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**UNITED STATES DISTRICT COURT**  
**SOUTHERN DISTRICT OF NEW YORK**

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SECURITIES AND EXCHANGE COMMISSION, :  
:  
Plaintiff, :  
: : 05 Civ. ( )  
- against- :  
:  
ZVI FUKS, A.K.A. ZVI FUCHS AND : : COMPLAINT  
SABINA BEN-YEHUDA, A.K.A. SONIA BEN :  
YEHUDA :  
:  
Defendants. :  
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Plaintiff, Securities and Exchange Commission (“Commission”), for its Complaint against defendants Zvi Fuks, also known as Zvi Fuchs (“Fuks”), and Sabina Ben-Yehuda, also known as Sonia Ben Yehuda (“Ben-Yehuda”) (collectively, the “Defendants”), alleges as follows:

1. The Commission charges Fuks and Ben-Yehuda with illegal insider trading in the stock of ImClone Systems, Inc. (“ImClone”) in December 2001, after receiving an illegal tip from Samuel D. Waksal (“Waksal”), ImClone’s co-founder and its CEO at the time. On the evening of December 26, 2001, Waksal learned privately and in advance of any official notice or public announcement that the United States Food and Drug Administration (“FDA”) would reject consideration of ImClone’s application to approve ImClone’s primary product, a cancer

treatment called “Erbitux.” On December 27, Waksal, while in possession of that material, non-public information, tipped Ben-Yehuda, who sold more than \$73,000 of ImClone stock. Ben-Yehuda passed the news on to Fuks, who sold over \$5 million of ImClone stock that day. ImClone received written notification of the FDA’s decision in the afternoon on December 28, 2001, and publicly announced the FDA’s decision in a press release at about 6:00 p.m. that day. This news prompted ImClone’s stock price to drop 16% from \$55.25 to \$46.46 by the close of the next trading day, December 31. By engaging in insider trading before the public disclosure of ImClone’s disappointing news, the Defendants illegally avoided trading losses.

2. By the conduct alleged herein, the Defendants have engaged, directly or indirectly, in transactions, acts, practices, or courses of business that constitute violations of Section 17(a) of the Securities Act of 1933 (“Securities Act”), 15 U.S.C. § 77q(a), Section 10(b) of the Securities Exchange Act of 1934 (“Exchange Act”), 15 U.S.C. § 78j(b), and Rule 10b-5, 17 C.F.R. § 240.10b-5 thereunder. Unless they are permanently enjoined by this Court, the Defendants will continue to engage in the transactions, acts, practices and courses of business set forth in this Complaint and in transactions, acts, practices and courses of business of similar type and object.

#### **JURISDICTION AND VENUE**

3. The Commission brings this action pursuant to the authority conferred upon it by Section 20(b) of the Securities Act, 15 U.S.C. § 77t(b), and Section 21(d) of the Exchange Act, 15 U.S.C. § 78u(d), for permanent injunctive relief against the Defendants prohibiting them from engaging in the transactions, acts, practices, and courses of business alleged in this Complaint. The Commission also brings this action pursuant to Section 21A of the Exchange Act, 15 U.S.C. § 78u-1, for civil penalties against the Defendants under the Insider Trading and Securities Fraud

Enforcement Act of 1988 (“ITSFEA”), and for such other relief as the Court may deem appropriate.

4. The Defendants, directly and indirectly, singly or in concert, made use of the means or instruments of transportation or communication in, or the means or instrumentalities of, interstate commerce, or of the mails, or of any facility of any national securities exchange, in connection with the transactions, acts, practices, and courses of business alleged herein. Certain of the alleged transactions, acts, practices, and courses of business occurred in the Southern District of New York, including, but not limited to, the Defendants’ sales of their ImClone securities. Accordingly, this Court has jurisdiction over this action, and venue is proper in this district, pursuant to Sections 20(b) and 22(a) of the Securities Act, 15 U.S.C. §§ 77t(b) and 77v(a), and Sections 21(d), 21A and 27 of the Exchange Act, 15 U.S.C. §§ 78u(d), 78u-1 and 78aa.

