

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

x 04 CRIM. 554

UNITED STATES OF AMERICA :

- v. - :

INDICTMENT

LARRY F. STEWART, :

04 Cr.

Defendant. :

x

COUNT ONE

(False Declarations Before Court)

The Grand Jury charges:

Background And Relevant Persons

1. At all times relevant to this indictment, the United States Secret Service employed civilian scientific experts in its Forensic Services Division who performed examinations of evidence to assist in, among other things, criminal investigations carried out by the Secret Service and by other federal and state law enforcement agencies, including the Federal Bureau of Investigation. The Forensic Services Division Laboratory was located in Washington, D.C., and included specialists in the forensic analysis of ink on questioned documents.

2. At all times relevant to this Indictment, LARRY F. STEWART, the defendant, was Director of the Secret Service's Forensic Laboratory. Through his training and experience, STEWART had obtained significant expertise in the forensic

analysis of ink on questioned documents.

3. At all times relevant to this Indictment, Employee-1 was an Assistant Branch Chief in the Secret Service's Forensic Services Division. Employee-1, through training and experience, possessed significant expertise in the forensic analysis of ink on questioned documents.

The Investigation Of Martha Stewart And Peter Bacanovic

4. In or about January 2002, 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 began regulatory and criminal investigations into trading in the stock of ImClone Systems, Inc. ("ImClone") in late December 2001. The investigations focused on, among other things, the December 27, 2001 sale of 3,928 ImClone shares by Martha Stewart, chairman of the board of directors and chief executive officer of Martha Stewart Living Omnimedia, Inc., with the assistance of her stockbroker at Merrill Lynch & Co., Peter Bacanovic. Martha Stewart's sale of ImClone stock occurred the day before ImClone, which was in the business of developing medicines, publicly announced that the United States Food and Drug Administration had refused to review its application for approval of a new cancer drug. The investigations sought to determine, among other things, whether Martha Stewart sold her ImClone shares based on

material, non-public information obtained from her broker, Peter Bacanovic.

5. In response to the investigations, Martha Stewart and Peter Bacanovic asserted, in interviews and testimony before Government investigators, that Martha Stewart's December 27, 2001 sale of ImClone stock was based on a pre-existing agreement between Martha Stewart and Peter Bacanovic that Martha Stewart would sell her ImClone stock if its price fell below \$60 per share.

6. In particular, on or about January 30, 2002, Peter Bacanovic caused to be produced to the SEC a worksheet (the "Worksheet") dated December 21, 2001, that listed each of the stocks held by Martha Stewart at Merrill Lynch on that date. The Worksheet contained handwritten notes, including a notation next to the entry for ImClone stock reading "@ 60." In subsequent testimony before the SEC, Bacanovic stated that the "@ 60" notation on the Worksheet reflected his discussion with Martha Stewart concerning selling her ImClone shares once the stock price fell below \$60 per share.

The Secret Service Lab Analyzes The "@ 60" Worksheet

7. As part of its investigation of Martha Stewart's trading in ImClone stock, in or about July 2002, the FBI submitted the Worksheet to the Secret Service's Forensic Services Division for analysis. The FBI requested the Secret Service to

determine whether the "@ 60" entry on the Worksheet was made with the same ink as the other handwritten entries on the Worksheet.

8. On or about July 25, 2002, the Worksheet and the FBI analysis request were logged into the Forensic Services Division Laboratory in Washington, D.C. by Employee-1. Employee-1 then commenced the requested examination of the Worksheet. Employee-1 conducted physical and chemical analyses of the Worksheet on or about August 1 and 2, 2002. The physical examinations included photographing the Worksheet under infrared and ultraviolet light, and the chemical examinations included thin layer chromatography, a process by which ink samples are broken down into their component parts on glass or plastic plates for analysis. Employee-1 conducted three thin layer chromatography tests, resulting in three "plates," as part of the August 2002 chemical analysis of the Worksheet.

9. Employee-1 completed a report detailing the examination results on or about August 5, 2002. The report concluded that "[o]ne blue ballpoint ink was used to produce the entry '@ 60' and the underline associated to it. A different blue ballpoint ink was used to produce all of the remaining entries on the document, including all of the circles, question marks and check marks found on the page." The report was approved by a supervisor in the Forensic Services Division on behalf of the Special Agent in Charge of that Division.

