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8 **UNITED STATES DISTRICT COURT**  
9 **NORTHERN DISTRICT OF CALIFORNIA**  
10 **SAN FRANCISCO DIVISION**

11  
12 SECURITIES AND EXCHANGE COMMISSION,  
13 Plaintiff,  
14 vs.  
15 JOHN PATRUCCO,  
16 Defendant.

Case No. C 04-3515 WDB

**COMPLAINT**

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18  
19 Plaintiff Securities and Exchange Commission (“Commission”) alleges:

20 **SUMMARY OF THE ACTION**

21 1. This case involves insider trading by the former Associate Director of External  
22 Reporting at VaxGen, Inc., a Brisbane, California-based biotechnology company. The defendant,  
23 John Patrucco (“Patrucco” or “Defendant”), was responsible for preparing reports filed by VaxGen  
24 with the Commission disclosing material information about the Company to the public. On May 22  
25 and 23, 2003, Patrucco purchased approximately 2,950 shares of VaxGen stock based on his advance  
26 knowledge that the Food and Drug Administration (“FDA”) had just approved VaxGen’s  
27 Investigational New Drug (“IND”) application for a potential anthrax vaccine. The approved IND  
28 application allowed VaxGen to begin clinical development of the vaccine through Phase I human

1 clinical trials – one of the major milestones before the FDA ultimately approves a drug for sale to the  
2 public. A few days later, because he was the individual at VaxGen charged with reporting material  
3 information about the Company to the public, Patrucco filed with the Commission a report on Form  
4 8-K disclosing to investors the fact that the FDA had approved VaxGen’s IND application. When the  
5 news was publicly announced, VaxGen’s stock price rose nearly 70%. Patrucco sold the 2,950 shares  
6 the following day, realizing a quick profit of nearly \$8,000.

7 2. By trading on the basis of material, nonpublic information concerning the FDA’s  
8 approval of VaxGen’s IND application, Defendant violated Section 10(b) of the Securities Exchange  
9 Act of 1934 (the “Exchange Act”) [15 U.S.C. § 78j(b)] and Rule 10b-5 [17 C.F.R. § 240.10b-5]  
10 thereunder.

### 11 **JURISDICTION AND VENUE**

12 3. This Court has jurisdiction over this action pursuant to Sections 21(d), 21(e), 21A, and  
13 27 of the Exchange Act [15 U.S.C. §§ 78u(d), 78u(e), 78u-1, and 78aa]. Defendant, directly or  
14 indirectly, has made use of the means and instrumentalities of interstate commerce or of the mails in  
15 connection with the acts, transactions, practices, and courses of business alleged in this Complaint.

16 4. Venue in this District is proper pursuant to Section 27 of the Exchange Act [15 U.S.C.  
17 § 78aa] because the defendant is located in the Northern District of California and a substantial  
18 portion of the conduct alleged in this Complaint occurred within the Northern District of California.

19 5. Assignment to the San Francisco Division of this Court is proper because a substantial  
20 part of the events or omissions that give rise to the claim occurred in San Mateo County.

### 21 **AUTHORITY TO BRING THIS ACTION**

22 6. The Commission brings this action pursuant to Sections 21(d), 21(e), and 21A of the  
23 Exchange Act [15 U.S.C. §§ 78u(d), 78u(e), and 78u-1].

24 7. Defendant, directly and indirectly, has engaged in transactions, acts, practices, and  
25 courses of business that constitute violations of Section 10(b) of the Exchange Act [15 U.S.C. §  
26 78j(b)] and Rule 10b-5 [17 C.F.R. § 240.10b-5] thereunder.



1 clinical trial results for a vaccine in the coming months and wanted its employees to understand the  
2 importance of keeping information about the Company confidential.

3 13. VaxGen had a written insider trading policy throughout Defendant's tenure at the  
4 Company. The policy barred "insiders" – defined as all Company directors, officers, and employees  
5 – from trading in VaxGen securities while possessing material, nonpublic information concerning  
6 VaxGen. The policy specified that material information ordinarily would include announcements by  
7 the FDA that apply to vaccines under development.

