IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 12-cv-02839-JLK-MJW

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

MICHAEL VAN GILDER, and
ROGER PARKER,

Defendants,

and

STEPHEN DILTZ,

Relief Defendant.

PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S SECOND UNOPPOSED MOTION FOR ENTRY OF PROPOSED FINAL JUDGMENTS AS TO DEFENDANT MICHAEL VAN GILDER AND RELIEF DEFENDANT STEPHEN DILTZ

Plaintiff Securities and Exchange Commission hereby files its Second Motion for Entry of Proposed Final Judgments as to Defendant Michael Van Gilder and Relief Defendant Stephen Diltz. For reasons discussed below, the Commission respectfully requests that the Court accept the proposed settlements as being fair, adequate, reasonable, and in the public interest, and enter the proposed consent judgments.

I. PRELIMINARY STATEMENT

This Commission enforcement proceeding relates to alleged insider trading in the securities of Delta Petroleum Corp. ("Delta"), in advance of a December 31, 2007 announcement that Tracinda Corp. ("Tracinda") was acquiring a 35 percent stake in Delta for $684 million. The Commission alleges that Delta CEO Roger Parker ("Parker") tipped his close friend Michael Van Gilder ("Van Gilder") with material nonpublic information about the Tracinda transaction, and that Van Gilder traded on that information realizing substantial profits. In addition, the Commission alleges that Mr. Van Gilder's broker, Stephen Diltz ("Diltz"), traded in Delta securities following Van Gilder's wrongful trading, earning trading profits, thereby being unjustly enriched.[1]

As the Court is aware, the Commission has reached separate settlement agreements with Mr. Van Gilder and Mr. Diltz. On February 26, 2014, the Commission filed its first motion for entry of proposed final judgments relating to these proposed settlements. Dkt. # 50. In its April 24, 2014 Order denying the Commission's motion ("April 24 Order"), the Court enumerated its concerns regarding the proposed settlements, which principally related to the terms of Mr. Van Gilder's settlement documents. The Court's concerns related to: (1) the waiver of findings of fact and conclusions of law; (2) the waiver of appeal rights; (3) language in the consent that the Court apparently perceived as indicating that Van Gilder neither admitted nor denied

[1] Mr. Van Gilder's position is that he was unaware of Diltz' trading in Delta securities.

allegations; and (4) the Commission's request for a permanent injunction. April 24 Order, Dkt. # 53, at pp. 1-2.

In response to these concerns, the Commission prepared revised consents and proposed final judgments that have been executed by Messrs. Van Gilder and Diltz.[2] Through these revised documents, the parties have attempted to address each of the concerns raised by the Court. First, the waivers of findings of fact and conclusions of law and the appellate waivers have been removed from both consents. Thus, the first two concerns raised by the Court should no longer be an issue. Second, Mr. Van Gilder's consent was revised to more explicitly incorporate the factual admissions from his criminal case and the fact of his guilty plea and conviction. Also, although Mr. Van Gilder's original consent did not contain a "neither admit nor deny" provision, it did contain some language describing the Commission's policies under 17 C.F.R. § 202.5. *See* Original Consent, Dkt. # 50-1, at ¶ 12.[3] That language has been deleted from the revised consent. This revision, when considered with Van Gilder's admissions and the deletion of the waiver of findings of facts, should clarify for the Court that a factual basis does exist to evaluate Mr. Van Gilder's settlement. Indeed, as described below, the facts of the civil case against Mr. Van Gilder and his criminal case largely overlap. Finally, although Mr. Van Gilder's consent judgment does contain a permanent injunction, as

[2] The revised consents and proposed final judgments of Messrs. Van Gilder and Diltz are attached to this motion as Exhibits 1-4.

[3] While the language in the above-cited consent paragraph was not intended to convey that Van Gilder was entering into the consent judgment on "neither admit nor deny" terms, the language was nonetheless ambiguous and may have caused confusion.

explained below, his factual admissions provide a valid basis for its entry under the facts and circumstances of this case and established case precedent.

Additionally, regarding Mr. Diltz, because he is merely a relief defendant and is not charged with any securities law violations, his consent judgment should be entered without requiring admissions from him. As noted, the waivers at issue have been removed.

For these and other reasons discussed below, the Commission respectfully requests acceptance of the proposed settlements and entry of the proposed consent judgments.

II. DISCUSSION

A. Procedural Background

1. The SEC's Civil Action

On October 26, 2012, the Commission filed its initial Complaint in this matter charging Mr. Van Gilder, then the chief executive at Van Gilder Insurance Corp., with insider trading violations relating to his trading in the securities of Delta, a Denver-based oil and gas exploration company. Dkt. # 1. Subsequently, the Commission filed two amended complaints. In the first, filed on November 27, 2012, the Commission added Mr. Parker, the CEO of Delta, as a defendant. Dkt. # 8. In the second, filed on February 26, 2014, the Commission added Mr. Diltz, Van Gilder's broker, as a relief defendant.[4] Dkt. # 48.

[4] The Commission filed the Second Amended Complaint after obtaining the written consent of the parties under Federal Rule of Civil Procedure 15(a)(2).

