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8	UNITED STATES DISTRICT COURT		
9	NORTHERN DISTRICT OF CALIFORNIA		
10	SAN FRANCISCO DIVISION		
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12 13	SECURITIES AND EXCHANGE COMMISSION,	Case No. C 04-3515 WDB	
14	Plaintiff,	COMPLAINT	
15	VS.		
16	JOHN PATRUCCO,		
	Defendant.		
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20	SUMMARY OF T	HE 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 po	otential anthrax vaccine. The approved IND	
28	application allowed VaxGen to begin clinical develop	ment 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.	

- 21(e), 21A, and directly or of the mails in s Complaint.
- 4. Venue in this District is proper pursuant to Section 27 of the Exchange Act [15 U.S.C. § 78aa] because the defendant is located in the Northern District of California and a substantial portion of the conduct alleged in this Complaint occurred within the Northern District of California.
- 5. Assignment to the San Francisco Division of this Court is proper because a substantial part of the events or omissions that give rise to the claim occurred in San Mateo County.

## **AUTHORITY TO BRING THIS ACTION**

- 6. The Commission brings this action pursuant to Sections 21(d), 21(e), and 21A of the Exchange Act [15 U.S.C. §§ 78u(d), 78u(e), and 78u-1].
- 7. Defendant, directly and indirectly, has engaged in transactions, acts, practices, and courses of business that constitute violations of 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.

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COMPLAINT -28. Defendant will, unless enjoined, continue to engage in the transactions, acts, practices, and courses of business alleged herein, or in transactions, acts, practices, and courses of business of similar purport and object.

## **DEFENDANT**

9. Patrucco, age 41, is a resident of Redwood City, California. Defendant resigned from VaxGen on July 15, 2003.

## **FACTUAL ALLEGATIONS**

- 10. VaxGen is a Delaware corporation headquartered in Brisbane, California. VaxGen is a biopharmaceutical company focused on developing and manufacturing biologic products that prevent and treat human infectious disease. At all relevant times, the Company's shares were registered with the Commission pursuant to Section 12(g) of the Exchange Act and quoted on the Nasdaq National Market. Like other public companies, VaxGen is required to file certain reports with the Commission disclosing information about the Company to investors, including annual reports on Form 10-K, quarterly reports on Form 10-Q, and current reports on Form 8-K. VaxGen's officers and directors also are required to file statements with the Commission reporting their holdings of and transactions in VaxGen securities, including statements on Forms 3, 4, and 5.
- 11. Patrucco started at VaxGen as its Assistant Controller in September 1999, shortly after the Company went public. VaxGen hired Patrucco because of his experience in external reporting reporting information about public companies to investors in press releases and Commission filings and his knowledge of Commission rules and regulations. In April 2002, Defendant became Associate Director of Corporate Administration and External Reporting. As Assistant Controller and Associate Director, Patrucco was responsible for preparing reports filed by VaxGen and its officers and directors with the Commission, including Form 10-Ks, Form 10-Qs, and Form 3s and 4s.
- 12. Defendant received training regarding the insider trading laws and VaxGen's insider trading policy. On September 26, 2002, Defendant attended a presentation by outside legal counsel emphasizing insider trading issues, including the prohibition on trading on material, nonpublic information. VaxGen required attendance at the presentation because it anticipated announcing

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

- 13. VaxGen had a written insider trading policy throughout Defendant's tenure at the Company. The policy barred "insiders" defined as all Company directors, officers, and employees from trading in VaxGen securities while possessing material, nonpublic information concerning VaxGen. The policy specified that material information ordinarily would include announcements by the FDA that apply to vaccines under development.
- 14. As part of his responsibilities for external reporting and corporate administration, Patrucco attended meetings of VaxGen's Finance Department. On May 21, 2003, during a regularly scheduled Finance Department meeting, Patrucco learned that the FDA had approved VaxGen's IND application for its potential anthrax vaccine. The approved IND application allowed VaxGen to begin clinical development of the vaccine through Phase I human clinical trials.
- 15. At the time, Patrucco knew that VaxGen had not publicly disclosed the fact that it had filed the IND application.
- 16. The day after learning about the still-secret FDA approval, Patrucco began buying VaxGen securities on the open market. On May 22 and 23, Defendant bought 2,950 shares at the following prices: \$3.05 (1,550 shares), \$3.07 (400 shares), and \$3.12 (1,000 shares).
- 17. A few days later, on May 27, 2003, after the close of the market, VaxGen announced that the FDA had approved the IND application. Because of his responsibilities for external reporting, Defendant filed the Form 8-K with the Commission disclosing the news.
- 18. On May 28, VaxGen shares rose sharply, closing at \$5.62 a nearly 70% increase over the prior day's closing price of \$3.34. That day, Defendant sold the 2,950 shares purchased on May 22 and 23 at prices of \$5.82 (600 shares), \$5.79 (750 shares), \$5.78 (200 shares), \$5.77 (400 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		
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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:Helane L. Morrison	
16	Marc J. Fagel Michael S. Dicke	
17	Robert S. Leach	
18	Attorneys for Plaintiff SECURITIES AND EXCHANGE COMMISSION	
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