

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Case No. 12-cr-00447-WYD

UNITED STATES OF AMERICA

Plaintiff,

v.

1. MICHAEL VAN GILDER

Defendant.

INDICTMENT

15 U.S.C. §§ 78j(b), 78ff

17 C.F.R. §240.10b-5

18 U.S.C. §981

18 U.S.C. §2

28 U.S.C. §2461

The Grand Jury charges that:

GENERAL ALLEGATIONS

At all times material to this indictment:

1. Delta Petroleum Corp. ("Delta") was an oil and natural gas exploration and development company based in Denver, Colorado. Delta described its core area of operations as being in the Gulf Coast and Rocky Mountain regions. Delta's common stock was traded on the NASDAQ's Global Select Market exchange under the ticker symbol "DPTR."

2. Tracinda Corp. ("Tracinda") was a privately held Nevada corporation wholly-owned by a California resident and

headquartered in Los Angeles County, California. Tracinda described its principal business as the buying, selling and holding of selected equity securities of businesses.

3. On December 31, 2007, Delta and Tracinda announced, and on February 20, 2008 consummated, a stock purchase agreement, whereby Tracinda purchased 36 million shares of Delta's common stock for \$684 million, representing approximately 35% of Delta's common stock then outstanding and making Tracinda the largest common stockholder of Delta at the time.

4. The defendant, MICHAEL VAN GILDER, was a resident of Denver, Colorado and the chief executive officer and a member of the board of directors of Van Gilder Insurance Company ("VGIC"), an insurance business owned by defendant Van Gilder's family and based in Denver, Colorado. Defendant VAN GILDER was a close personal friend of an executive at Delta (hereinafter, "the Delta Executive"). VGIC arranged for and provided insurance policies covering certain of Delta's business operations.

COUNTS 1 - 5

(Securities Fraud: Insider Trading)

5. The allegations set forth in paragraphs 1 through 4 of this Indictment are hereby re-alleged as if set out in full and incorporated herein by reference with respect to each and every count of this Indictment.

6. From at least on or about November 5, 2007 and continuing until at least on or about January 9, 2008, the exact

dates being unknown to the Grand Jury, in the State and District of Colorado, and elsewhere, the defendant,

MICHAEL VAN GILDER,

willfully and knowingly, directly and indirectly, by use of the means and instrumentalities of interstate commerce, and of the mails, and of the facilities of national securities exchanges, in connection with the purchase and sale of securities, did use and employ manipulative and deceptive devices and contrivances, in violation of Title 17, Code of Federal Regulations, Section 240.10b-5, by (a) employing devices, schemes and artifices to defraud; (b) making untrue statements of material facts and omitting 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) engaging in acts, practices and courses of business which operated and would operate as a fraud and deceit upon other persons and entities, in connection with the purchase and sale of Delta common stock.

The Insider Trading Scheme

Insider Tip About Delta's 2007
Third Quarter Performance.

7. On or about November 8, 2007, Delta publicly announced, and filed with the U.S. Securities and Exchange Commission ("SEC") a quarterly report disclosing its operational performance, revenues, earnings and other financial performance for its quarterly period ended September 30, 2007.

8. On or about November 5, 2007, three days prior to this disclosure, the financial publication Barron's disseminated an article entitled "Day of Reckoning," focusing on Delta, which article was generally pessimistic about the company's prospects and questioned the valuation of its common stock. The article noted, in particular, among other things, that, in five of the last seven quarters, Delta, in its quarterly reports, had missed its initial guidance figures for its oil and natural gas production and that it had "a similarly checkered history of missing analysts' earnings" projections. The article further noted that the company was facing cash flow problems and opined that, to address these problems, Delta would have to sell assets or obtain external financing through stock sales or raising debt. Following the publication of the article, the price of Delta's common stock dropped \$1.49 per share, or approximately 8.8%, below its prior day's closing price.

9. Defendant VAN GILDER was, at the time, a shareholder of Delta and held shares of its common stock and long-term call options to purchase Delta common stock in a brokerage account with Merrill Lynch & Co., Inc., administered for defendant VAN GILDER by one of the brokerage firm's stockbrokers in Chicago, Illinois (said account hereinafter, the defendant's "Merrill Lynch brokerage account", and said stockbroker hereinafter, the defendant's "Chicago stockbroker").

