* at 1226-27. The Eighth Circuit quickly disposed of this argument:

> That [the defendant] did not testify is not a fact the jurors learned through outside contact, communication, or publicity. It did not enter the jury room through an external, prohibited route. It was part of the trial, and was part of the information each juror collected. It should not have been discussed by the jury, and indeed was the subject of a jury instruction to that effect. But it was not "extraneous information," and therefore does not fall within the exception outlined in Rule 606(b).

Id. at 1227. The law is clear that information of which the jury becomes aware in the normal course of the trial, even if that information may not be considered as evidence against the defendant and the jury is so instructed, is not "extraneous" information for purposes of Rule 606(b). *See, e.g.*, *United States* v. *Brito*, 136 F.3d 397, 414 (5th Cir. 1998) (barring inquiry where jurors were alleged to have discussed the defendants' possible sentences and

rights to appeal, contrary to the jury instructions, because "there is nothing to suggest this information was brought to the jury's attention by an outside source"); *United States* v. *Tran*, 122 F.3d 670, 672-73 (8th Cir. 1997) (barring inquiry where jurors were alleged to have considered defendant's failure to testify "because it was known to the jurors as a result of their presence at the trial, not as a result of something disclosed to them that had not occurred in the courtroom"); *United States* v. *Voigt*, 877 F.2d 1465, 1468-69 (10th Cir. 1989) (no inquiry permitted under Rule 606(b) where jurors were alleged to have disregarded instruction not to consider defendant's failure to testify because the information was not extraneous); *United States* v. *Stewart*, 1994 WL 547811, at * 7 (E.D. Pa. Oct. 3, 1994) (inquiry into whether a juror followed instruction not to consider defendant's failure to testify would require the trial court to determine "how the juror interpreted the instruction and how he used it in arriving at his decision," which would necessitate an examination of the "deliberative process of a juror, an inquiry that is specifically prohibited by Fed. R. Evid. 606(b)").

As was true in *Rodriguez*, the jurors did not learn of Pasternak's testimony "through outside contact, communication, or publicity." *Rodriguez*, 116 F.3d at 1227. Nor did her testimony "enter the jury room through an external, prohibited route." *Id.* Instead, her testimony "was part of the trial, and was part of the information each juror collected." *Id.* Accordingly, Pasternak's testimony, limited though it was by the District Court's instruction, cannot be considered extraneous information with respect to Bacanovic.

Bacanovic argues that Pasternak's testimony is analogous to information deemed extraneous in *United States* v. *Schwarz*, 283 F.3d 76 (2d Cir. 2002), *Bulger* v. *McKay*, 575 F.2d 407 (2d Cir. 1978), *Benjamin* v. *Fischer*, 248 F. Supp. 2d 251 (S.D.N.Y. 2002), *United States* v. *Brown*, 108 F.3d 863 (8th Cir. 1997), and *Lacy* v. *Gardino*, 791 F.2d 980 (1st Cir. 1986). These cases are easily distinguished, however, as each involved information to which the jurors became exposed, not in the courtroom in the normal course of the trial as in *Rodriguez* and this case, but through sources external to the courtroom and outside the trial record. *See Schwarz*, 283 F.3d at 88-89 (jurors learned content of a co-defendant's mid-trial guilty plea allocution which took place outside the presence of the jury and was not admitted at trial); *Bulger*, 575 F.2d at 409-10 (jurors learned the defendant's home address from a newspaper article, which cast serious doubt on defense theory as to why the defendant had been present at the crime scene); *Benjamin*, 248 F. Supp. 2d at 257-58 (jurors placed police report redacted with black ink up to the light during deliberations, and learned of defendant's criminal history, which had been excluded from evidence); *Brown*, 108 F.3d at 865 (members of the jury observed in the hallway outside the courtroom the celebrations of four co-defendants whose Rule 29 motions were granted, and learned from other jurors that another co-defendant had pleaded guilty and paid a multimillion dollar fine, which was not in the trial record); *Lacy*, 791 F.2d at 981-82 (juror peeled redacting tape off two exhibits that had concealed defendant's prior criminal history, which had been excluded from evidence).

Consistent with Fed. R. Evid. 606(b) and relevant case law, the District Court correctly held that "Bacanovic's claim is not that the jury considered extraneous information, but that the jury failed to follow the court's limiting instructions. A jury's ability to follow legal instructions falls squarely within the realm of internal jury deliberations, which Rule 606(b) staunchly protects." (JA 1131).

3. Even If There Were Any Error, It Was Harmless

Any error that occurred, and the Government believes there was none, is subject to harmless error review. The central question in this analysis is "the probable effect [of the extraneous information] on a hypothetical average jury," not the actual jurors themselves. *Manley* v. *AmBase Corp.*, 337 F.3d 237, 252 (2d Cir. 2003) (citation and internal quotation marks omitted). Thus, neither Hartridge's views on Pasternak's testimony, nor those of any other juror, may be considered in making this determination. Rather, courts look to the likely impact on the average juror of the "extraneous" information in light of the weight of the evidence properly admitted at trial. *See Lay*, 791 F.2d at 986 ("The prejudicial effect of the improper evidence must be weighed against the weight of the properly admitted evidence." (citation and internal quotation marks omitted)). As the District Court concluded, "even if Hartridge's post-trial statements were admissible, Bacanovic cannot show that Pasternak's testimony prejudiced him. The evidence that was admitted at trial as against Bacanovic was more than sufficient for the jury's verdict." (JA 1132).