In the Second Amended Complaint ("SAC"), the Commission alleges that during November and December 2007, Mr. Parker tipped his friend Mr. Van Gilder with material nonpublic information concerning the impending $684 million investment in Delta by Tracinda, a privately-held investment company owned by investor Kirk Kerkorian. Shortly after Delta announced Tracinda's investment on December 31, 2007, its stock price rose approximately 19 percent. The Commission alleges that Van Gilder traded on the basis of Parker's tip in advance of the Tracinda announcement generating illegal profits. The Commission also alleges that Parker tipped Van Gilder with material nonpublic information concerning Delta's third quarter 2007 earnings results. Specifically, the SAC contains the following allegations, among others:

- Delta was a publicly-traded Delaware corporation based in Denver, Colorado, that engaged in exploration, acquisition, development, production and sale of natural gas and crude oil. Dkt. # 48, at ¶ 11.
- Parker was the CEO of Delta and the chairman of its board of directors. *Id.* at ¶ 9.
- Van Gilder and Parker were close friends, had known each other for several years, and frequently socialized together. *Id.* at ¶ 8.
- Tracinda is a private investment company owned by billionaire Kirk Kerkorian. *Id.* at ¶ 12.
- On December 31, 2007, Delta announced that Tracinda had agreed to acquire a 35 percent stake in Delta for $684 million. In reaction to the announcement, Delta's stock price rose approximately 19 percent on December 31. *Id.* at ¶ 30.
- Beginning in late November 2007, Parker was in possession of material nonpublic information concerning Tracinda's impending investment in Delta, including Tracinda's interest in pursuing the investment, negotiations between the parties, and the activities of Delta's board of directors. *Id.* at ¶¶ 13, 15.
- During the weeks leading up to the December 31, 2007 announcement, Parker conveyed material nonpublic information to Van Gilder about the impending Tracinda investment. *Id.* at ¶ 14.

- On November 26, 2007, Van Gilder purchased 1,750 shares of Delta stock following a weekend during which Parker and Van Gilder exchanged 47 text messages and six telephone calls. *Id.* at ¶ 16.
- On December 8, 2007, Van Gilder purchased 4,000 shares of Delta stock. *Id.* at ¶ 20.
- On December 17, 2007, the Delta board of directors was informed of Tracinda's interest in making an investment in Delta and the board authorized Delta's management to pursue discussions with Tracinda. *Id.* at ¶ 22.
- Later that day, and hours after Delta's board of directors authorized the discussions with Tracinda, Parker and Van Gilder exchanged 13 text messages. The following day, Van Gilder wired $40,000 to his brokerage account, and on December 19, he purchased 200 Delta call options with a strike price of $20 and an expiration date of March 2008. *Id.* at ¶ 23.
- On December 17 and 18, 2007, Diltz purchased Delta stock and call options for his own personal accounts after previously purchasing Delta stock and call options for Van Gilder. *Id.* at ¶ 24.
- On December 22, 2007, Tracinda formally communicated a revised offer to Delta to purchase a 35 percent stake of Delta for $19.00 per share. *Id.* at ¶ 25.
- On or about December 22, 2007, Parker tipped Van Gilder with additional material nonpublic information concerning the Tracinda investment. Shortly after a phone call with Parker, Van Gilder emailed two relatives under the subject "Xmas present," writing, "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." *Id.* at ¶ 26.
- The next trading day, on December 24, 2007, Van Gilder purchased 3,000 shares of Delta stock and 90 Delta call options with a strike price of $20. *Id.* at ¶ 27.
- Van Gilder's realized and unrealized trading profits from his Delta trading totaled approximately $109,000. *Id.* at ¶ 31.
- Diltz's trading profits totaled approximately $51,000. *Id.* at ¶ 31.

As a result of this alleged conduct, the Commission charged both Mr. Van Gilder and Mr. Parker with insider trading violations under Section 10(b) of Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 thereunder [15 U.S.C. § 78j(b) and 17 C.F.R. § 240.10b-5]. The Commission seeks findings of liability against Van Gilder and

Parker, permanent injunctions, disgorgement of ill-gotten gains and losses avoided, and civil penalties against each, and an officer and director bar against Parker. The Commission seeks disgorgement of unjust enrichment from Mr. Diltz.

2. The Criminal Case Against Mr. Van Gilder

On October 24, 2012, two days prior to the filing of the Commission's initial Complaint, a federal grand jury in Denver returned an indictment against Mr. Van Gilder charging him with five counts of insider trading. *See* Indictment attached as Exh. 1 to Declaration of Thomas J. Krysa ("Krysa Decl."). Van Gilder was charged for his trading in Delta securities in advance of Delta's third quarter 2007 earnings announcement and the December 31, 2007 Tracinda investment – essentially the same conduct as the SEC's civil case – in violation of Section 10(b) of the Exchange Act and Rule 10b-5.

On May 1, 2013, Mr. Van Gilder entered a change of plea and executed a Plea Agreement and Statement of Facts Relevant to Sentencing in the criminal case. In the Plea Agreement, Van Gilder pled guilty to Count 5 of the Indictment, charging him with insider trading relating to the purchase of 90 call options in Delta common stock on December 24, 2007. *See* Plea Agreement attached as Exh. A to Van Gilder's Amended Consent, at p. 1. As part of the Plea Agreement, Van Gilder stipulated to a Statement of Facts that included the following facts, among others:

- Delta was a publicly-traded oil and natural gas exploration and development company based in Denver, Colorado. *Id.* at V.B.
- Van Gilder was close personal friends with a senior executive at Delta who was also a member of its board of directors. Van Gilder and the Delta senior executive had a long-term friendship and frequently socialized together. *Id.* ¶ V.C.