#### **RELEVANT PERSONS AND ENTITIES**

5. The Defendants are:

a. **Zvi Fuks** is 68 years old and the Chairman of the Department of Radiation Oncology at Memorial Sloan Kettering Hospital in New York. In December 2001, he was a member of the ImClone Scientific Advisory Board and the medical advisory board of Scientia, an investment vehicle set up by Waksal to invest in start up bio-tech companies. He is a U.S. citizen and resides in New York City.

b. **Sabina Ben-Yehuda** is 51 years old and an Israeli citizen living in New York City. In December 2001, she worked for Waksal at Scientia.

6. **Samuel D. Waksal** is 57 years old and resides in Minersville, Pennsylvania at the Schuykill Federal Correctional Institution. He is the co-founder of ImClone and was its CEO until he resigned on May 22, 2002. He is currently serving an 87 months prison term in connection with his guilty plea in *United States v. Samuel Waksal*, for bank fraud, securities fraud, perjury and tax evasion. The Commission also filed a separate action against Waksal charging him with insider trading for attempting to sell his own ImClone stock, purchasing ImClone put option contracts, causing his daughter to sell ImClone stock, and tipping his father who then sold ImClone securities, while in possession of the material, non-public information that the FDA would soon issue a negative decision on ImClone's Erbitux application. That matter has been settled.

7. **ImClone Systems, Inc.** is a biopharmaceutical corporation organized under the laws of Delaware and headquartered in New York, New York. ImClone securities are registered with the Commission pursuant to Section 12(g) of the Exchange Act, 15 U.S.C. §§ 78l(g), and are traded on The Nasdaq Stock Market.

### **THE ILLEGAL CONDUCT**

#### **Waksal's Fiduciary Duty**

8. At the time of the transactions and events alleged in this Complaint, Waksal was ImClone's CEO, and therefore owed a fiduciary duty to ImClone and its shareholders. As a result, Waksal had a fiduciary duty, among other things, not to trade while in possession of material, non-public information and to keep material, non-public information confidential.

#### **ImClone's Erbitux Application**

9. Over several years prior to December 2001, ImClone had devoted significant resources to developing a cancer treatment called "Erbitux," with the objective of obtaining FDA

approval to market the product. ImClone's Form 10-K Annual Report for the fiscal year ended December 31, 2001 described Erbitux as ImClone's "lead product candidate" and said that Erbitux "has been shown in several early stage clinical trials . . . when administered with either radiation therapy or chemotherapy, to cause tumor reduction in certain cases." On September 19, 2001, ImClone announced that the Bristol-Myers Squibb Company would invest a total of \$1 billion in Erbitux and also buy \$1 billion in outstanding ImClone stock and would co-develop and co-promote Erbitux with ImClone.

10. On October 31, 2001, ImClone submitted to the FDA the final substantial portion of its rolling application for approval, called a "Biologics License Application" or "BLA." ImClone's October 31 submission of its BLA gave the FDA 60 days, until Monday, December 31, to decide whether to accept ImClone's BLA for filing. By the end of December 2001, the FDA had three options. It could (1) accept ImClone's BLA for filing; (2) accept the BLA for filing, but simultaneously issue a disciplinary review letter notifying ImClone that the BLA still had serious deficiencies that it would need to correct before the BLA could be approved; or (3) refuse to file the BLA by issuing a Refusal to File ("RTF") letter. The issuance of an RTF letter is a disappointing development for an applicant because it means that the applicant must file a new BLA to begin the process again.

#### **Waksal Learns of the FDA Decision**

11. On the evening of Wednesday, December 26, 2001, as he was returning from a vacation in St. Bart's, Waksal learned privately that the FDA would issue an RTF letter to ImClone on December 28, 2001. In the afternoon on December 28, the FDA faxed the RTF letter to ImClone's offices. At approximately 6:00 p.m. on December 28, ImClone announced the FDA's decision in a press release. The price of ImClone fell from a pre-announcement,

December 28, closing price of \$55.25 per share to \$46.46 per share by the close of the next trading day, Monday, December 31.

**The Relationships Between Waksal, Ben-Yehuda and Fuks**

12. In December 2001, Fuks was on the Scientific Advisory Board of ImClone and was Waksal's friend. Ben-Yehuda and Fuks are long-standing friends. In December 2001, Ben-Yehuda worked for Waksal at Scientia.