POINT VIII

There Is No Reasonable Likelihood That Lawrence Stewart's Perjury Affected The Judgment Of The Jury

Approximately two months after the conclusion of the trial on March 5, 2004, the prosecutors learned of accusations that Lawrence Stewart, the Government's forensic ink expert at trial and at the time the head of the Secret Service forensic laboratory, may have committed perjury with respect to certain aspects of his testimony. The Secret Service and USAO immediately launched an investigation into the allegations. As a result of that investigation, the Government charged Mr. Stewart with falsely testifying about two subjects. *First*, Mr. Stewart falsely testified that he personally participated in the testing of the "@60" Worksheet in July and August of 2002 and on January 13 and 15, 2004. In fact, the Government's investigation showed that the testing on those dates was performed only by Susan Fortunato, another ink expert at the Secret Service lab, not by Mr. Stewart. *Second*, Mr. Stewart falsely testified that he was familiar with a book proposal by two laboratory employees shown to him by defense counsel on the witness stand during rebuttal. The investigation did not reveal any falsity with respect to any of the scientific opinions or conclusions testified to by Mr.

Stewart.[*] After a two-week jury trial, Mr. Stewart was acquitted of both counts of perjury.[**]

Based on Mr. Stewart's alleged perjury, the defendants moved for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure. The District Court denied the motion, holding that the prosecutors did not know, and should not have known, of the perjury, that the perjury related only to collateral matters, and that there was no reasonable likelihood that the perjury could have affected the jury's verdict. (JA 1722).

Courts apply two alternative standards in determining the impact of alleged perjury on a verdict depending on the prosecutors' knowledge of the perjury. Even the less

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[*] Bacanovic claims that Mr. Stewart also testified falsely about the reasons that the laboratory did not test a handwritten ink dash next to one of the entries on the Worksheet. (B.Br. 70). The investigation uncovered no evidence of perjury on this subject, however. Fortunato, who actually conducted the forensic ink examinations, told prosecutors that she had not tested the dash because, among other reasons, it was against lab policy to take a sample if doing so might leave insufficient ink for defense testing. (JA 1693-94). Mr. Stewart's testimony was entirely consistent with this explanation and was not perjurious. (Tr. 3297-98 & 3379-80).

[**] Although the acquittal suggests that the jury did not believe Mr. Stewart's false testimony was material for purposes of convicting him on a perjury charge, the verdict does not alter the Government's view that Mr. Stewart testified falsely on these subjects at trial.

onerous standard requires the defense to show a *reasonable* likelihood that the false testimony could have affected the judgment of the jury. The District Court found that the prosecutors did not know, and should not have known, of the false testimony. In light of the District Court's findings of fact, the defendants' motions should be evaluated under the more stringent of the two standards – the defendants must show "the jury probably would have acquitted in the absence of the false testimony." *United States* v. *Sanchez*, 969 F.2d 1409, 1414 (2d Cir. 1992). The defendants did not, and cannot, meet this heavy burden.

As the District Court also held, judged under *either* standard, the defendants' arguments fail because they cannot meet their burden to show that Mr. Stewart's false testimony had any effect on the jury's verdict. Accordingly, there was no basis for an evidentiary hearing, and the District Court properly denied the defendants' motions without an evidentiary hearing.

A. Applicable Legal Principles

The decision on whether to hold an evidentiary hearing based on newly discovered evidence of perjury is committed to the sound discretion of the district court. *See United States* v. *White*, 972 F.2d 16, 22 (2d Cir. 1992). The district court's denial of a new trial motion based on newly discovered evidence is reviewed for abuse of discretion, *see United States* v. *Monteleone*, 257 F.3d 210, 218 (2d Cir. 2001), and its findings of fact will not be reversed unless clearly erroneous, *see United States* v. *Diaz*, 176 F.3d 52, 106 (2d Cir. 1999).

"[M]otions for a new trial based on the identification of perjured testimony should be granted only with great caution and in the most extraordinary circumstances." *Sanchez*, 969 F.2d at 1414. Whether the introduction of perjured testimony requires a new trial depends on the "materiality of the perjury to the jury's verdict and the extent to which the prosecution was aware of the perjury." *United States* v. *Wallach*, 935 F.2d 445, 456 (2d Cir. 1991). "[T]he discovery of new evidence which merely discredits a government witness and does not directly contradict the government's case ordinarily does not justify the grant of a new trial." *United States* v. *Spencer*, 4 F.3d 115, 119 (2d Cir. 1992) (quotation marks omitted); *see also White*, 972 F.2d at 20-21 ("The importance of such evidence is, of course, lessened when the perjury involves some collateral matter concerning the witness, rather than testimony about facts relevant to the merits of the case."); *United States* v. *Reyes*, 49 F.3d 63, 68 (2d Cir. 1995) ("New evidence that is merely impeaching will not ordinarily justify a new trial.").

"[W]here the government was unaware of the perjury at the time of trial, 'a new trial is warranted only if the testimony was material and the court [is left] with a firm belief that but for the perjured testimony, the defendant would most likely not have been convicted.'" *United States* v. *Wong*, 78 F.3d 73, 81 (2d Cir. 1996) (quoting *Wallach*, 935 F.2d at 456 (internal quotation marks and citation omitted)). However, in the rare instance that the prosecution knew or should have known of the perjury, the conviction must be set aside "if there is any reasonable likelihood that the false testimony could have affected the

judgment of the jury." *Wallach*, 935 F.2d at 456 (quotation marks and citation omitted).

Significantly, this Court has directed that under either standard, "where independent evidence supports a defendant's conviction, the subsequent discovery that a witness's testimony at trial was perjured will not warrant a new trial." *Wong*, 78 F.3d at 82; *see also United States* v. *Moreno*, 181 F.3d 206, 213 (2d Cir. 1999) (same). The defendants ignore the independent evidence inquiry mandated by cases like *Wong*, instead relying heavily on language in this Court's 1975 decision in *United States* v. *Stofsky*, 527 F.2d 237 (2d Cir. 1975). There, it was noted that "intentional governmental suppression of evidence useful to the defense at trial will mandate a virtual automatic reversal of a criminal conviction." *Id.* at 243. Subsequent to *Stofsky*, however, this Court explained the import of this language. In *Wong*, the Court explained that "new impeachment evidence may satisfy the 'reasonable likelihood' standard where a conviction depends on the testimony of a single government witness, or on a witness whose credibility was not attacked on cross-examination." 78 F.3d at 82. Under circumstances in which it is shown that the central witness against a defendant has committed perjury, application of the less stringent "reasonable likelihood" standard would likely lead to "virtually automatic" reversal of the conviction, since there presumably would not be sufficient independent evidence of guilt beyond that tainted by the witness' perjury. This was precisely the case in the decisions cited by the defendants in support of their argument that reversal is "virtually automatic" under the "reasonable likelihood" standard. *See Wallach*, 935 F.2d at 457 (witness who perjured himself

was "the centerpiece of the government's case"); *Stofsky*, 527 F.2d at 245-46 (recognizing that under some circumstances the credibility of a key government witness may be as significant to the jury as the factual elements of the crime itself).

