

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - x

UNITED STATES OF AMERICA	:	MISDEMEANOR
- v. -	:	<u>INFORMATION</u>
DOUGLAS FANEUIL,	:	02 Cr.
Defendant.	:	

- - - - - x

COUNT ONE

(Receiving Money Or Other Valuable Thing
As Consideration For Not Informing)

The United States Attorney charges:

Background

1. At all times relevant to this Information, DOUGLAS FANEUIL, the defendant, was employed by Merrill Lynch & Co., Inc. ("Merrill Lynch"), a broker-dealer headquartered in New York, New York. FANEUIL was employed as an assistant to a financial advisor (the "Financial Advisor") at a Merrill Lynch branch located in New York, New York. Merrill Lynch paid FANEUIL a regular salary. Over and above FANEUIL's regular salary, the Financial Advisor paid FANEUIL certain incentive compensation equal to a percentage of the Financial Advisor's own commission income (the "Additional Compensation").

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

2. At all times relevant to this Information, Merrill Lynch distributed policies advising its employees, including

DOUGLAS FANEUIL, the defendant, and the Financial Advisor, of their responsibilities under the federal securities laws, which stated in part:

Inside Information

Background and Definition

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

Information is material if a reasonable person would want to consider it in determining whether to engage in a securities transaction or if it could reasonably be expected to affect the market price of a security if it becomes generally known. Information should be considered non-public if it has not been disclosed in the news media, research reports, corporate public filings or reports, or in some other similar public manner. Non-public information should generally be regarded as material unless it is clearly unimportant to investors.

3. At all times relevant to this Information, Merrill Lynch also distributed policies advising its employees, including DOUGLAS FANEUIL, the defendant, and the Financial Advisor, of their duties to safeguard information concerning the business affairs of its clients, which stated, in part:

Confidentiality of Client Information

You may not discuss the business affairs of any client with anyone, including other employees except on a need-to-know basis.

Information or records concerning the business of the Firm and/or its clients may not be released except to persons legally entitled to receive them.

Client Information Privacy Policy

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

. . .

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

The Insider Trading Scheme

The Acquisition of Inside Information

4. At all times relevant to this Information, Samuel Waksal, the president, chief executive officer, and a director, of ImClone Systems Incorporated, was one of the Financial Advisor's clients. ImClone Systems Incorporated ("ImClone") was a corporation organized under the laws of the State of Delaware with its principal place of business in New York, New York. ImClone was engaged in the business of developing biologic medicines, including the development of Erbitux, a biologic treatment for irinotecan-refractory colorectal cancer. ImClone publicly described Erbitux as its lead product candidate. At all times relevant to this Information, ImClone's common stock was

listed on the NASDAQ National Market System, an electronic securities market system administered by the National Association of Securities Dealers, under the symbol "IMCL."

5. On or about October 31, 2001, ImClone submitted to the United States Food and Drug Administration (the "FDA") a Biologics Licensing Application ("BLA") for approval of Erbitux (the "Erbitux BLA"). Pursuant to FDA regulations, within 60 days following the submission of a BLA, the FDA must decide whether the BLA is administratively and scientifically complete to be accepted for FDA review. Only if a BLA is accepted for filing does the FDA review the application to determine whether the proposed treatment will be approved.

6. On or about December 26, 2001, Samuel Waksal learned of a report that a source within the FDA had stated that ImClone was expected to receive a Refusal to File Letter on December 28, 2001. This information was material, non-public information that when subsequently made public after the close of business on December 28, 2001, caused the price of ImClone stock to decline.

7. On the morning of December 27, 2001, DOUGLAS FANUEIL, the defendant, received a telephone call from a member of Samuel Waksal's family, who placed an order to sell all of that family member's ImClone stock. Subsequently, that family

member's approximately 39,472 shares were sold for approximately \$2,472,837.

8. On the morning of December 27, 2001, DOUGLAS FANUEIL, the defendant, also received a telephone call from Samuel Waksal's accountant, who requested that all of the ImClone stock in Samuel Waksal's Merrill Lynch account, approximately 79,797 shares, then worth approximately \$4.9 million, be transferred to a family member and then sold.

9. On December 27, 2001, information regarding Samuel Waksal's efforts to sell significant amounts of his ImClone stock and regarding the sale of significant amounts of ImClone stock by Samuel Waksal's family member constituted material, non-public information.