- Tracinda was a privately-held Nevada corporation, wholly-owned by Kirk Kerkorian. *Id.* at ¶ V.E.
- On December 31, 2007, Delta and Tracinda publicly announced a stock purchase agreement whereby Tracinda purchased 36 million shares of Delta's common stock for $684 million, representing approximately 35% of Delta's outstanding common stock. *Id.* at ¶ V.E.
- Until the December 31, 2007 announcement, the stock purchase agreement between Delta and Tracinda (and Tracinda's interest in Delta) was not information generally known to the investing public. *Id.* at ¶ V.E.
- On or about December 17, 2007, the Delta senior executive provided Van Gilder with material nonpublic information that Delta's Board of Directors had approved investment discussions with Tracinda. Based on this information, Van Gilder wired approximately $40,000 to his brokerage account and on December 19, 2007, he purchased 200 Delta call options, with a strike price of $20 and an expiration date of March 2008. *Id.* at ¶ V.F.
- On or about December 22, 2007, the Delta senior executive informed Van Gilder that Delta had decided to accept Tracinda's $19 per share offer. *Id.* at ¶ V.G.
- On or about December 24, 2007, and based on material nonpublic information the Delta senior executive provided him, Van Gilder purchased 3,000 shares of Delta common stock at prices ranging between $15.63 and $15.65 per share, and 90 call options with a strike price of $20 per share and a March 2008 expiration. *Id.* at ¶ V.H.
- The government's total trading gain figure, for sentencing guidelines purposes, was $109,264.67. Van Gilder's total trading gain figure, for sentencing guidelines purposes, was $95,274. *Id.* at ¶ V.M.

On August 14, 2013, the Court in the criminal case sentenced Mr. Van Gilder and judgment was entered against him. The Court sentenced Van Gilder to five years of probation, a fine of $5,000, and a special assessment of $100. *See* Judgment in a Criminal Case attached as Exh. 2 to Krysa Decl. On August 20, 2013, the court in the criminal case entered an order of forfeiture against Van Gilder, ordering that $86,100 was subject to forfeiture as proceeds obtained by him relating to Count 5 of the Indictment for

which Van Gilder pled guilty. *See* Preliminary Order of Forfeiture for Personal Money Judgment attached as Exh. 3 to Krysa Decl.

B. Mr. Van Gilder's Settlement Agreement Is Fair, Adequate, Reasonable, and in the Public Interest.

The Commission and Mr. Van Gilder have reached a settlement agreement wherein Mr. Van Gilder consents to the entry of final judgment that: (1) orders a permanent injunction against future violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder; (2) orders disgorgement of $109,265 representing profits gained as a result of conduct alleged in the SAC, plus prejudgment interest of $22,667, for a total of $131,932, but provides that the disgorgement owed will be reduced by $86,100, the amount already forfeited by Van Gilder in the criminal case; and (3) orders a civil penalty of $109,265 under Section 21A of the Exchange Act. Mr. Van Gilder's amended consent does not contain any language regarding the Commission's "neither admit nor deny" policy. To the contrary, Van Gilder specifically admits the facts set out in his Plea Agreement Stipulation of Facts and those facts are incorporated by reference into the amended consent. *See* Amended Consent at ¶ 2. Additionally, Mr. Van Gilder's amended consent does not contain a waiver of appellate rights or a waiver of findings of fact and conclusions of law. For reasons that follow, the Commission requests that the Court accept the parties' settlement and enter the proposed consent judgment.

1. Standard of Review

In reviewing a consent judgment, the Court's role is to determine whether the proposed settlement is fair, adequate, reasonable, and in the public interest.[5] *See, e.g.*, *SEC v. Citigroup Global Markets, Inc.*, 673 F.3d 158, 164-65 & n.1 (2d Cir. 2012); *SEC v. Wang*, 944 F.2d 80, 85 (2d Cir. 1991); *SEC v. Randolph*, 736 F.2d 525, 529 (9th Cir. 1984). In assessing the public interest, a court must defer to the agency that is charged with making "an assessment of how the public interest is best served." *Citigroup*, 673 F.3d at 164. A consent judgment is presumptively fair, adequate, reasonable, and in the public interest if it is the product of arm's-length negotiations. *Wal–Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005); *see also United States v. Oregon*, 913 F.2d 576, 581 (9th Cir. 1990) ("[O]nce the court is satisfied that the decree was the product of good faith, arms-length negotiations, a negotiated decree is presumptively valid and the objecting party 'has a heavy burden of demonstrating that the decree is unreasonable.'") (quoting *Williams v. Vukovich*, 720 F.2d 909, 921 (6th Cir. 1983)).