Since *Stofsky*, courts in this Circuit have routinely denied defendants evidentiary hearings or other relief where there is sufficient evidence of the defendant's guilt independent of the perjured testimony. *See*, *e.g.*, *Wong*, 78 F.3d at 82 (assuming *arguendo* prosecutors' knowledge of the perjury, new trial motion was denied in light of other evidence of guilt and cumulative nature of additional impeachment from disclosure of perjured testimony); *White*, 972 F.2d at 22 (assuming *arguendo* prosecutors' knowledge of the perjury, new trial motion was denied in light of the fact that the defendant was acquitted of all counts where the only evidence was the uncorroborated testimony of the witness who committed perjury and was convicted on the one count for which there was substantial corroboration of the witness' testimony); *see also United States* v. *Seck*, 175 F. Supp. 2d 526, 530 (S.D.N.Y. 2001); *United States* v. *Salameh*, 54 F. Supp.2d 236, 262 (S.D.N.Y. 1999); *Lamberti* v. *United States*, 22 F. Supp.2d 60, 80-86 (S.D.N.Y. 1998); *United States* v. *Devery*, 935 F. Supp. 393, 411-14 (S.D.N.Y. 1996); *United States* v. *Duran-Peralta*, 1989 WL 105789, at *6 (S.D.N.Y. Sept. 6, 1989); *Davis* v. *Scully*, 1986 WL 14987, at *10-12 (S.D.N.Y. Dec. 18, 1986).

B. The Prosecution Team Did Not Know, Nor Should It Have Known, Of The Alleged Perjury

The District Court held, based on the affidavits of the prosecutors and other members of the prosecution team and hundreds of pages of documentary evidence submitted by the parties, that the prosecutors did not know and should not have known of Mr. Stewart's alleged perjury. (JA 1742-50). The District Court's findings may be disturbed only if they were clearly erroneous. Here, those findings were correct and fully supported by the record. The defendants do not dispute that the AUSAs (and presumably the case agents and paralegals) on the case lacked knowledge of the alleged perjury. Rather, they argue that Mr. Stewart's knowledge of his own perjury, and suspicions held by other Secret Service employees of the lab, should be imputed to the prosecutors, or alternatively that the prosecutors should have known of the perjury.

1. Lawrence Stewart And Other Secret Service Employees Were Not Members Of The Prosecution Team

The District Court rejected the defendants' contention that Mr. Stewart's perjury should be imputed to the prosecution, finding that his role was consistent with that of any expert witness and that it did not rise to the level of participating in the investigation and trial as a member of the prosecution team. (JA 1742-47). The District Court similarly held that any knowledge or suspicions harbored by Secret Service employees who worked in Mr. Stewart's

lab could not be imputed to the prosecution team. (JA 1742, 1747).

District courts have noted that whether any law enforcement agent's knowledge of perjury can be imputed to prosecutors for purposes of determining whether a new trial is required is not clear in this Circuit. *See, e.g.*, *Bell* v. *Coughlin*, 820 F. Supp. 780, 789 n.6 (S.D.N.Y. 1993) (stating that the Second Circuit's position is "unclear" and that its analysis in some cases "suggests that it may not recognize this principle [that prosecutors are chargeable with knowledge if a member of the investigating team knows of the perjury]"); *Chamberlain* v. *Mantello*, 954 F. Supp. 499, 508 (N.D.N.Y. 1997) (noting that the Second Circuit may not recognize the imputation principle); *Vail* v. *Walker*, 1997 WL 695583, at *5 (N.D.N.Y. Nov. 4, 1997) (noting that "[i]mputing to the prosecutor knowledge of perjury possessed by a law enforcement officer has been questioned in this circuit").

In 1982, this Court suggested in *dicta*, in a footnote, that where the prosecutor did not know of perjury committed by a Government witness, but a law enforcement officer did have knowledge of the perjury, the law enforcement officer's knowledge "may be attributable to the prosecutor if the officer acted as an arm of the prosecution." *Wedra* v. *Thomas*, 671 F.2d 713, 717 n.1 (2d Cir. 1982). Since that decision, however, this Court has on multiple occasions upheld the denial of motions for new trials based on the perjury of a law enforcement agent, and has declined to impute knowledge of the agent's perjury to the prosecutors, even where there could have been no doubt that the agent acted as an "arm of the prosecution."

For example, in *United States* v. *Sanchez*, 969 F.2d 1409 (2d Cir. 1992), the Court reversed the district court's granting of a new trial on the basis of alleged perjury by police officers who conducted the search that provided the central evidence in the case. The Court held that the district court had erred in deeming discrepancies in the officers' testimony to be tantamount to perjury and that, even if the officers did commit perjury, it could not be said that the jury would probably have acquitted the defendant in the absence of the false testimony. In finding this stricter test of prejudice applicable instead of the more lenient test, the Court noted that "[t]here is nothing whatsoever in the record before us in this case to indicate that the prosecutor knowingly used false testimony to convict [the defendant]," at least implicitly rejecting any imputation of the officers' knowledge to the prosecutors. *Id.* at 1414; *see also United States* v. *Moore*, 54 F.3d 92, 99 (2d Cir. 1995) (in a case in which police officers were alleged to have committed perjury at trial, holding that to be entitled to a new trial, the defendant must demonstrate not only that the witnesses committed perjury, but also that "'the jury probably would have acquitted in the absence of the false testimony'" — the stricter standard that applies when the prosecution did not know and should not have known of the perjury (quoting *Sanchez*, 969 F.2d at 1413-14)); *Chamberlain*, 954 F. Supp. at 508 (because the District Attorney had no knowledge of perjury by state troopers, nor was there any way the prosecutors could have known of the perjury, "knowledge of the perjury of the prosecution's witnesses in this case cannot be imputed to the Tompkins County District Attorney"); *United States* v. *Persico*, 1993 WL 385799, at *5-6 (S.D.N.Y. Sept. 29,

