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SOUTHERN DISTRICT OF CALIFORNIA

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10 UNITED STATES DISTRICT COURT
11 SOUTHERN DISTRICT OF CALIFORNIA

13 SECURITIES AND EXCHANGE
14 COMMISSION,

15 Plaintiff,

16 v.

17 SANJIV S. AGARWALA,

18 Defendant.

Case No. '06CV 0352 J POR

COMPLAINT FOR VIOLATIONS
OF THE FEDERAL SECURITIES
LAWS

19
20 Plaintiff Securities and Exchange Commission ("Commission") alleges as
21 follows:

22 JURISDICTION AND VENUE

23 1. This Court has jurisdiction over this action pursuant to Sections 20(b)
24 and 22(a) of the Securities Act of 1933 ("Securities Act"), 15 U.S.C. §§ 77t(b) &
25 77v(a), and Sections 21(d)(1), 21(e), 21A(a)(1), and 27 of the Securities Exchange
26 Act of 1934 ("Exchange Act"), 15 U.S.C. §§ 78u(d)(1), 78u(e), 78u-1(a)(1), &
27 78aa. Defendant has, directly or indirectly, made use of the means or
28 instrumentalities of interstate commerce, of the mails, or of the facilities

1 of a national securities exchange in connection with the transactions, acts,
2 practices, and courses of business alleged in this complaint.

3 2. Venue is proper in this district pursuant to Section 22(a) of the
4 Securities Act, 15 U.S.C. § 77v(a), and Section 27 of the Exchange Act, 15 U.S.C.
5 § 78aa, because certain of the transactions, acts, practices, and courses of business
6 constituting violations of the federal securities laws occurred within this district.

7 **SUMMARY**

8 3. This matter involves unlawful insider trading in the securities of
9 Maxim Pharmaceuticals, Inc. ("Maxim") by defendant Sanjiv S. Agarwala prior to
10 three announcements regarding Maxim's cancer drug Ceplene in April, May, and
11 September 2004. As one of the researchers involved in the Ceplene clinical trials,
12 Agarwala learned of material nonpublic information regarding the trials. While
13 aware of material non-public information and immediately before each of the three
14 announcements, Agarwala purchased or sold Maxim stock for a total profit and
15 loss avoided of \$14,784.

16 4. In an attempt to hide his unlawful insider trading, Agarwala used his
17 father's brokerage account to make the trades. However, it was Agarwala, and not
18 his father, who actually made the trades. Agarwala placed the April and May stock
19 purchases in advance of positive news from computers in the Pittsburgh,
20 Pennsylvania hospital where he works. Agarwala placed the September sale in
21 advance of negative news from his laptop computer using an internet address
22 traceable to the hotel in Del Mar, California, where he was staying the day the
23 trade was placed.

24 5. By engaging in the conduct described in this complaint, Agarwala,
25 directly and indirectly, engaged in acts, practices, and courses of business in
26 violation of Section 17(a) of the Securities Act, 15 U.S.C. § 77q(a), and Section
27 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5 thereunder, 17
28 C.F.R. § 240.10b-5.

1 6. The Commission brings this action for an order permanently
2 restraining and enjoining Agarwala against future violations of the federal
3 securities laws, ordering disgorgement of unlawful profits and losses avoided and
4 prejudgment interest thereon, and imposing a civil penalty.

5 THE DEFENDANT

6 7. Agarwala, age 44, is a resident of Pittsburgh, Pennsylvania.
7 Agarwala is an associate professor of medicine and medical director of the
8 melanoma program at the University of Pittsburgh Medical Center.

9 RELATED ENTITY

10 8. Maxim Pharmaceuticals, Inc. was a Delaware corporation
11 headquartered in San Diego, California. It was a pharmaceutical company that
12 researched and developed drug therapies for patients with cancer and liver disease.
13 Maxim's common stock was registered with the Commission pursuant to Section
14 12(g) of the Exchange Act and traded on the Nasdaq Stock Market. On January 4,
15 2006, Maxim merged with EpiCept Corporation and terminated the registration of
16 its stock under Section 12(g) of the Exchange Act.

17 THE DEFENDANT'S FRAUDULENT CONDUCT

18 A. Maxim's Announcements and Agarwala's Insider Trading

19 9. From January 2000 until Fall 2004, Agarwala was a consultant to
20 Maxim. As a consultant, Agarwala provided Maxim with expertise in clinical trial
21 design for the Ceplene drug trials and participated in meetings with other
22 consultants and advisors where the progress of the drug trial was discussed.