In such circumstances, a court may review a consent judgment to determine if it is "ambiguous," there will be "difficulties in implementation," or implementation "would create a drain on judicial resources." *Microsoft*, 56 F.3d 1448, 1462 (D.C. Cir. 1995); *In re United States*, 503 F.3d 638, 641 (7th Cir. 2007). If a consent judgment will "diminish

[5] The use and entry of consent judgments has long been endorsed by the Supreme Court. *See, e.g., United States v. Armour & Co.*, 402 U.S. 673, 681 (1971); *Swift & Co. v. United States*, 276 U.S. 311, 324-27 (1928). The Second Circuit has observed that there is a "strong federal policy favoring the approval and enforcement of consent decrees," *SEC v. Wang*, 944 F.2d 80, 85 (2d Cir. 1991), and that the Commission "can bring the large number of enforcement actions it does only because in all but a few cases consent decrees are entered." *SEC v. Everest Mgmt. Corp.*, 475 F.2d 1236, 1240 (2d Cir. 1972).

the legal rights of a party who objects to the decree" or if a consent judgment "imposes obligations on a party that did not consent to the decree," a court may conclude that the consent judgment is not fair or in the public interest. *United States v. Hialeah*, 140 F.3d 968, 984 (11th Cir. 1998); *Local No. 93, Int'l Ass'n of Firefighters v. Cleveland*, 478 U.S. 501, 529 (1986). But the court's role is not to decide "whether the settlement is one which the court itself might have fashioned, or considers as ideal," *Cannons Eng'g Corp.*, 899 F.2d 79, 84 (1st Cir. 1990), to withhold approval unless the court determines that the proposed judgment "is the best possible settlement that could have been obtained," *United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1436 (6th Cir. 1991), or to "engage in an unrestricted evaluation of what relief would best serve the public," *United States v. BNS Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) (internal quotation marks omitted).

In conducting this review, courts must defer to "the judgment of the government agency which has negotiated and submitted the proposed judgment" in keeping with the constitutionally mandated separation of powers that assigns to the Commission the responsibility to execute the securities laws. *Randolph*, 736 F.2d at 529.[6] In deciding whether to settle, agencies such as the Commission must balance numerous factors, including "the value of the particular proposed compromise, the perceived likelihood of obtaining a still better settlement, [and] the prospects of coming out better, or worse, after a full trial." *Citigroup*, 673 F.3d at 164. The Commission must also assess "whether

[6] *See Microsoft*, 56 F.3d at 1459 (noting the "constitutional difficulties that inhere" in judicial review of settlements for compliance with the "public interest"); *Maryland v. United States*, 460 U.S. 1001, 1005-06 (1983) (Rehnquist, J., dissenting from summary affirmance) (explaining the separation of powers problems created by a "public interest" judicial review of consent decrees).

agency resources are best spent on this violation or another," *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985), and whether "the benefits of pursuing an adjudication" outweigh "the costs to the agency (including financial and opportunity costs)," *New York State Law Dep't v. FCC*, 984 F.2d 1209, 1213 (D.C. Cir. 1993). These assessments are entrusted to agencies, not courts, because an agency is "far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities." *Heckler*, 470 U.S. at 831-32; *see also Board of Trade v. SEC*, 883 F.2d 525 (7th Cir. 1989) (holding that the Commission is in the best position to "compare the value of pursuing one case against the value of pursuing another"); *Citigroup*, 673 F.3d at 163 ("[It is not] the proper function of federal courts to dictate policy to executive administrative agencies" because "federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.").

Applying the principles set forth above, the Court should enter Mr. Van Gilder's consent judgment because it is fair, adequate, reasonable, and in the public interest: the consent judgment was negotiated at arm's length; its terms are unambiguous; and it would not unduly burden court resources or positively injure or burden third parties who have not consented to the judgment. Additionally, the parties agree that the settlement is appropriate in light of the risks and costs of further litigation.

2. Van Gilder's Consent Does Not Contain the Waivers Discussed by the Court in its April 24 Order

In its April 24 Order, the Court expressed concern about the provisions of the consent that waived findings of fact and conclusions of law (*see* Order, Section I.A.) and

that waived the right to appeal (*see Id.* at I.B.). The Commission has addressed the Court's concerns by removing those provisions from the amended consent of Mr. Van Gilder.[7]

3. Van Gilder's Consent Incorporates Admissions from the Criminal Case

In its April 24 Order, the Court stated, "[t]he proposed settlement between the SEC and Van Gilder fails to provide a sufficient factual basis to determine whether it is fair, adequate, reasonable, and in the public interest." April 24 Order, Section I.C. The current settlement between the SEC and Van Gilder provides a sufficient factual basis for the Court to evaluate the settlement. Here, in his amended consent, Mr. Van Gilder admitted the facts set out in the Stipulation of Facts in his plea agreement in the criminal case and those facts are specifically incorporated by reference into the consent.[8] Amended Consent at ¶ 2. Those facts provided a foundation for the criminal court to

[7] The Commission notes that appellate waivers have been routinely upheld by the Tenth Circuit and other circuit courts. *See e.g.*, *United States v. Polly*, 630 F.3d 991, 1000-02 (10th Cir. 2011); *United States v. Rahman*, 642 F.3d 1257, 1259 (9th Cir. 2011); *United States v. Sandoval*, 477 F.3d 1204, 1208 (10th Cir. 2007); *United States v. Sharp*, 442 F.3d 946, 949-51 (6th Cir. 2006); *United States v. Hahn*, 359 F.3d 1315, 1327 (10th Cir. 2004); *United States v. Elliott*, 264 F.3d 1171, 1174 (10th Cir. 2001); *United States v. Brown*, 232 F.3d 399, 404-06 (4th Cir. 2000). The appellate waivers simply informed Mr. Van Gilder of the practical legal effect of his consent judgment since it is well established that an appeal ordinarily may not be taken from a consent judgment. *Mock v. T.G. & Y. Stores Co.*, 971 F.2d 522, 526 (10th Cir. 1992) ("[A] party to a consent judgment is thereby deemed to waive any objections it has to matters within the scope of the judgment.").