1993) (finding no support for the theory that the prosecutors "may be charged with an agent's knowledge of his own criminal activity that later led to the agent's prosecution"); *cf. United States* v. *Diaz*, 176 F.3d 52, 107 (2d Cir. 1999) (finding no basis to impute a law enforcement officer's knowledge of perjury to the prosecutors).

Even assuming *arguendo* that the law does permit imputation of an agent's knowledge of perjury to prosecutors, such imputation is possible only where the agent served as an "arm of the prosecution" in the traditional role of a criminal investigator, doing things like executing search warrants, *see United States* v. *Sanchez*, 813 F. Supp. 241, 245 (S.D.N.Y. 1993), or serving as the case agent, *see United States* v. *Morell*, 524 F.2d 550, 555 (2d Cir. 1975) (imputing case agent's knowledge to the prosecutors for *Brady* purposes); *cf. United States* v. *Ruiz*, 711 F. Supp. 145, 147 (S.D.N.Y. 1989) (knowledge of perjury by one prosecutor on a trial team is attributable to all the prosecutors on the team). The Government, however, is aware of no federal court that has ever imputed to the prosecutors the knowledge of a civilian government employee who played the limited role of expert witness.

Two government entities investigated and prosecuted this case: the USAO and the FBI. When the USAO requires scientific expertise on an issue, it has the option of retaining experts from the private sector or from the government if any government employee has the necessary expertise. In this case, the prosecutors turned to employees of the Secret Service lab for the limited purpose of providing scientific analysis on the ink that appeared on the "@60" Worksheet. The Secret Service did not attend or

conduct a single interview or serve a single subpoena in this case. No one from the Secret Service participated in any charging decisions or discussions or reviewed any of the Indictments prior to their filings. No one from the Secret Service participated in any of the trial preparation apart from that relating to the ink testimony. No one from the Secret Service (at least that the Government is aware of) attended any portion of the trial other than Mr. Stewart's testimony and the testimony of Bacanovic's ink expert. (JA 1680-81, 1683-85, 1691-1701, 1747).

Neither Mr. Stewart nor any other employee of the Secret Service lab who had anything to do with this case, is a law enforcement agent. Rather, they are civilian employees of the Secret Service lab who are not authorized to effect arrests or conduct investigations. Mr. Stewart served in the strictly traditional expert role of providing expert analysis and testimony, and consulting with the prosecutors on the report and testimony of the defense expert. The USAO and FBI never consulted with Mr. Stewart on trial strategy other than discussions of the presentation of evidence regarding ink analysis and the analysis and testimony of Bacanovic's ink expert. Mr. Stewart never attended any of the almost daily meetings between the AUSAs, case agents, and paralegals in which investigative and trial strategy was discussed. Mr. Stewart's involvement was limited to observing Bacanovic's ink experts conduct their analyses prior to trial for the purpose of ensuring that the evidence was not damaged; speaking on the telephone with prosecutors and attending several meetings and trial preparation sessions to prepare him to testify; his trial testimony; and consulting with the

prosecutors on the analysis and testimony of Bacanovic's ink expert. (JA 1742-45, 1680-81, 1683-85, 1691-1701).

To accept the defendants' assertion that Mr. Stewart was a member of the prosecution team, despite the fact that his role was purely that of an expert witness on the ink that appeared on the "@60" Worksheet, would mean that *every* expert in *every* case should be treated as a member of the prosecution team. Such a rule would be contrary to the law in this Circuit and other federal courts, where expert witnesses are not viewed as members of the prosecution. *See*, *e.g.*, *Bell* v. *Coughlin*, 820 F. Supp. at 791 (finding that ballistics expert who was also a detective had committed perjury but denying new trial motion under the standard applicable where the prosecution team did not know and should not have known of the perjury); *Vail* v. *Walker*, 1997 WL 695583, at *6 (refusing to impute to prosecutors knowledge of perjury by a state trooper, the supervisor of a forensics unit, who testified as a fingerprint expert); *see also United States* v. *Salameh*, 54 F. Supp.2d 236, 262 (S.D.N.Y. 1999) (requiring defendant to come forward with evidence that prosecutors knew or should have known of alleged perjury of an FBI Agent who testified as an expert witness on the composition of a bomb detonated at the World Trade Center in 1993); *cf. United States* v. *Williams*, 233 F.3d 592 (D.C. Cir. 2000) (denying new trial motion where prosecutors did not know that detective who testified as an expert witness at trial had embellished his credentials).

In accordance with this case law, it is clear that an expert witness should not be considered a member of the prosecution team, and his knowledge of his own perjury

cannot be imputed to the prosecutors, where his or her role is limited to that of a traditional expert. Indeed, this is so even where the expert witness may also be a law enforcement officer, as was true in most of the cases discussed above. Here, not only was Mr. Stewart *not* a law enforcement officer, his role was limited to providing expert ink analysis and testimony. There is no basis, in law or fact, to impute Mr. Stewart's knowledge of his own alleged perjury to the prosecutors. Indeed, it would be "nonsensical" to impute to the prosecutors Mr. Stewart's "knowledge of his own criminal activity that later led to [his] prosecution." *Persico*, 1993 WL 385799, at *6.