23 10. In early 2004, Maxim sent a letter to its clinical investigators,
24 including Agarwala, asking if they would be willing to participate in a treatment
25 protocol to provide Ceplene to patients with malignant melanoma.

26 11. On April 13, 2004, at 12:35 p.m. EDT, Agarwala purchased, through
27 his father's brokerage account, 2000 Maxim shares at prices ranging from \$8.69 to
28 \$8.72 per share. Agarwala placed the trade from a computer located in a common

1 area at the hospital where he works.

2 12. On April 14, at 3:05 a.m. EDT, Maxim announced that it had received
3 FDA approval for its treatment protocol for Ceplene in malignant melanoma
4 patients.

5 13. Later that day, Agarwala sold all 2000 Maxim shares at \$9.21
6 per share, at 5.98% to 5.62% above the purchase price, for a profit of \$984.
7 Agarwala placed the trade from his computer in his hospital office. On April 14,
8 Maxim's share price closed at \$8.80, a 3.17% increase from the April 13 close of
9 \$8.53. Volume rose to 2,712,642, a 2,126% increase from the April 13 volume of
10 121,874.

11 14. On May 11, 2004, at 12:53 a.m. EDT, Maxim emailed Agarwala
12 positive Ceplene test data in advance of its public announcement of the
13 information. The email stated that the information regarding the test was highly
14 confidential and could not be disclosed by the recipients until after Maxim's press
15 release.

16 15. On May 11, at 11:24 a.m. EDT, Agarwala purchased, through his
17 father's brokerage account, 2000 Maxim shares at \$7.96 per share, for a potential
18 profit of \$1,480. Agarwala placed the trade from a computer located in a common
19 area at the hospital where he works.

20 16. On May 12, at 3:05 a.m. EDT, Maxim announced that the results from
21 the Ceplene clinical trial in acute myeloid leukemia were positive. On May 12,
22 Maxim's share price closed at \$8.70, an 8.75% increase from the May 11 close of
23 \$8.00. Volume rose to 11,660,640, a 7,700% increase from the May 11 volume of
24 149,489.

25 17. On September 16, 2004, Agarwala attended a meeting at Maxim's
26 headquarters in Del Mar, California. At the meeting, Maxim disclosed negative
27 test results for the Ceplene clinical trial in patients with malignant melanoma to its
28 consultants.

1 18. On September 17, at 7:24 a.m. EDT, Agarwala liquidated his entire
2 position of 4400 Maxim shares at \$5.84 per share from his father's brokerage
3 account, for a loss avoided of \$12,320. Agarwala placed the trade from his laptop
4 computer using an internet address traceable to the hotel in Del Mar, California,
5 where he was staying.

6 19. On Sunday, September 19, at 11:18 p.m. EDT, Maxim announced that
7 the results of the Ceplene clinical trial in patients with malignant melanoma were
8 negative. On Monday, September 20, Maxim's share price closed at \$3.04, a
9 48.82% decrease from the September 17 close of \$5.94. Volume rose to
10 17,475,615, a 1,624% increase from the September 17 volume of 1,013,807.

11 **B. Maxim's Confidentiality Policies and Agarwala's**
12 **Breach of Duty**

13 20. Agarwala signed a consulting agreement with Maxim in January 2000
14 and an updated agreement in April 2004 (with an effective date of January 2001).
15 Both agreements state, in relevant part:

16 During the term of this Agreement and in the course of Consultant's
17 performance hereunder, Consultant [Agarwala] may receive and
18 otherwise be exposed to Confidential Information relating to Maxim's
19 business practices, strategies and technologies.

20 Consultant acknowledges the confidential and secret character of the
21 Confidential Information and agrees that the Confidential Information
22 is the sole, exclusive and valuable property of Maxim. Accordingly,
23 Consultant agrees not to use Confidential Information except in the
24 performance of this Agreement and not to disclose all or any part of
25 the Confidential Information in any form to any third party, either
26 during or after the term of this Agreement, without the prior written
27 consent of Maxim.

28

1 21. In addition, in June 2003, Agarwala signed a nondisclosure agreement
2 with Maxim requiring that he not use Maxim's proprietary information for any
3 unauthorized purpose or in violation of the law.

4 22. On September 13, 2004, Maxim emailed Agarwala and its other
5 consultants, reminding them "of the need for confidentiality with information
6 regarding Maxim's clinical studies and study status." The email went on to state
7 that analyst firms had been attempting to obtain inside information on the clinical
8 trials through conversations with consultants and staff and asked for assistance in
9 keeping information about the trials confidential.

10 23. Agarwala knew, or was reckless in not knowing, that the information
11 regarding the Ceplene clinical trials was material non-public information and that
12 he owed a duty of trust and confidence to Maxim and its shareholders.