10. LARRY F. STEWART did not participate in or observe any of the analysis conducted by Employee-1 on the Worksheet in or about August 2002. STEWART was notified of the analysis on or about August 6, 2002, via an internal Forensic Services Division email report.

The Charges Against Martha Stewart And Peter Bacanovic

11. On or about June 4, 2003, a Grand Jury in the Southern District of New York filed Indictment 03 Cr. 717 (MGC), which charged Martha Stewart and Peter Bacanovic with various offenses arising from their participation in a scheme to obstruct the regulatory and criminal investigations into trading by Martha Stewart and others in ImClone common stock.

12. The indictment alleged that, as part of the criminal scheme, Peter Bacanovic had altered the Worksheet by adding the handwritten notation "@ 60" next to the entry for ImClone, using ink that was scientifically distinguishable from ink used elsewhere on the Worksheet, in an effort to corroborate Bacanovic's and Martha Stewart's claim that they had a pre-existing agreement to sell Martha Stewart's ImClone stock if the market price of ImClone fell to \$60 per share. The indictment alleged Peter Bacanovic's alteration of the Worksheet (i) as an act in furtherance of the conspiracy charged against both Martha Stewart and Peter Bacanovic, (ii) as the basis for a false documents charge against Peter Bacanovic, and (iii) in connection

with one perjury specification against Peter Bacanovic.

13. A superseding Indictment, S1 03 Cr. 717 (MGC), which contained allegations almost identical to those in the original indictment, was filed on or about January 4, 2004.

Additional Analysis Of The Worksheet By The Secret Service Lab

14. On or about January 9, 2004, LARRY F. STEWART, Employee-1, and another supervisory employee within the Forensic Services Division Laboratory attended a meeting in New York, New York with prosecutors and agents responsible for the prosecution of Martha Stewart and Peter Bacanovic. At that meeting, the prosecutors asked that the Forensic Services Division perform additional tests on the Worksheet to (i) identify the inks present on the Worksheet, and (ii) compare the ink contained in three marks on the Worksheet that had previously been untested by the Forensic Services Division with the ink on the rest of the Worksheet.

15. In response to that request, commencing on or about January 13, 2004, Employee-1 conducted additional chemical analyses on the Worksheet in order to identify the inks present on the Worksheet and to compare the ink in the three untested marks with the remainder of the inks on the document. Employee-1 conducted four additional thin layer chromatography examinations, resulting in four additional "plates," in order to conduct those tests. Employee-1 finished the examination on or about January

15, 2004, and on or about January 16, 2004, gave the Worksheet, the examination workpapers, and chromatography plates showing the results of the chemical analyses to LARRY F. STEWART.

16. LARRY F. STEWART did not participate in conducting the chemical analyses carried out by Employee-1 on the Worksheet between January 13 and 15, 2004. On or about January 13, 2004, Employee-1 showed STEWART one of the chromatography plates that Employee-1 had created in order to consult with STEWART regarding the interpretation of those results.

17. Between on or about January 16, 2004 and on or about January 23, 2004, LARRY F. STEWART reviewed the Worksheet and the workpapers and chromatography plates prepared by Employee-1, and drafted a report setting forth the results of the examinations of the Worksheet. On or about January 23, 2004, STEWART signed a report regarding the examination of the Worksheet. The January 23, 2004 report concluded that

Two different blue ballpoint inks were used to produce the handwritten entries found on the document. One blue ballpoint ink was used to produce the entry "@60" and the underline associated to it. A different blue ballpoint ink was used to produce all of the remaining entries on the document including all of the circles, question marks and check marks found on the page.

[The bulk of the handwritten entries found on [the Worksheet] were produced with an ink that matches that found in Papermate blue ballpoint stickpens (aka Write Bros. and Kilometrico). The ink used to produce the entry "@60" and the

underline associated to it does not match any ink in our library of over 8000 writing inks.

The horizontal dash mark to the left of the question mark found at the right-side end of the "Apple Computer Inc" entry was also tested. The results proved inconclusive based on the contamination of the entry and the lack of available ink for testing.

LARRY F. STEWART Testifies At Trial

18. Trial of the superseding indictment against Martha Stewart and Peter Dacanovic began on January 27, 2004 and continued into early March 2004.