**Waksal Tips Ben-Yehuda, Who Sells**

13. On the evening of Wednesday, December 26, 2001, Waksal learned ImClone would receive an RTF letter that Friday. The next morning, December 27, there was a flurry of phone activity among Waksal, Ben-Yehuda and Fuks. From the record of telephone calls and the timing of trades, it is apparent that Waksal tipped Ben-Yehuda about the impending RTF letter.

TIME <sup>1</sup>	CALL BETWEEN	LENGTH OF CALL
5:59 a.m.	Fuks calls Ben-Yehuda	7 minutes
6:51 a.m.	Waksal calls Ben-Yehuda	19 seconds
8:06 a.m.	Ben-Yehuda calls Waksal	2 minutes
8:22 a.m.	Ben-Yehuda calls Waksal	4 minutes
8:27 a.m.	Ben-Yehuda calls Fuks	1 minute
8:31 a.m.	Ben-Yehuda calls Waksal	2 minutes
8:39 a.m.	Ben-Yehuda calls Fuks	7 minutes
8:49 a.m.	Fuks calls Waksal	1 minute

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<sup>1</sup> All calls are Eastern Standard Time.

8:54 a.m.	Ben-Yehuda calls Fuks	1 minute
9:08 a.m.	Fuks calls Ben-Yehuda	2 minutes

14. On December 27, 2001, Waksal, knowingly or recklessly, for his direct or indirect benefit, and in breach of a fiduciary duty to ImClone and its shareholders, communicated to Ben-Yehuda, in words or in substance, the material, non-public information that the FDA had decided to issue an RTF letter to ImClone on December 28.

15. Waksal, intending to bestow upon Ben-Yehuda a gift of illegal profits or illegal loss avoidance, communicated this information to Ben-Yehuda, knowing, or having reason to know, that Ben-Yehuda would sell her ImClone stock.

16. At 6:51 a.m. on December 27, 2001, Waksal called Ben-Yehuda, who was in Israel at the time. Before the market opened that day, Ben-Yehuda and Waksal spoke three more times. At 8:38 a.m., after the fourth phone call between Ben-Yehuda and Waksal, Ben-Yehuda called her PaineWebber broker. At the opening of the market, Ben-Yehuda sold all 1,178 of her ImClone shares for \$73,453.

17. On December 27, 2001, when Ben-Yehuda sold her ImClone stock, she knew or acted in reckless disregard of the fact that (1) she possessed material, non-public information concerning ImClone; and (2) Waksal breached a fiduciary duty he owed to ImClone and its shareholders when he gave that information to her.

18. By selling 1,178 shares of her ImClone stock on December 27, instead of waiting until the news of the RTF letter became public, Ben-Yehuda avoided losses in an amount to be determined at trial.

### **Ben-Yehuda Tips Fuks, Who Sells**

19. On the morning of December 27, before the market opened, Ben-Yehuda and Fuks spoke to each other several times. Fuks also called Waksal once.

20. Through these phone calls, Ben-Yehuda, as a gift or with the expectation of economic or reputational benefit, knowingly or recklessly conveyed to Fuks, in words or in substance, the material, non-public information that the FDA had decided to issue an RTF letter to ImClone on December 28, knowing or having reason to know that Fuks would effect transactions in ImClone securities.

21. At the time Ben-Yehuda tipped Fuks, she knew or acted in reckless disregard of the fact that (1) she possessed material, non-public information concerning ImClone; and (2) Waksal breached a fiduciary duty he owed to ImClone and its shareholders when he gave her that information.

22. That same morning, shortly after his series of phone calls with Ben-Yehuda, Fuks sold all 89,173 shares of ImClone stock in his Bear Stearns account. The order ticket was time-stamped 9:27 a.m. and was executed at 10:04 a.m., generating proceeds for Fuks of \$5,357,216.

23. When Fuks sold his ImClone stock based on the information Ben-Yehuda gave him about ImClone, he knew or acted in reckless disregard of the fact that he did so based on improperly obtained, material, non-public information.