Even more nonsensical is the defendants' argument that the purported knowledge of Mr. Stewart's perjury possessed by other civilian employees of the Secret Service lab, should be imputed to the prosecutors. Only one other employee, Susan Fortunato, had any significant involvement in the ink analysis performed in this case, and, like Mr. Stewart, her role was strictly limited to providing expert analysis related to the "@60" Worksheet. *See United States* v. *Diaz*, 176 F.3d 52, 107 (2d Cir. 1999) (upholding district court's determination that police officer who knew of perjury by Government witness but had only limited involvement in investigation and did not testify or assist the prosecution at trial, played only an ancillary role and, accordingly, his knowledge could not be imputed to the prosecutors). No other employee had any role of any sort in the ink analysis, much less the investigation and prosecution of this case. (JA 1747).

On these facts, the District Court held that Mr. Stewart "participated in the prosecution of this case as an ordinary

expert witness," and that other Secret Service laboratory employees "were even less involved" in the prosecution of this case. (JA 1742). None of these individuals could reasonably be characterized as an "arm of the prosecution." Accordingly, any knowledge or suspicion they may have had cannot be imputed to the prosecutors, even under the broadest interpretation of the law.

2. The Prosecution Team Should Not Have Known Of Mr. Stewart's Alleged Perjury

As the District Court found, the defendants have equally failed to show that the prosecutors should have known that Mr. Stewart testified falsely at trial. The defendants point to what Bacanovic refers to as "red flags" that should have put the Government on notice that Mr. Stewart had provided false testimony. (B.Br. 77). These "red flags" are nothing of the sort. For example, the defendants suggest that Fortunato informed prosecutors at a January 9, 2004 meeting that she was the only person who conducted the August 2002 tests. This is simply inaccurate. As set forth in the prosecutors' affidavits to the District Court, there was no discussion at that meeting of whether Fortunato performed the tests alone or whether she was assisted by Mr. Stewart or anyone else. (JA 1692). Nothing in Fortunato's interview memoranda or related notes, prepared by Secret Service agents in connection with the investigation into Mr. Stewart's alleged perjury, was to the contrary. (JA 1749) ("Fortunato's description of the [January 9, 2004] meeting, gleaned from a statement she made during the Secret Service investigation into Lawrence's perjury, does not demonstrate, as defendants

suggest, that she informed the prosecution that she alone performed the initial round of tests."). Citing the prosecutors' affidavits, the defendants similarly claim that Mr. Stewart told the prosecutors in meetings before he testified that he had only observed and supervised the August 2002 tests, but not that he had participated. (B.Br. 77). To the contrary, the prosecutors explained in their affidavits that Mr. Stewart told them that he participated in the August 2002 tests, just as he later testified. (JA 1696-98).

The defendants also argue that the presence of Mr. Stewart's initials on certain worksheets created in connection with the January 2004 tests and the absence of his initials on worksheets for the August 2002 tests should have tipped them off that he was lying about his participation in the August 2002 tests. This argument rests on a fundamental mischaracterization of what Mr. Stewart told prosecutors about his practice when it came to initialing worksheets. Citing the prosecutors' affidavits, the defendants claim that Mr. Stewart purportedly "explained [to the prosecutors] that he had a practice of initialing documents *when he was involved in the analysis and preparation of a report*." (B.Br. 76) (emphasis added). This is an inaccurate description of Mr. Stewart's statement to prosecutors. Mr. Stewart, in fact, said that "it was his practice to place his initials on the worksheets *when he reviewed them for a report that he would prepare and sign*." (JA 1697) (emphasis added). In light of the fact that Fortunato prepared and signed the August 2002 report summarizing the tests conducted at that time, while Mr. Stewart prepared and signed the January 2004 report summarizing the additional tests done at that time, there was nothing at all

inconsistent in Mr. Stewart's initialing the January 2004 worksheets but not the August 2002 worksheets.

Also inaccurate is the defendants' claim that the prosecutors permitted Mr. Stewart to testify that the ink used to create the "@60" notation was different from all the remaining ink on the Worksheet. (B.Br. 76). As the defendants well know, that was not Mr. Stewart's testimony. Mr. Stewart testified that the "@60" notation was different from the other ink on the page, with the exception of the dash that appeared in the upper right-hand corner of the Worksheet. (Tr. 3297). Mr. Stewart testified that, like the "@60," the dash was different from the bulk of the ink on the Worksheet, but that there had been insufficient ink remaining in the sample to test the dash in January 2004. (*Id*.). He further testified that although "the dash is not the same as the bulk of the entries," it was "possible the dash is the same as the @60. It's possible that it is a different ink. We can't tell. There isn't enough uncontaminated ink there for us to tell." (Tr. 3297-98, 3379-80).

In denying the defendants' motion for a new trial, the District Court considered these and numerous other supposed "red flags" that the defendants raised below but do not discuss on appeal.[*] As the District Court explained:

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[*] In various footnotes in their briefs, the defendants claim that the trial of Mr. Stewart revealed additional information that should have put the prosecution on notice that Mr. Stewart had testified falsely. As the defendants acknowledge, the record of Mr. Stewart's trial is not part of the record in this case. Accordingly, the Government

> Defendants have failed to point to anything in the voluminous documents they have submitted which should have alerted the prosecutors that the director of the Secret Service laboratory was lying about his participation in the testing of the worksheet. Neither have defendants shown that the prosecutors were negligent in failing to investigate the extent of his participation. . . . Accordingly, defendants have not shown that the Government failed to "properly utilize[] the available information" regarding Lawrence's participation in the testing of the worksheet.

(JA 1748-49). The District Court's factual findings and decision are amply supported by the record and the law, and should be upheld.