19. On or about February 19, 2004, LARRY F. STEWART was called as a witness by the prosecution to testify regarding the forensic analysis of the Worksheet. STEWART falsely testified, in substance and in part, about the following matters:

a. STEWART testified that he observed and participated in carrying out the chemical analysis of the Worksheet in 2002 with Employee-1, when in fact, as STEWART well knew, he had not observed or participated in carrying out those chemical tests.

b. STEWART testified that he worked side-by-side with Employee-1 in carrying out the chemical analysis of the Worksheet between on or about January 13 and 15, 2004, when in fact, as STEWART well knew, he had not participated in carrying out those chemical tests.

Statutory Allegations

20. On or about February 19, 2002, in the Southern District of New York, LARRY F. STEWART, the defendant, under oath in a proceeding before a court of the United States, unlawfully, willfully and knowingly did make a false material declaration, to wit, in the criminal trial of United States v. Martha Stewart and Peter Bacanovic, 03 Cr. 717 (MGC), STEWART gave the following testimony, the underlined portions of which he believed to be materially false:

Specification One

(Page 3285, Lines 2 - 9)

- Q. Mr. Stewart, this Government Exhibit 479, which is a picture of the two spots you just described, when was this done?
- A. This original plate was done in July of 2002 with [Employee-1] and myself.
- Q. And when you did that were you involved in the actual creation of the plate?
- A. Yes, sir.

Specification Two

(Page 3292, Line 3 - Page 3293, Line 6)

- MR. BURCK: Mr. Bove, could you put up Government Exhibit 479, please.
- Q. Tell us a little more about chromatography. What exactly does it consist of?
- A. Well, it can happen in a number of different ways, but I'll specifically talk about how it was used in this case. Chromatography is a piece of plastic or glass that has silica gel on top of it. Now, silica gel is a powdered material, and the silica sticks to the plastic or the glass. What I have to do in the laboratory is I have to take the ink that's dry on the document and I have to make it liquid again, and I do that by putting

solvent or chemicals on the ink that makes it extract from its dry phase into a liquid phase; it turns it liquid again. I then take that and I place it on this silica gel that is on this plate, it is either plastic or glass plate.

And if you look at the picture up there in Government Exhibit 472, on the left hand side at the bottom, that little blue circle, that's where I first placed an ink. That is where I actually put it on to that plate.

Q. What ink was that?

A. That was the ink that was the "AVEA" ink that was on the Government Exhibit 81.

MR. BURCK: Mr. Bove, could you put 81 up next to 479?

A. It is in the upper left quadrant.

So I took a small amount of that AVEA ink and I turned it liquid again and I put it on this plate. I then did the same thing for the #60 ink. And that's the blue dot that is on the right side of the plate.

Specification Three

(Page 3322, Line 12 - Page 3323, Line 7)

Q. Mr. Stewart, you testified that you performed the tests with [Employee-1] that were done in July and August of 2002; do you remember that testimony before?

A. Yes.

Q. And is it your testimony that you observed, or is it your testimony that you actually conducted the hole punching and spotting of the chromatographic plate that occurred in connection with these tests? What is your testimony?

A. Observed, participated and reviewed.

Q. And so it's your testimony that you and [Employee-1], both, you, with all of the experience that you have talked about, as well as [Employee-1] -- who was not a new person, right? She had been there for years, right, doing ink analysis in your lab?

A. She has been there approximately 15 years.

Q. Right. So the two of you together examined --

MR. STRASSBERG: Can we put up Exhibit 81A, please?

Q. The two of you together examined this one-page document, is that right?

A. Yes.

Specification Four

(Page 3358, Line 17 - Page 3359, Line 13)

- Q. And now that your recollection is refreshed, am I right that it was January 13 of 2004 when you did the first test that involved ink from the dash?
- A. That's correct.
- Q. Now, I assume you've seen the results of the tests that you did for both of these tests, the one on the 13th and the one on the 15th, right?
- A. Yes.
- Q. And am I right that you actually conducted these tests, you personally, as opposed to [Employee-1] or someone else in your lab?
- A. [Employee-1] and I worked on it the together, same time.
- Q. Is this another instance where you worked side by side to do the test?
- A. Yes, sir.
- Q. Do you remember who placed the ink on the plate or put the plate in the solution, or anything like that?
- A. No. We did it side by side at the same time. so, no, I don't know.
- Q. You don't remember whether she did it or you did it, but you did it together?
- A. Yes.