8 14. As part of his responsibilities for external reporting and corporate administration,  
9 Patrucco attended meetings of VaxGen's Finance Department. On May 21, 2003, during a regularly  
10 scheduled Finance Department meeting, Patrucco learned that the FDA had approved VaxGen's IND  
11 application for its potential anthrax vaccine. The approved IND application allowed VaxGen to  
12 begin clinical development of the vaccine through Phase I human clinical trials.

13 15. At the time, Patrucco knew that VaxGen had not publicly disclosed the fact that it had  
14 filed the IND application.

15 16. The day after learning about the still-secret FDA approval, Patrucco began buying  
16 VaxGen securities on the open market. On May 22 and 23, Defendant bought 2,950 shares at the  
17 following prices: \$3.05 (1,550 shares), \$3.07 (400 shares), and \$3.12 (1,000 shares).

18 17. A few days later, on May 27, 2003, after the close of the market, VaxGen announced  
19 that the FDA had approved the IND application. Because of his responsibilities for external  
20 reporting, Defendant filed the Form 8-K with the Commission disclosing the news.

21 18. On May 28, VaxGen shares rose sharply, closing at \$5.62 – a nearly 70% increase  
22 over the prior day's closing price of \$3.34. That day, Defendant sold the 2,950 shares purchased on  
23 May 22 and 23 at prices of \$5.82 (600 shares), \$5.79 (750 shares), \$5.78 (200 shares), \$5.77 (400  
24 shares), and \$5.74 (1,000 shares). Patrucco realized a nearly \$8,000 profit on the trades.

1 **CLAIM FOR RELIEF**

2 **(Insider Trading: Violations of Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and Rule**  
3 **10b-5 [17 C.F.R. § 240.10b-5] Thereunder)**

4 19. The Commission hereby incorporates Paragraphs 1 through 18 by reference.

5 20. Patrucco had a fiduciary duty to VaxGen and its securities holders not to trade in  
6 VaxGen securities, either directly or indirectly, based on material, nonpublic information concerning  
7 the Company. Defendant breached that duty when he purchased VaxGen stock on May 22 and 23,  
8 2003 based on material, nonpublic information concerning the FDA's approval of VaxGen's IND  
9 application.

10 21. Defendant, by engaging in the conduct set forth above, with scienter, directly or  
11 indirectly:

- 12 (a) employed devices, schemes, or artifices to defraud;
- 13 (b) made untrue statements of a material fact or omitted to state a material fact  
14 necessary in order to make the statements made, in light of the circumstances  
15 under which they were made, not misleading; or
- 16 (c) engaged in acts, practices, or courses of business which operated or would  
17 operate as a fraud or deceit upon other persons,

18 in connection with the purchase or sale of securities, by the use of means or instrumentalities of  
19 interstate commerce or of the mails, or of a facility of a national securities exchange.

20 22. By reason of the foregoing, Defendant has violated, and unless restrained and enjoined  
21 will continue to violate, Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and Rule 10b-5 [17  
22 C.F.R. § 240.10b-5].

23 **PRAYER FOR RELIEF**

24 WHEREFORE, the Commission respectfully requests that the Court:

25 I.

26 Permanently enjoin Defendant and Defendant's agents, servants, employees, attorneys, and all  
27 persons in active concert or participation with them who receive actual notice of the judgment by  
28

1 personal service or otherwise from violating, directly or indirectly, Section 10(b) of the Exchange Act  
2 [15 U.S.C. § 78j(b)] and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5];

3 II.

4 Enter an Order requiring Defendant to disgorge an amount equal to his illegal trading profits  
5 from the securities transactions complained of herein, plus prejudgment interest;

6 III.

7 Enter an Order requiring Defendant to pay civil penalties under Section 21A of the Exchange  
8 Act [15 U.S.C. § 78u-1]; and

9 IV.

10 Grant such other and further relief as the Court may deem just, equitable, and appropriate.

11 Dated: August 20, 2004

12 Respectfully submitted,

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15 By: \_\_\_\_\_  
16 Helane L. Morrison  
17 Marc J. Fagel  
18 Michael S. Dicke  
19 Robert S. Leach

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