10. On or about November 5, 2007, an acquaintance of defendant VAN GILDER, hereinafter identified as "R.W.," sent defendant VAN GILDER and a mutual acquaintance, hereinafter identified as "J.R.," an email providing an internet link to the aforementioned Barron's article. Later that day, defendant VAN GILDER sent an email to his Chicago stockbroker forwarding this article link and asking the broker to call him to discuss selling defendant VAN GILDER's Delta investment.

11. On November 5, 2007, following an exchange of emails with his Chicago stockbroker, defendant VAN GILDER spoke, in a series of telephone calls, with the Delta Executive. The Delta Executive conveyed to defendant VAN GILDER, in words and substance, that when it announced its third quarter financial performance on November 8th, Delta would report figures that would not miss third quarter forecasts and projections for its financial and operational performance. At the time of these conversations, Delta's third quarter financial and operational performance had not yet been publicly released and was not generally known to the investing public, as the Delta Executive and defendant VAN GILDER well knew.

12. Based on this confidential material, non-public information, defendant VAN GILDER decided not to liquidate his Delta investment but instead contacted his Chicago stockbroker to buy more Delta common stock on his behalf. On November 6, 2007,

as a consequence, defendant VAN GILDER, through his Chicago stockbroker, purchased an additional 1,250 shares of Delta common stock at \$15.55 per share.

13. Several hours after his stock purchase, defendant VAN GILDER responded to R.W.'s earlier email, counseling R.W. and J.R. as follows:

Guys - I had a dialogue a friend, of whom you know. Do not sell this stock, rather buy more. The article is bogus. Delta will hit their numbers at this Thursday's announcement.

14. Delta, in its November 8th release of 2007 third quarter results, thereafter disclosed earnings and other financial figures, and production figures, in line with or exceeding previous forecasts and predictions of its performance for the quarter.

Insider Tip About Tracinda's
\$684 Million Stock Purchase.

15. In or about late November 2007, a mutual friend of the Delta Executive and the owner of Tracinda discussed with the Delta Executive the possibility of Tracinda making a substantial investment in Delta. At the time, the possibility of Tracinda's interest in Delta was confidential and not generally known to the investing public.

16. On November 26, 2007, following a series of telephone calls and other communications with the Delta Executive over the course of November 23, 2007 through November 25, 2007, defendant

VAN GILDER contacted his Chicago stockbroker and, through him, purchased an additional 1,750 shares of Delta common stock at \$13.87 and \$13.88 per share.

17. On December 2, 2007, the Delta Executive and Tracinda's owner and other representatives of Tracinda spoke directly about Tracinda making a substantial equity investment in Delta. The following day, the Delta Executive and other Delta representatives traveled to Las Vegas, Nevada, to meet with Tracinda representatives to explore the possible investment. The Delta Executive again met with Tracinda representatives in Las Vegas on December 10th to further discuss the matter. Over the course of these days, the Delta Executive and defendant VAN GILDER had a series of telephone conversations and cell phone text message communications, during which the Delta Executive informed VAN GILDER of, and kept him apprised with respect to, the confidential negotiations between Delta and Tracinda concerning Tracinda's possible equity investment in Delta.

18. On Saturday, December 8, 2007, within an hour of an exchange of text messages with the Delta Executive, and as a result of his receipt of this material, confidential non-public information, defendant VAN GILDER emailed his Chicago stockbroker to advise that VAN GILDER "want[ed] to buy as much Delta as possible" and that the two should talk the next business day. On December 10, 2007, defendant VAN GILDER, through the Chicago

stockbroker, purchased an additional 4,000 shares of Delta common stock, at \$17.64 per share, for his Merrill Lynch brokerage account. Within minutes of the execution of these purchases, defendant VAN GILDER spoke by telephone with a family member, who, several minutes thereafter, in turn, contacted his own stockbroker to purchase Delta common stock for his own account.