13 24. Agarwala knew, or was reckless in not knowing, that he should have
14 kept the information regarding the Ceplene clinical trials confidential and that he
15 could not use or take advantage of the information.

16 25. Agarwala purchased and sold Maxim securities on April 13,
17 May 11, and September 17, 2004 in breach of his duty of trust and confidence to
18 Maxim. By purchasing Maxim securities for his own benefit while aware of
19 material nonpublic information regarding the Ceplene clinical trials, Agarwala
20 violated Section 17(a) of the Securities Act, 15 U.S.C. § 77q(a), and Section 10(b)
21 of the Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. §
22 240.10b-5.

FIRST CLAIM FOR RELIEF

FRAUD IN THE OFFER OR SALE OF SECURITIES

Violations of Section 17(a) of the Securities Act

26 26. The Commission realleges and incorporates by reference paragraphs 1
27 through 25 above.

1 27. Defendant Agarwala, by engaging in the conduct described above,
2 directly or indirectly, in the offer or sale of securities, by the use of means or
3 instruments of transportation or communication in interstate commerce or by the
4 use of the mails:

- 5 a. with scienter, employed devices, schemes or artifices to
6 defraud;
- 7 b. obtained money or property by means of untrue statements of
8 material fact or by omitting to state a material fact necessary in
9 order to make the statements made, in the light of the
10 circumstances under which they were made, not misleading; or
- 11 c. engaged in transactions, practices, or courses of business which
12 operated or would operate as a fraud or deceit upon the
13 purchaser.

14 28. By engaging in the conduct described above, defendant Agarwala
15 violated, and unless restrained and enjoined will continue to violate, Section 17(a)
16 of the Securities Act, 15 U.S.C. § 77q(a).

17 **SECOND CLAIM FOR RELIEF**

18 **FRAUD IN CONNECTION WITH THE**
19 **PURCHASE OR SALE OF SECURITIES**

20 **Violations of Section 10(b) of the Exchange Act and Rule 10b-5 Thereunder**

21 29. The Commission realleges and incorporates by reference paragraphs 1
22 through 25 above.

23 30. Defendant Agarwala, by engaging in the conduct described above,
24 directly or indirectly, in connection with the purchase or sale of a security, by the
25 use of means or instrumentalities of interstate commerce, of the mails, or of the
26 facilities of a national securities exchange, with scienter:

- 27 a. employed devices, schemes, or artifices to defraud;
- 28 b. made untrue statements of a material fact or omitted to state a

1 material fact necessary in order to make the statements made,
2 in light of the circumstances under which they were made, not
3 misleading; or

4 c. engaged in acts, practices or courses of business which operated
5 or would operate as a fraud or deceit upon other persons.

6 31. By engaging in the conduct described above, defendant Agarwala
7 violated, and unless restrained and enjoined will continue to violate, Section 10(b)
8 of the Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. §
9 240.10b-5.

10 **PRAYER FOR RELIEF**

11 WHEREFORE, the Commission respectfully requests that the Court:

12 **I.**

13 Issue a final judgment, in a form consistent with Fed. R. Civ. P. 65(d),
14 permanently enjoining defendant Agarwala and his officers, agents, servants,
15 employees, and attorneys, and those persons in active concert or participation with
16 any of them, who receive actual notice of the final judgment by personal service or
17 otherwise, and each of them, from violating Section 17(a) of the Securities Act, 15
18 U.S.C. § 77q(a), and Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), and
19 Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5.

20 **II.**

21 Order defendant Agarwala to disgorge all ill-gotten gains from his illegal
22 conduct, together with prejudgment interest thereon.

23 **III.**

24 Order defendant Agarwala to pay a civil penalty under Section 21A(a) of the
25 Exchange Act, 15 U.S.C. § 78u-1(a).

26 **IV.**

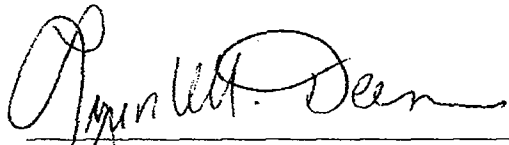
27 Retain jurisdiction of this action in accordance with the principles of equity
28 and the Federal Rules of Civil Procedure in order to implement and carry out the

1 terms of all orders and decrees that may be entered, or to entertain any suitable
2 application or motion for additional relief within the jurisdiction of this Court.

3 V.

4 Grant such other and further relief as this Court may determine to be just and
5 necessary.

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7 DATED: February 15, 2006



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Lynn M. Dean
Attorney for Plaintiff
Securities and Exchange Commission