[8] Although Van Gilder's settlement includes admissions, "[i]t is commonplace for [SEC] settlements to include no binding admission of liability" or admission of the allegations in the complaint. *Citigroup*, 673 F.3d at 166. More broadly, consent judgments of all stripes "often admit no violation of the law," *United States v. ITT Continental Baking*, 420 U.S. 223, 226 (1975), and it is "customary" that a "consent decree [does] not purport to adjudicate" the plaintiff's claims, *Maher v. Gagne*, 448 U.S. 122, 126 n.8 (1980).

accept Mr. Van Gilder's plea and enter a criminal judgment of conviction against him, and thus, they necessarily provide a factual foundation for the entry of a civil consent judgment against Mr. Van Gilder. As indicated above, the admitted facts of the criminal case largely overlap with the facts alleged in the SAC. The admitted facts provide, among other things, that: Van Gilder and a senior executive at Delta were close personal friends; the Delta senior executive provided Van Gilder with material nonpublic information about Tracinda's impending investment in Delta; and Van Gilder traded on the basis of that information earning illegal profits by purchasing 200 Delta call options on or about December 19, 2007, and 3,000 shares of Delta common stock and 90 call options on or about December 24, 2007.

These admitted facts, and the other admitted facts contained in the plea agreement and incorporated by reference into the amended consent, provide a sufficient factual basis for Mr. Van Gilder's civil settlement. The facts of Mr. Van Gilder's conduct are known to the public, having been aired in the criminal case through Van Gilder's plea agreement, his change of plea hearing, and his sentencing.

4. The Court Should Enter the Proposed Injunction

The proposed consent judgment enjoins Mr. Van Gilder from future violations of Exchange Act Section 10(b) and Rule 10b-5 thereunder. In its April 24 Order, the Court expressed concerns with "obey-the-law" injunctions but left open the possibility for one in this settlement if an admission of liability could provide the requisite foundation. April 24 Order, Section I.D. As explained above, those admissions are present here and there is support for an injunction given the circumstances of this case. Indeed, other

district courts have ordered injunctions against defendants in SEC enforcement actions similar to this one, where criminal convictions preceded civil judgments. *See, e.g.*, *SEC v. Kinnucan*, --- F. Supp. 2d ---, 2014 WL 1244768, at *4 (S.D.N.Y., March 25, 2014); *SEC v. Haligiannis*, 470 F. Supp. 2d 373, 383-84 (S.D.N.Y. 2007); *SEC v. Gupta*, 2013 WL 3784138, at *3, (S.D.N.Y., July 17, 2013). In addition, the Tenth Circuit Court of Appeals has accepted the use of permanent injunctions in SEC enforcement matters. *SEC v. Curshen*, 372 Fed. Appx. 872, 882-83 (10th Cir. 2010); *SEC v. Pros Intern., Inc.*, 994 F.2d 767, 769 (10th Cir. 1993).

Courts have authority to enter permanent injunctions pursuant to Section 21(d) of the Exchange Act [15 U.S.C. § 78u(d)]. In a litigated context, in order to obtain an injunction, the Commission must demonstrate that a violation of the securities laws has occurred, and that there is a reasonable probability of a defendant engaging in future violations. *See Pros Intern., Inc*., 994 F.2d at 769; *SEC v. Colonial Investment Mgmt.*, 381 Fed. Appx. 27, 31 (2d Cir. 2010); *SEC v. Gruenberg*, 989 F.2d 977, 978 (8th Cir. 1993); *SEC v. Murphy*, 626 F.2d 633, 655 (9th Cir. 1980). The existence of past violations permits an inference that future violations will occur. *See SEC v. Fehn*, 97 F.3d 1276, 1295-96 (9th Cir. 1996); *Gruenberg*, 989 F.2d at 978 (citing *SEC v. Washington County Utility District*, 676 F.2d 218, 227 (6th Cir. 1982)); *Murphy*, 626 F.2d at 655. Also when considering the likelihood of future violations, courts consider the following factors: (1) the egregiousness of the violations; (2) the degree of scienter; (3) the isolated or repeated nature of the violations; (4) the sincerity of the defendant's assurances against future violations; and (5) whether by reason of a defendant's

profession he or she will be in a position where there are opportunities for future violations. *See Pros Intern., Inc.*, 994 F.2d at 769; *Colonial Investment Mgmt.*, 381 Fed. Appx. at 31; *Fehn*, 97 F.3d at 1295-96; *Murphy*, 626 F.2d at 655; *SEC v. Cavanagh*, 155 F.3d 129, 135 (2d Cir. 1998); *Haligiannis*, 470 F. Supp. 2d at 384. "Although no single factor is determinative, we have previously held that the degree of scienter 'bears heavily' on the decision. *Pros Intern., Inc.*, 994 F.2d at 769 (citing *SEC v. Haswell*, 654 F.2d 698, 699 (10th Cir. 1981).