C. The Defendants Cannot Satisfy Their Burden Under Either Standard

The defendants bear the burden of showing that Mr. Stewart's alleged perjury had an impact on the jury's verdicts of conviction. As the District Court concluded, even if the lower standard of proof applied for those rare cases in which the prosecutors knew or should have known of the perjury, the defendants failed to sustain their

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will not respond in this brief, other than to note that it vigorously disputes the defendants' assertions and that it has responded to those assertions in a letter that is included in the joint appendix. (JA 1905).

burden. This is so for three principal reasons. First, especially in light of the jury's decision to acquit the defendants of all charges that the $60 agreement was false, it cannot be claimed that Mr. Stewart's false testimony or revelation of the false testimony to the jury could possibly have had any effect on the jury's verdict of conviction. Second, further undermining any contention that Mr. Stewart's false testimony had any effect on the verdict is the fact that his testimony was almost entirely undisputed by Bacanovic's ink expert. Third, the Government presented overwhelming evidence of guilt on the counts of conviction, and not only was that evidence wholly independent of Mr. Stewart's testimony, it had nothing to do with Mr. Stewart's testimony.

1. The Jury's Decision To Acquit The Defendants On The $60 Story

Neither defendant was convicted of any charge that he or she was lying about the existence of the agreement to sell ImClone at $60 per share. Bacanovic was acquitted of falsifying the Worksheet by adding the "@60" notation, and of the perjury specification of Count Six that referred specifically to the "@60" Worksheet. Moreover, both defendants were acquitted of *all* the false statement and perjury specifications relating to the purported $60 agreement.

This Court's analysis in *United States* v. *White*, provides guidance on how to assess the impact of a witness' perjury on the jury's verdict where the defendant was acquitted on some counts and convicted on others. In *White*, the defendant was charged with four counts of distributing narcotics and one count of conspiracy to

distribute narcotics. The defendant was acquitted of the four substantive counts but convicted of the conspiracy count. 972 F.2d at 22. After the verdict, the defendant moved for a new trial based on evidence that the Government's principal witness had testified falsely about his prior drug use. *Id.* at 20. The district court denied the motion without ordering discovery or an evidentiary hearing on whether the Government knew or should have known about the perjury. *Id.* at 22. In upholding the district court's decision, the Court determined that denial of the new trial motion was appropriate under either the "reasonable likelihood" standard applicable where the prosecution knew or should have known, or the "but for" standard applicable where the prosecution was unaware of the perjury. *Id.* ("On this review, we . . . can use either standard and reach the same result."). The Court held that, based on the verdicts returned by the jury, it was evident that "the jury in fact gave little credence to [the witness'] testimony." *Id.* The Court reached this conclusion on the basis of a careful analysis of the evidence offered by the prosecution, including the witness' testimony, with respect to each count of the indictment:

> It appears clear from the record that the knowledge that [the witness] lied about his drug use would not have affected the verdict. [The defendant] had been charged in a five count indictment containing one count of conspiracy and four counts of distribution. The jury acquitted [the defendant] of all four counts of distribution where the only evidence was the uncorroborated testimony of [the witness]. If the jury had be-

> lieved [the witness], it would have had to find [the defendant] guilty of those four counts. The only conviction was on the conspiracy count, where [the witness'] testimony was fully corroborated by other evidence showing [the defendant's] involvement in the conspiracy. The verdict demonstrates that the jury did not rely on [the witness'] testimony alone to convict [the defendant].

Id. Thus, despite the centrality of the witness' testimony to the single count of conviction, the Court found there was no reasonable likelihood that the perjured testimony affected the jury's verdict in light of its rejection of all counts that relied solely on the witness' testimony and the conviction on the one count for which there was corroboration. As the Court explained, these facts distinguished the case from *Wallach* in which the testimony of the witness who committed perjury "along with that of another witness known by the jury to be a convicted perjurer, was the only testimony that directly linked the defendants" to the crime. *White*, 972 F.2d at 21.

Here, there is much less of a "reasonable likelihood" that the jury was affected by Mr. Stewart's alleged perjury than was true even in *White*, much less *Wallach*. Not only was Bacanovic acquitted of all charges directly relating to the "@60" Worksheet, and both defendants were acquitted of all specifications relating to the existence of the $60 agreement, Mr. Stewart's testimony had *no* bearing whatsoever on any of the false statement and perjury specifications that the defendants were convicted of and

which necessarily formed the basis of the jury's additional convictions on the conspiracy and obstruction of justice charges. The specifications and counts of conviction related to the defendants' false statements and concealment of material facts concerning (a) Bacanovic's instructing Faneuil to inform Stewart about the Waksal sales on December 27, 2001, (b) the message that Bacanovic left with Ann Armstrong for Stewart on December 27, and (c) the defendants' subsequent false statements about their discussions of the investigations into ImClone sales on December 27. Mr. Stewart did not testify on any of these matters, nor did he have any personal knowledge of any of the facts relevant to these counts. In no sense, then, can the convictions obtained in this case be characterized as "rest[ing] on perjured testimony." *Shotwell Mfg. Co.* v. *United States*, 371 U.S. 341, 357 (1963).

The defendants nevertheless urge the Court to make the insupportable logical leap that even though Mr. Stewart's testimony did not convince the jury of their guilt on the only counts to which it was relevant, his testimony may have played a role in convicting them on the counts that it had no bearing on at all.[*] There can be no serious argu

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[*] Even with respect to the Indictment's allegations about the $60 agreement and the falsification of the Worskheet, there was much more, and more important, evidence than just Mr. Stewart's testimony. As the Government set forth in its opposition to the defendants' Rule 29 motions, there were at least 23 different pieces of evidence supporting the Government's argument that the $60 agreement was a cover story, and Mr. Stewart's

ment in this case that Mr. Stewart's degree of participation in the testing of the "@60" Worksheet or his familiarity with the book proposal is probative of whether Bacanovic caused Martha Stewart to be tipped off about the Waksal sales on December 27, 2001, or whether the defendants lied to investigators about this in the ensuing months. As the District Court concluded,

> [The defendants'] argument is wholly speculative and logically flawed. The existence of the $60 agreement would not have exonerated defendants. It would not have been inconsistent for the jury to find that defendants did make the $60 agreement, but that the agreement was not the *reason* for the sale. Defendants do not persuasively explain how knowledge of Lawrence's lies could have made the jury more likely to believe that the agreement was the reason for the sale.