19. On December 17, 2007, the Delta Executive advised Delta's board of directors of his discussions with Tracinda's representatives about Tracinda's investment interest in Delta, and the board authorized the Delta Executive and the rest of its management to proceed with negotiations with Tracinda. That evening, the Delta Executive exchanged a series of cell phone text messages with defendant VAN GILDER, and the following morning, defendant VAN GILDER telephoned his Chicago stockbroker. Several hours later that day, defendant VAN GILDER directed that \$40,000 be wire transferred from a bank account to his Merrill brokerage account.

20. On December 19, 2007, a representative of Tracinda contacted the Delta Executive and made an offer for Tracinda to purchase a one-third interest in Delta through a purchase of Delta's common stock at \$17 per share. At the time, Delta's common stock was trading at approximately \$14.65 per share, and Tracinda's overture remained confidential and generally unknown to the investing public, as did its particular stock purchase

offer. Defendant VAN GILDER, through his Chicago stockbroker, purchased 200 call options, entitling him to purchase up to 20,000 shares of Delta common stock at \$20 per share up until March 22, 2008.

21. Over the course of December 20 through December 22, 2007, the Delta Executive had continuing confidential discussions with Tracinda's representatives concerning the terms of Tracinda's stock purchase offer. The Delta Executive sought, among other things, in these discussions to negotiate a higher share price for the stock purchase, at the direction of Delta's board of directors. On Saturday, December 22, 2007, as a result of these discussions, Tracinda agreed to increase its stock purchase offer to \$19 per share. Tracinda's representatives indicated to the Delta Executive that this was Tracinda's final offer.

22. In a series of telephone calls on that same day, December 22, 2007, the Delta Executive kept defendant VAN GILDER informed of the progress of these confidential discussions. Immediately following one of these telephone conversations with the Delta Executive, defendant VAN GILDER sent an email to two of his family members, its subject identified as, "Xmas present," and the email reading as follows:

Siblings - my present (just kidding) is that I can't stress enough the opportunity right now to buy Delta Petroleum. Something significant will happen in the next 2-4

weeks.

When one of the recipients emailed him a reply asking for more details, defendant VAN GILDER sent the relative an email stating, "Call me, prefer not to have in email," and providing a telephone number. During the course of his telephone calls with the Delta Executive that day, defendant VAN GILDER also contacted his Chicago stockbroker to talk about Delta, exchanging a series of emails and having several telephone calls with the broker between calls with the Delta Executive.

23. On December 24, 2007, the next business day, acting at defendant VAN GILDER's direction and based on the confidential, material non-public information about the Tracinda stock purchase offer that defendant VAN GILDER had received to date, the defendant's Chicago stockbroker purchased, on the defendant's behalf, 3,000 more shares of Delta common stock, at prices ranging between \$15.63 and \$15.65 per share, and 90 more call options to purchase up to 9,000 additional shares of Delta common stock at \$20 per share up until March 22, 2008.

24. On December 28, 2007, during the course of working to finalize the Tracinda stock purchase agreement, the Delta Executive exchanged a series of cell phone text messages with defendant VAN GILDER, and defendant VAN GILDER caused \$272,212 from a bank account to be wire transferred into his Merrill Lynch brokerage account. The following day, Saturday, defendant VAN

GILDER emailed his Chicago stockbroker, requesting the broker to "get it on Delta asap."

25. On December 29, 2007, Delta's board of directors approved a finalized stock purchase agreement for Tracinda to purchase approximately 35% of Delta's common stock for \$19 per share. On Monday, December 31, 2007, before the commencement of regular hours trading on the NASDAQ's Global Select Market, Delta and Tracinda issued press releases announcing the stock purchase agreement and Tracinda's stock investment pursuant to it. Within an hour of the commencement of regular hours trading that day, acting on his direction, defendant VAN GILDER's Chicago stockbroker purchased, on the defendant's behalf, an additional 4,000 shares of Delta common stock, at prices ranging from \$19.28 to \$19.33 per share, and 114 additional call options to purchase Delta common stock. By the close of regular hours trading that day, Delta's common stock price had risen \$3.34 from its previous close of \$15.51 on December 28, 2007. Over the course of the next three trading days, its common stock price continued to rise, closing at \$22.82 per share by January 4, 2008.