Assessing these factors in the context of a settlement, an injunction is appropriate here. Mr. Van Gilder pled guilty to securities fraud through insider trading and, under case law, the existence of this violation permits an inference of future violations. Additionally, given his criminal conviction, Mr. Van Gilder's conduct meets the first two factors in favor of an injunction. Van Gilder's level of scienter bears heavily on the analysis. *Pros Intern., Inc.*, 994 F.2d at 769. Also, Mr. Van Gilder's conduct occurred over approximately one month and involved purchasing Delta securities four separate times. In addition, given Mr. Van Gilder's professional experience, he may be in a position where there are opportunities for future violations. On balance, based on these factors, given Van Gilder's admissions, and under established Tenth Circuit precedent, an injunction should be accepted by the Court as a term of the settlement.

5. Disgorgement and Prejudgment Interest Are Appropriate

As indicated, the proposed consent judgment provides that Mr. Van Gilder is liable for disgorgement of $109,265 as ill-gotten gains from his insider trading. This amount is based on Mr. Van Gilder's Delta securities purchases (including both options

and common stock) between November 26, 2007 and December 24, 2007, and his subsequent sales shortly after the Tracinda announcement on December 31, 2007.[9] This amount is consistent with the U.S. Attorney's view of Van Gilder's total trading gain. *See* Plea Agreement Statement of Facts, at ¶ V.M. For purposes of the civil settlement, Mr. Van Gilder has been credited the amount of his criminal forfeiture, or $86,100, which will reduce the amount of disgorgement that he owes pursuant to the consent judgment to $23,165.

Disgorgement is an equitable remedy that seeks to deprive the wrongdoer of the fruits of his or her illegal conduct. *SEC v. Contorinis*, 743 F.3d 296, 301 (2d Cir. 2014); *SEC v. First City Financial Corp.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989). The primary purpose of disgorgement is not to compensate investors; rather, the purpose is to deprive wrongdoers of unjust enrichment and to deter others from violating the securities laws. *First City*, 890 F.2d at 1230, 1232 n.24; *SEC v. Tome*, 833 F.2d 1086, 1096 (2d Cir. 1987); *SEC v. Blatt*, 583 F.2d 1325, 1335 (5th Cir. 1978); *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1104 (2d Cir. 1972); *SEC v. Mantria*, 2012 WL 3778286, at *1 (D. Colo., August 30, 2012). The district court has broad discretion regarding whether to order disgorgement and the amount to be disgorged. *Contorinis*, 743 F.3d at 301. Disgorgement need only be a reasonable approximation of profits causally connected to the violation. *First City*, 890 F.2d at 1231. Since it is difficult in many cases to separate

[9] For securities that were purchased and sold, the actual sales prices were used to calculate the gain. For securities that were purchased but not sold, the closing stock price on December 31, 2007 was used to calculate the gain. Mr. Van Gilder notes that Judge Daniel in the criminal case found that the forfeiture amount constituted $86,100 relating to the count of criminal conviction.

"legal from illegal profit,. . . it is proper to assume that all profits gained while defendants were in violation of the law constituted ill-gotten gains." *SEC v. Bilzerian*, 814 F. Supp. 116, 121 (D.D.C. 1993), *aff'd*, 29 F.3d 689 (D.C. Cir. 1994) (citations omitted). Any risk of uncertainty regarding the amount of disgorgement should fall to the wrongdoer whose illegal conduct created the uncertainty. *SEC v. Tourre*, --- F. Supp. 2d --- , 2014 WL 969442, at *6 (S.D.N.Y., March 12, 2014). Disgorgement is an appropriate remedy in insider trading cases. *Contorinis*, 743 F.3d at 301-07; *SEC v. MacDonald*, 699 F.2d 47, 54-55 (1st Cir. 1983).

Applying these principles, the $109,265 disgorgement amount is an appropriate settlement term. This amount reflects Mr. Van Gilder's total trading gain in Delta securities that he purchased prior to the Tracinda announcement between November 26 and December 24, 2007.[10] These gains are causally connected to Van Gilder's insider trading violations and any uncertainty as to the amount is borne by Mr. Van Gilder, not the Commission. For these reasons, it is well within the Court's discretion to order disgorgement of this amount.[11]

[10] While Mr. Van Gilder certainly accepts responsibility for what he did, he notes that he realized no actual long-term gain as a result of the entirety of his trading in Delta securities.

[11] It should be noted that the $109,265 disgorgement amount includes approximately $13,542 in gains relating to Van Gilder's common stock purchases prior to December 17, 2007, the date he admitted in his plea agreement that he first received material nonpublic information from Parker. At a trial of this matter, the SEC would seek to prove that Van Gilder possessed material nonpublic information from Parker prior to these earlier stock purchases. Given the risks and costs of further litigation, the parties settled to a disgorgement amount that includes this $13,542 gain amount even though it would remain disputed if the litigation continued.