(Title 18, United States Code, Section 1623.)

COUNT TWO

(False Declarations Before Court)

The Grand Jury further charges:

21. The allegations of paragraphs 1 through 18 are repeated and realleged as though fully set forth herein.

22. On or about February 23, 2004, Peter Bacanovic called an ink expert to testify in his defense at trial. Bacanovic's ink expert testified (i) that the ink used to make the "60" entry and the dash at the right-hand

end of the line for Apple Computer on the Worksheet was a scientifically distinguishable ink from that used to make the other entries on the Worksheet; and (ii) that testing using a densitometer demonstrated that at least two different pens were used to create the entries on the Worksheet other than the "© 60" entry and the dash.

23. On or about February 25, 2004, LARRY F. STEWART was called as a witness by the prosecution in its rebuttal case to testify regarding the use of densitometers in ink analysis. STEWART falsely testified, in substance and in part, about the following matter: STEWART testified that he was familiar with a book proposal prepared by two employees of the Secret Service's Forensic Services Division concerning the use of densitometry in ink analysis, when in fact, as STEWART well knew, STEWART was not familiar with that book proposal and had not heard of it before being confronted with it on the witness stand.

Statutory Allegations

24. On or about February 25, 2004, in the Southern District of New York, LARRY F. STEWART, the defendant, under oath in a proceeding before a court of the United States, unlawfully, willfully and knowingly did make a false material declaration, to wit, in the criminal trial of United States v. Martha Stewart and Peter Bacanovic, 03

Cr. 717 (MGC), STEWART gave the following testimony, the underlined portions of which he believed to be materially false:

Specification One

(Page 4197, Line 3 - Page 4199, Line 8)

- Q. Mr. Stewart, are you familiar with a person named [Employee-2]?
- A. Yes, I am.
- Q. In fact, is that the [Employee-2] that works at the Secret Service?
- A. Yes, he's our chief research scientist.
- Q. Are you familiar with [Employee-3]?
- A. Yes, [Employee-3] works for me.
- Q. He is another individual involved with ink analysis at the Secret Service?
- A. Yes, sir.
- Q. Are you familiar that they have submitted a proposal for a book that would talk about one of the chapters we talked about -

THE COURT: Well, before you tell what it says, why don't you show it to the witness.

MR. STRASSBERG: Sure. I will, your Honor. I was just going to ask him if he was aware. He may be aware.

THE COURT: Except that that becomes -- that is, if he is not aware of it, you have already testified about it.

MR. STRASSBERG: I don't have this marked, your Honor. I am happy to mark it for identification. I don't intend to introduce it.

THE COURT: You may show it to the witness and see if he is familiar with it.

(Pause)

BY MR. STRASSBERG:

- Q. I am going to direct your attention to the fourth page of this document, and the heading "C." Feel free to look at the front, if you would like, Mr. Stewart, and then let me re-ask my question, which is simply: Are you aware that [Employee-2] and [Employee-3] have submitted a book proposal --

THE COURT: Wait. Let the witness look at it first.

MR. STRASSBERG: Sure.

THE COURT: Because you can't testify.

A. Yes, I am familiar with this.

Q. So --

MR. STRASSBERG: Your Honor, may I ask the question?

THE COURT: What is the question?

BY MR. STRASSBERG:

Q: The question is: Are you aware, Mr. Stewart, that [Employee-2] and [Employee-3] have submitted a book proposal that includes as a chapter a heading of "Instrumental methods for determining analytical features that do not tend to change with age" -- this is a book proposal about ink analysis, and that includes underneath it, in this chapter about things that don't affect aging

MR. BURCK: Objection, your Honor. Your Honor -

MR. STRASSBERG: -- TLC densitometry.

THE COURT: That is just another way of putting that into evidence, please.

Have you seen the proposal for the chapter?

THE WITNESS: Yes, I have.

(Title 18, United States Code, Section 1623.)

Jolene Carrone
FOR PERSON

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Form No. USA-33s-274 (Ed. 9-25-58)

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- v -

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18 U.S.C. § 1623

DAVID N. KELLEY
United States Attorney.

A TRUE BILL.

Henry Carmona

Foreperson.