(JA 1752) (emphasis in original).[*]

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testimony was only one of those pieces of evidence. *See* Gov't Opposition to Defendants' Rule 29 Motions, pp. 4-8. Indeed, this same evidence was probative of whether the "@60" Worksheet was falsified, with the ink testimony serving only as additional circumstantial evidence that the "@60" notation was placed on the document to corroborate the agreement.

[*] The defendants criticize the District Court for making an independent assessment of the impact of Mr. Stewart's alleged perjury on the jury's verdict, quoting

The defendants also appear to espouse the theory, expressly rejected by the District Court, (JA 1758-59) ("it is simply not plausible that Lawrence's dishonesty concerning collateral matters would cause the jury to question the substance of [other Government witnesses'] testi-

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from language in *United States* v. *Rodriguez-Gonzalez*, 899 F.2d 177, 182 (2d Cir. 1990), that "acquittal does not have the effect of conclusively establishing the untruth of all of the evidence introduced against the defendant," and *United States* v. *Acosta*, 17 F.3d 538, 546 (2d Cir. 1994), that "[a] court knows only what the jury's verdicts were, not what the jury found, and it is not within the province of the court to attempt to determine the reason or reasons for verdicts." *Rodriguez-Gonzalez* and *Acosta* concern, respectively, a defendant's double jeopardy and due process challenges to a sentencing enhancement for conduct that he was acquitted of at trial, and the grounds for reversing a conviction where the jury has returned inconsistent verdicts. *See Rodriguez-Gonzalez*, 899 F.2d at 178, 181-82; *Acosta*, 17 F.3d at 544-45. Those decisions have nothing to do with perjured testimony, assessing the prosecution's knowledge of the perjury, the standards for determining whether perjury affected the jury's verdict, or any other issue relevant to this appeal. It almost goes without saying that language taken out of context from *Rodriguez-Gonzalez* and *Acosta*, which address entirely different areas of law, does not obviate the need for the District Court to inquire into the likely effect of the perjury on the jury's verdict, as mandated by *Wong*, *White*, *Moreno*, *Wallach*, and a myriad of other decisions of this Court.

mony"), that courts are to presume that the jury would disbelieve *all* Government witnesses where *one* witness is alleged to have committed perjury, even if that witness was not the centerpiece of the Government's case. (S.Br. 73). They do not cite to a single case that stands for this proposition; nor is there support for such a rule, because it would directly contravene the settled law in this Circuit that there is no "reasonable likelihood" that perjury, particularly on a collateral matter, affected the jury's decision "where independent evidence supports a defendant's conviction." *Wong*, 78 F.3d at 82. *See also United States* v. *Reyes*, 49 F.3d 63, 68 (2d Cir. 1995); *United States* v. *Rosner*, 516 F.2d 269, 279 (2d Cir. 1975).

2. The Substance Of Mr. Stewart's Testimony Was Largely Undisputed And The False Testimony Related Only To Collateral Matters

Further demonstrating that Mr. Stewart's testimony had no impact on the verdict is the fact that the substance of his testimony was almost entirely undisputed. In fact, Stewart's counsel elected not to cross-examine Mr. Stewart at all. Bacanovic's counsel stated in his summation,

> We had a lot of expert testimony about [the Worksheet]. But our expert and their expert really agreed on almost everything about the main important points.

(Tr. 4657). In the Government's case-in-chief, Mr. Stewart testified on direct examination about the following scientific conclusions: (1) the ink used to make the "@60"

notation was different from the remaining ink on the "@60" Worksheet, with the exception of the dash at the end of the line entry for Apple Computer, about which the Secret Service lab could not make any firm conclusions because there was insufficient ink remaining in the sample to test it against the "@60" notation (Tr. 3277-94); (2) the ink used to make all the notations other than the "@60" and the dash was likely from a type of Paper Mate stick pen; (3) the ink used to make the "@60," and possibly the dash, was unusual and its source could not be identified (Tr. 3302-04); and (4) age testing of the ink on the Worksheet was not feasible and, therefore, when the various notations were placed on the Worksheet could not reliably be determined (Tr. 3304-08). None of this was disputed by Bacanovic's ink expert at trial. (JA 1755) ("[I]t is clear that the impeachment value of Lawrence's perjury would be severely limited since the most critical aspects of his scientific analysis were corroborated by the defense.").

Nor did Mr. Stewart or the Government ever contest the conclusion of Dr. Albert Lyter, Bacanovic's ink expert, that the inks used to create the "@60" notation and the dash were one and the same. Indeed, the sole area of significant disagreement between Dr. Lyter and Mr. Stewart was whether a device known as a densitometer could be used to reliably determine whether two or more different pens with the same type of ink, *e.g.*, two different Paper Mate stick pens, were used to make the notations other than the "@60" and the dash. (Tr. 3316, 3714-17, 4181-92). But even on this one area of substantive disagreement, Mr. Stewart and Dr. Lyter differed, not about whether multiple pens might have been used to create the notations other than the "@60" and the dash, but about

using a densitometer to make that determination. (Tr. 4218-19).

Mr. Stewart's alleged perjury concerning his participation in the testing of the "@60" Worksheet in August 2002 and January 2004, and his familiarity with the book proposal, does not cast doubt on the accuracy or scientific validity of any of the central conclusions he testified about. The central conclusions were uncontested. (JA 1759) ("the core of Lawrence's testimony was substantiated by Bacanovic's expert"). Mr. Stewart's false testimony involved quintessentially collateral matters, as "[t]he perjury does not contradict any factual aspect of the government's case," and as such did not warrant a new trial. *Devery*, 935 F. Supp. at 412. Mr. Stewart's alleged perjury concerns the purely collateral issues of who participated in the testing of the "@60" Worksheet and whether Mr. Stewart was familiar with a book proposal; the perjury does not relate to the substantive elements of his testimony or the scientific procedures and conclusions that he testified about. In the words of the District Court, "Lawrence's false statements were entirely collateral to the substance of his testimony and to the defendants' culpability for the crimes charged." (JA 1752).[*]

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[*] The defendants also argue that the Government conceded the materiality of Mr. Stewart's false statements by charging him with perjury. That claim is meritless, for the reasons set forth in the Government's brief in opposition to Mr. Stewart's motion to dismiss the indictment. (SA 16, 24-27).