24. By selling 89,173 shares of ImClone stock on December 27, instead of waiting until the news of the RTF letter became public, Fuks avoided losses in an amount to be determined at trial.

## **FIRST CLAIM FOR RELIEF**

***Ben-Yehuda Violated Section 17(a) of the Securities Act,  
15 U.S.C. § 77q(a), Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b),  
and Rule 10b-5, 17 C.F.R. § 240.10b-5 Thereunder,  
When She Sold ImClone Stock While in Possession of Material,  
Non-Public Information and When She Tipped Fuks With That Information***

25. The Commission realleges and incorporates by reference the allegations contained in Paragraphs 1 through 24, above.

26. Ben-Yehuda, directly or indirectly, singly or in concert, by the use of the means or instruments of transportation or communication in, or the means or instrumentalities of, interstate commerce, or by use of the mails, or of any facility of any national securities exchange, in the offer or sale, and in connection with the purchase or sale, of ImClone securities: (a) employed devices, schemes, or artifices to defraud; (b) obtained money or property by means of, or otherwise made, untrue statements of material fact or omitted to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; and (c) engaged in transactions, acts, practices and courses of business which operated or would have operated as a fraud or deceit upon purchasers of ImClone securities and upon other persons, as more fully described in Paragraphs 1 through 24.

27. As part of and in furtherance of this violative conduct, when Ben-Yehuda sold ImClone stock on December 27, 2001 and when she tipped Fuks, she knew or acted in reckless disregard of the fact that (1) she possessed material, non-public information concerning ImClone; and (2) Waksal breached a fiduciary duty he owed to ImClone and its shareholders when he gave her that information.

28. By reason of the activities described in Paragraphs 1 through 24, above, Ben-Yehdua, singly or in concert, directly or indirectly, violated, and unless enjoined will again

violate, Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

**SECOND CLAIM FOR RELIEF**

*Fuks Violated Section 17(a) of the Securities Act,  
15 U.S.C. § 77q(a), Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b),  
and Rule 10b-5, 17 C.F.R. § 240.10b-5 Thereunder,*

**When He Sold ImClone Stock While in Possession of Material, Non-Public Information**

29. The Commission realleges and incorporates by reference the allegations contained in Paragraphs 1 through 24, above.

30. Fuks, directly or indirectly, singly or in concert, by the use of the means or instruments of transportation or communication in, or the means or instrumentalities of, interstate commerce, or by use of the mails, or of any facility of any national securities exchange, in the offer or sale, and in connection with the purchase or sale, of ImClone securities: (a) employed devices, schemes, or artifices to defraud; (b) obtained money or property by means of, or otherwise made, untrue statements of material fact or omitted to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; and (c) engaged in transactions, acts, practices and courses of business which operated or would have operated as a fraud or deceit upon purchasers of ImClone securities and upon other persons, as more fully described in Paragraphs 1 through 24.

31. As part of and in furtherance of this violative conduct, when Fuks sold ImClone stock on December 27, 2001, he knew or acted in reckless disregard of the fact that he was doing so based on improperly obtained, material, non-public information.

32. By reason of the activities described in Paragraphs 1 through 24, above, Fuks, singly or in concert, directly or indirectly, violated, and unless enjoined will again violate,

Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

**RELIEF SOUGHT**

**WHEREFORE**, Plaintiff respectfully requests a Final Judgment:

- A. Permanently enjoining the Defendants, their agents, servants, employees, and attorneys, and all persons in active concert or participation with them who receive actual notice of the injunction by personal service or otherwise, and each of them, from future violations of Section 17(a) of the Securities Act, 15 U.S.C. § 77q(a), and Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5;
- B. Ordering the Defendants to disgorge all of their losses avoided from all of their insider trading in ImClone securities, and to pay prejudgment interest thereon;
- C. Ordering Ben-Yehuda jointly and severally liable for Fuks' losses avoided and prejudgment interest thereon from his insider trading in ImClone securities;
- D. Ordering the Defendants to pay civil money penalties pursuant to Section 21A of the Exchange Act, 15 U.S.C. § 78u-1; and

E. Granting such other relief as the Court shall deem just and proper.

Dated: New York, New York  
March 9, 2005

Respectfully submitted,

By: 

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