The consent judgment also provides that Mr. Van Gilder is liable for prejudgment interest of $22,667 on the disgorgement amount. Prejudgment interest is designed to "deprive the wrongdoer of the benefit of holding the illicit gains over time by reasonably approximating the cost of borrowing such gain from the government." *Contorinis,* 743 F.3d at 308. The SEC utilizes Internal Revenue Service rates of interest on tax underpayments and refunds as its benchmark to calculate prejudgment interest and this practice has been endorsed by courts. *SEC v. First Jersey Securities, Inc.*, 101 F.3d 1450, 1476 (2d Cir. 1996); *SEC v. Gordon*, 822 F. Supp. 2d 1144, 1161-62 (N.D. Ok. 2011); *SEC v. Drexel Burnham Lambert, Inc.*, 837 F. Supp. 587, 612 n.8 (S.D.N.Y. 1993). Whether to order prejudgment interest is within the equitable discretion of the district court. *Contorinis,* 743 F.3d at 308; *First Jersey*, 101 F.3d at 1476. The payment of prejudgment interest is appropriate here. It is fair, adequate, and reasonable to require Mr. Van Gilder to pay interest on his insider trading gains.

6. The Civil Penalty Is Appropriate

The proposed consent judgment provides that Mr. Van Gilder is liable for a civil penalty of $109,265, an amount equal to his gain. In insider trading cases, Section 21A of the Exchange Act provides that the amount of the civil penalty "shall be determined by the court in light of the facts and circumstances, but shall not exceed three times the profit gained or loss avoided as a result" of the violations. Exchange Act Section 21A(2) [15 U.S.C. § 78u-1(2)]. Congress has articulated a strong public policy in favor of the assessment of civil penalties in insider trading cases "to enhance deterrence against insider trading, and where deterrence fails, to augment the current methods of detection

and punishment of this behavior." *SEC v. Happ*, 392 F.3d 12, 32 (1st Cir. 2004); *see also SEC v. Sargent*, 329 F.3d 34, 42 n.2 (1st Cir. 2003). Courts routinely order civil penalties in SEC cases where defendants also received criminal sanctions. *See, e.g.*, *SEC v. Kinnucan*, --- F. Supp. 2d ---, 2014 WL 1244768, at *6 (S.D.N.Y., March 25, 2014); *SEC v. Rajaratnam*, 822 F. Supp. 2d 432, 433-34 (S.D.N.Y., November 8, 2011); *SEC v. Haligiannis*, 470 F. Supp. 2d 373, 385-86 (S.D.N.Y. 2007); *SEC v. Gupta*, 2013 WL 3784138, at *1-3, (S.D.N.Y., July 17, 2013). This comports with Congressional intent. In *Rajaratnam*, Judge Rakoff (to whom this Court has cited), in addressing whether civil penalties were warranted following severe criminal sanctions, summed the issue up as follows:

> The foremost focus of any criminal punishment is on the defendant's moral blameworthiness and on the prison time thus merited. While the concern with blameworthiness may also bear on the monetary aspects of a criminal sentence (such as a fine), more often, as in the case of restitution and disgorgement, they are designed to compensate victims and deprive the defendant of his ill-gotten gains. By contrast, . . . SEC civil penalties, most especially in a case involving such lucrative misconduct as insider trading, are designed, most importantly, to make such unlawful trading a money-losing proposition not just for this defendant, but for all who would consider it, by showing that if you get caught . . . you are going to pay severely in monetary terms.

Rajaratnam, 822 F. Supp. 2d at 434 (internal quotations omitted).

In a litigated context, in assessing the appropriate amount of a civil penalty, courts consider several factors including: (1) the egregiousness of the defendant's conduct; (2) the degree of the defendant's scienter; (3) whether the defendant's conduct created substantial losses or the risk of substantial losses to other persons; (4) whether the defendant's conduct was isolated or recurrent; and (5) whether the penalty should be

reduced due to the defendant's demonstrated current and future financial condition. *Haligiannis*, 470 F. Supp. 2d at 386.

In reaching a settlement with Mr. Van Gilder, the Commission required a civil penalty of $109,265, which is equal to one-time of the amount of his trading gains. This amount is clearly within the statutory mandate that allows for up to three times the total gain. The proposed amount is also supported by the above factors. Van Gilder's conduct resulted in a criminal conviction, and thus, the first two factors support a civil penalty. His conduct was not isolated, rather it occurred during several trades over a month-long period. Finally, Van Gilder has financial resources so there is no basis for a reduction due to financial condition. Given these factors in the context of a settlement, the civil penalty amount is reasonable, appropriate, and in the public interest, especially in light of the Congressional mandate to make insider trading a money-losing proposition.

C. Mr. Diltz's Settlement Agreement is Fair, Adequate, Reasonable, and in the Public Interest.

As indicated above, in filing its SAC, the Commission added Mr. Diltz as a relief defendant. In doing so, the Commission made the conscious decision, after assessing the evidence, not to charge Mr. Diltz with any violations of the securities laws. Rather, as a relief defendant, the Commission seeks disgorgement of gains that Mr. Diltz received through his trading in Delta securities that, in the Commission's view, constitute unjust enrichment to him. In settlement of this action, Mr. Diltz has executed a consent judgment that orders him to disgorge $51,000 as unjust enrichment and to pay $10,818 in prejudgment interest, for a total of $61,753. After the Court's April 24 Order, the

Commission revised Mr. Diltz's consent to remove the waiver of findings of fact and conclusions of law and the waiver of appellate rights. As part of his settlement, Mr. Diltz has not made any admissions and his consent contains a "neither admit nor deny" provision.