10. As an employee of Merrill Lynch, DOUGLAS FANEUIL, the defendant, and the Financial Advisor owed fiduciary and other duties to Merrill Lynch to protect the confidentiality of its clients' transactions, including those transactions that would constitute material, non-public information regarding certain securities, and to abstain from "tipping" such material, non-public information to others.

11. In breach of those duties and for his own personal benefit and the benefit of other persons with whom he had a close personal and business relationship, the Financial Advisor, directly and indirectly, disclosed to another client (the "Tippee") confidential, material, non-public information that the

Financial Advisor had misappropriated and stolen from Merrill Lynch, namely information regarding the sale of ImClone stock by Samuel Waksal's family member and the attempted sale of ImClone stock by Samuel Waksal.

12. On December 27, 2001, the Tippee learned that Samuel Waksal was trying to sell all of the ImClone stock that Waksal held at Merrill Lynch. The Tippee then sold all of the Tippee's shares of ImClone stock, approximately 3,928 shares, yielding proceeds of approximately \$228,000.

Public Announcement of the FDA Decision

13. On or about December 28, 2001, at approximately 2:55 p.m. (EST), the FDA transmitted to ImClone via facsimile a letter stating that the FDA had refused to accept the Erbitux BLA for filing. After the close of business on December 28, 2001, ImClone issued a press release announcing that the FDA had refused to accept the Erbitux BLA for filing (the "RTF Press Release").

14. On December 28, 2001, prior to the issuance of the RTF Press Release, the closing price of ImClone stock was \$55.25. On December 31, 2001, the first day that ImClone stock traded after the issuance of the RTF Press Release, the price of ImClone stock closed at \$46.46, representing a decline of approximately 16%.

15. By selling a total of 3,928 shares of ImClone stock two days prior to ImClone's public announcement of the FDA's refusal to accept for filing the Erbitux BLA, and on the day on which Samuel Waksal attempted to sell all of his shares of ImClone that he held at Merrill Lynch, the Tippee avoided losses of approximately \$45,673.

FANEUIL's Failure To Inform Law Enforcement

16. In or about January 2002, the Northeast Regional Office of the Securities and Exchange Commission ("SEC") commenced an investigation to determine whether the Tippee, the Financial Advisor and others had violated the federal securities laws and regulations that prohibit trading while in possession of and using material non-public information. It was material to the SEC's investigation to determine, among other things, the reasons for the Tippee's December 27, 2001 sale of ImClone stock.

17. On or about January 3, 2002, DOUGLAS FANEUIL, the defendant, was interviewed by telephone in New York, New York by SEC attorneys and did not truthfully reveal all he knew concerning the actions of the Financial Advisor and the reasons for the Tippee's sale of ImClone stock on December 27, 2001.

18. On or about March 7, 2002, DOUGLAS FANEUIL, the defendant, was interviewed in New York, New York by a Special Agent of the Federal Bureau of Investigation ("FBI") and by SEC attorneys, and again did not truthfully reveal all he knew

concerning the actions of the Financial Advisor and the reasons for the Tippee's sales of ImClone stock on December 27, 2001.

19. In consideration for not informing the SEC of all the true facts surrounding the Financial Advisor's actions and the Tippee's sale of ImClone stock on December 27, 2001, the Financial Advisor continued to pay DOUGLAS FANEUIL, the defendant, the Additional Compensation, and offered to arrange for FANEUIL to receive an additional week of vacation and pay for his airline ticket.

20. On or about June 20, 2002, DOUGLAS FANEUIL, the defendant, came forward and voluntarily disclosed to Merrill Lynch, and subsequently to the SEC and the FBI, the true facts surrounding the Financial Advisor's actions and the Tippee's sale of ImClone stock on December 27, 2001.

Statutory Allegation

21. From in or about January 2002 until on or about June 20, 2002, in the Southern District of New York and elsewhere, DOUGLAS FANEUIL, the defendant, as a consideration for not informing against a violation of a law of the United States, namely, violations of Title 15, United States Code, Sections

78j(b) and 78ff; Title 18, United States Code, Section 2; and Title 17, Code of Federal Regulations, Section 240.10b-5, received money and other valuable things.

(Title 18, United States Code, Section 873).

JAMES B. COMEY
United States Attorney