3. There Was Overwhelming Independent Evidence Of Guilt On The Counts Of Conviction

That the defendants' convictions were supported by ample evidence wholly independent of Mr. Stewart's testimony is beyond dispute. *See Moreno*, 181 F.3d at 213 ("[e]ven assuming . . . that the government knowingly introduced the perjured testimony . . . where independent evidence supports a defendant's conviction, the subsequent discovery that a witness's testimony at trial was perjured will not warrant a new trial"); *Wong*, 78 F.3d at 82 (same). In its opinion denying the defendants' new trial motions, the District Court detailed the "overwhelming" evidence of the defendants' guilt on the counts of conviction, evidence that was completely unrelated to forensic ink analysis, Mr. Stewart's testimony, or his alleged perjury. (JA 1723-34, 1750-51, 1755-57). Consistent with the evidence at trial, the District Court found that:

> [T]he jury convicted the defendants of lies that had nothing to do with the $60 agreement. The outcome would have been no different had Lawrence's entire testimony been rejected by the jury, or had Lawrence not testified at all.
>
> * * *
>
> Faneuil, Armstrong, and Pasternak, among others, provided evidence of the falsity of [the defendants'] statements. In other words, Stewart was convicted on the testimony of Bacanovic's assistant [Faneuil], her own

> assistant [Armstrong], and her best friend [Pasternak]. Bacanovic was convicted on the testimony of Stewart's assistant [Armstrong] and his own assistant [Bacanovic].

(JA 1751, 1758).

Stewart and Bacanovic attack the District Court's conclusions by arguing, inexplicably, that the Court failed to address claims they raised below. Stewart asserts that "the District Court erred by limiting its analysis to the impact of Lawrence's actual testimony, and failing to account for the likely impact on the jury of the revelation of his lies during trial." (S.Br. 73). To the contrary, the District Court explicitly held that "[t]here is no reasonable likelihood that knowledge by the jury that Lawrence lied about his participation in the ink tests and whether he was aware of a book proposal could have affected the verdict." (JA 1750). As is clear in reading the opinion, the District Court considered *both* the impact of Mr. Stewart's actual testimony and the effect revelation of his perjury would have had on the jury. (JA 1751) (noting that "the outcome of the trial would have been no different had Lawrence's entire testimony been rejected"). The District Court directly addressed the very issue that Stewart claims it did not:

> [The defendants] contend that because Lawrence was not simply a Government witness, but an employee of the Government who participated in the prosecution of the case, the revelation of his perjury would have caused the jury to question the credi-

> bility of other Government agents and employees who testified in the case.

(JA 1757-58). The District Court then expressly rejected the defendants' argument:

> Defendants do not explain how Lawrence's perjury could have affected the jury's assessment of the credibility, truthfulness, and motivations of [] critical witnesses [such as Armstrong and Pasternak].
>
> Furthermore, it is simply not plausible that Lawrence's dishonesty concerning collateral matters would cause the jury to question the substance of Farmer and Glotzer's testimony. . . . His tangential misrepresentations would therefore have an extremely limited capacity to impugn the factual testimony of other Government employees.

(JA 1759, 1755 (noting that "even putting aside indications that the jury did not give credence to Lawrence's testimony, it is clear that the impeachment value of Lawrence's perjury would be severely limited since the most critical aspects of his scientific analysis were corroborated by the defense")).

No less perplexing is Bacanovic's claim that the District Court "chose to ignore" his argument that Mr. Stewart also lied about the reasons the lab did not test the dash. (B.Br. 79). In fact, the District Court specifically addressed this claim: "Defendants also contend that discovery obtained from the Government in connection with these motions demonstrates that Lawrence lied about

a third matter: that he disagreed with Fortunato's decision not to test the dash beside the Apple Computer entry [on the Worksheet]." (JA 1760-61). The Court rejected Bacanovic's claim because "the defendants fail to explain how the revelation of this perjury – if in fact it is perjury – could have affected the verdict." (JA 1760). The Court again explained that "[d]efendants cannot escape the fact that the jury acquitted Bacanovic of Count Five and both defendants of making false statements relating to the existence of the $60 agreement, and the fact that ample evidence supports the charges of which the jury convicted defendants." (JA 1760-61). The Court further noted that "Bacanovic availed himself of the opportunity to cross-examine Lawrence at length about the laboratory's decision not to test the dash, and may have succeeded thereby in creating sufficient doubt about the laboratory's method of conducting its tests to persuade the jury to acquit Bacanovic of the false document charge." (JA 1761).

In short, all of the claims that Bacanovic and Stewart raised below were fully considered, and denied, by the District Court.

POINT IX

The Potential Effect Of *Blakely* v. *Washington* On The Defendants' Sentences

This Court has held that the Sentencing Guidelines continue to govern sentences in this Circuit until the Supreme Court rules otherwise. *United States* v. *Mincey*, 380 F.3d 102 (2d Cir. 2004). On August 6, 2004, this Court issued procedural and administrative measures, among other things, denying leave to file supplemental

briefs based on the *Blakely* decision pending the Supreme Court's decision in *United States* v. *Booker*, No. 04-104, and *United States* v. *Fanfan*, No. 04-105. In light of these measures, the Government respectfully requests leave to file a supplemental brief following the Supreme Court's decision if necessary.

CONCLUSION

The judgment of conviction should be affirmed.

Dated: New York, New York
November 24, 2004

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the undersigned counsel hereby certifies that this brief complies with the type-volume limitation of Rule 32(a)(7)(B). As measured by the word-processing system used to prepare this brief, there are 56,078 words in this brief.

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