Under their equitable powers, courts may order disgorgement from a relief defendant where that person has received ill-gotten funds for which he does not have a legitimate claim regardless of whether that relief defendant has committed any wrongdoing. *SEC v. Contorinis*, 743 F.3d 296, 305 n.4 (2d Cir. 2014); *SEC v. Cavanagh*, 155 F.3d 129, 136 (2d Cir. 1998). To be subject to disgorgement, the funds must be causally connected to the wrongdoing. *Contorinis*, 743 F.3d at 305. This causation requirement is a *but-for* standard of causation, rather than one of proximate cause. *See SEC v. Teo*, --- F.3d ---, 2014 WL 503455, at *9-11 (3d Cir., February 10, 2014).

Here, the SEC seeks disgorgement of Mr. Diltz's trading gains of $51,000 for trades he made during December 2007 that followed those placed by his client, Mr. Van Gilder. During the period at issue, Mr. Diltz was Mr. Van Gilder's broker, and Van Gilder placed his trades in Delta securities through Diltz. As alleged in the SAC, on December 17 and 18, Diltz purchased Delta stock and call options for his own personal accounts after previously purchasing Delta stock and call options for Van Gilder. SAC, Dkt. # 48, at ¶ 24. In one instance, Diltz's call options had the same strike price and expiration date as the options he purchased on Van Gilder's behalf. *Id.*

An order of disgorgement is appropriate against Mr. Diltz for unjust enrichment. Diltz's trading gains were causally related to Van Gilder's wrongful conduct since Diltz

traded in Delta securities after Van Gilder instructed him to buy Delta securities in Van Gilder's account. Thus, Van Gilder's insider trading can be said to be a *but-for* cause of Diltz's gains. Prejudgment interest is also an appropriate settlement term with respect to Diltz. It is within the Court's equitable discretion to order prejudgment interest on disgorgement ordered against a relief defendant. *See, e.g., SEC v. Rosenthal*, 426 Fed. Appx. 1, 3-4 (2d Cir. 2011); *SEC v. Mattera*, 2013 WL 5952619, at *3-4 (S.D.N.Y., November 7, 2013); *SEC v. Universal Consulting Resources, LLC*, 2011 WL 6012529, at *1-2 (D. Colo., December 1, 2011).

The lack of admissions by Mr. Diltz and the "neither admit nor deny" provision should not preclude entry of his consent judgment. First, since Diltz is only a relief defendant and he was not charged with any violations of the securities laws, there is nothing for him to admit – thus there is no need to make a finding of liability against him. Under the law, he may be required to disgorge gains from unjust enrichment despite not having committed a securities law violation, so long as his gains were causally connected to wrongful conduct. That is the essence of being a relief defendant. Indeed, the Commission evaluated Mr. Diltz's conduct and ultimately determined not to bring any securities violations against him. Second, the public record of Mr. Van Gilder's conduct and his admissions that have been incorporated into this proceeding serve as a factual basis for Mr. Diltz's settlement. This is because Mr. Diltz's unjust enrichment derives from Mr. Van Gilder's wrongful conduct. As indicated above, Diltz's trading gains are

causally connected to Mr. Van Gilder's insider trading. By trading after Mr. Van Gilder's trading, Diltz was able to realize gains resulting in unjust enrichment.[12]

On balance, the Court should enter Mr. Diltz's consent judgment since the settlement is fair, adequate, reasonable, and in the public interest.[13] The settlement was negotiated at arm's length and its terms are unambiguous. Finally, Mr. Diltz's consent judgment will not unduly burden court resources or positively injure or burden third parties who have not consented to the judgment. For these reasons, and those discussed above, the Commission respectfully requests that the Court accept Mr. Diltz's settlement agreement with the Commission and enter the proposed consent judgment.

III. CONCLUSION

Based on the foregoing, the Commission respectfully requests that the Court accept the proposed settlements since they are fair, adequate, reasonable, and in the public interest, and that the Court enter the proposed consent judgments of Mr. Van Gilder and Mr. Diltz.

[12] This Court has previously entered an order of settlement against a relief defendant where no factual findings were made and where the order contained an NAND provision. *See SEC v. Bridge Premium Finance, LLC et al.*, 12-cv-02131-JLK-BNB, Dkt. # 62.

[13] Mr. Diltz's consent judgment is subject to the standards of review enumerated in Section II.B.1. *infra*.

LOCAL RULE 7.1A CERTIFICATION

From May 23 through 28, 2014, counsel for the Commission exchanged emails and had phone conversations with counsel for Defendant Van Gilder. As a result, Mr. Van Gilder does not object to the instant motion.

From May 23 through 28, 2014, counsel for the Commission exchanged emails and had phone conversations with counsel for Relief Defendant Diltz. As a result, Mr. Diltz does not object to the instant motion.

From May 23 through 28, 2014, counsel for the Commission exchanged emails with counsel for Defendant Parker. Mr. Parker does not object to the instant motion.

DATED: May 28, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 28, 2014, a copy of the foregoing **PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S SECOND UNOPPOSED MOTION FOR ENTRY OF PROPOSED FINAL JUDGMENTS AS TO DEFENDANT MICHAEL VAN GILDER AND RELIEF DEFENDANT STEPHEN DILTZ** was filed with the CM/ECF filing system which will send notice to the following:

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