26. On January 9, 2008, acting through his Chicago stockbroker, defendant VAN GILDER sold the 290 call options on Delta's common stock that he had purchased between December 19 and December 24, 2007, realizing a profit of approximately \$86,100 on the transaction.

Securities Transaction In Furtherance of the Scheme

27. On or about the dates set forth below, as to each of the enumerated Counts, in the State and District of Colorado, and elsewhere, by use of the means or instrumentalities of interstate commerce, and by use of a national securities exchange, and in furtherance of this scheme to defraud and course of business, the defendant, MICHAEL VAN GILDER, on the basis of material, non-public information obtained from the Delta Executive, did cause to be executed the following securities transactions by and through his Merrill Lynch brokerage account:

<u>Count</u>	<u>Approx. Date</u>	<u>Securities Transaction</u>
1	November 6, 2007	Purchase of 1,250 shares of Delta common stock
2	December 10, 2007	Purchase of 4,000 shares of Delta common stock
3	December 19, 2007	Purchase of 200 call options on Delta common stock
4	December 24, 2007	Purchase of 3,000 shares of Delta common stock
5	December 24, 2007	Purchase of 90 call options on Delta common stock

All in violation of Title 15, United States Code, Sections 78j(b) and 78ff; Title 17, Code of Federal Regulations, Section 240.10b-5 [Rule 10b-5]; and Title 18, United States Code, Section 2.

FORFEITURE ALLEGATION

28. As a result of committing the offenses alleged in

Counts 1 through 5 of this Indictment, the defendant,

MICHAEL VAN GILDER,

shall forfeit to the United States pursuant to Title 18, United States Code, Section 981(a)(1)(C) and Title 28, United States Code, Section 2461, all property, real and personal, that constitutes or is derived from proceeds traceable to the commission of the offense.

SUBSTITUTE ASSET PROVISION

29. If any of the above-described forfeitable property, as a result of any act or omission of the defendant:

- a. cannot be located upon the exercise of due diligence;
- b. has been transferred or sold to, or deposited with, a third person;
- c. has been placed beyond the jurisdiction of the Court;
- d. has been substantially diminished in value; or
- e. has been commingled with other property which cannot be subdivided without difficulty;

it is the intent of the United States, pursuant to Title 21, United States Code, Section 853(p), to seek forfeiture of any other property of said defendant up to the value of the above forfeitable property.

Title 18, United States Code, Section 981, Title 28, United

States Code, Section 2461.

A TRUE BILL

Ink signature on file in Clerk's office
FOREPERSON

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(Rev. 03/07)

DEFENDANT: Michael Van Gilder

YOB: 1967

ADDRESS: Denver, Colorado

COMPLAINT FILED? _____ YES X _____ NO

IF YES, PROVIDE MAGISTRATE CASE NUMBER: _____
IF NO, PROCEED TO "OFFENSE" SECTION

HAS DEFENDANT BEEN ARRESTED ON COMPLAINT? _____ YES X _____ NO

IF NO, A NEW WARRANT IS REQUIRED

OFFENSE: Counts 1-5
Securities Fraud
15 U.S.C. §§ 78j(b), 78ff;
17, C.F.R. § 240.10b-5

LOCATION OF OFFENSE (COUNTY/STATE): Denver County, Colorado

PENALTY: Counts 1-5
Per Count, NMT 20 years imprisonment; \$5,000,000 fine, or both; \$100 Special Assessment.

AGENTS:

Amy Sanders, Special Agent
Federal Bureau of Investigation
Denver, CO

AUTHORIZED BY:

Kenneth M. Harmon
Assistant U.S. Attorney

ESTIMATED TIME OF TRIAL:

X five days or less _____ over five days _____ other

THE GOVERNMENT

_____ will seek detention in this case X will **not** seek detention in this case

The statutory presumption of detention **is** or **is not** applicable to this defendant. **(Circle one)**

OCDETF CASE: _____ Yes X _____ No