

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

UNITED STATES OF AMERICA)
)
 v.) Docket No. 5:19-cr-76-2
)
 WILLIAM KELLY,)
 Defendant.)

GOVERNMENT’S SENTENCING MEMORADUM

William Kelly played a critical role in the AnC Vermont EB-5 fraud. He posed as an attorney, giving added weight to his voice and recommendations. He regularly acted as the fixer, problem solving across the Jay Peak EB-5 troubled waters, even if it required him to craft deceitful narratives. Kelly often stepped in to draft key documents that furthered the fraud, creating and enhancing the party line. Quiros and Stenger, both of whom had greater stakes in the Jay Peak EB-5 fraud than Kelly did, often followed Kelly’s party line. Kelly championed the AnC project despite evidence that it did not legitimately qualify as an EB-5 project. He lied and supported others’ lies to investors, the Vermont Regional Center (VRC), U.S. Citizenship and Immigration Services (USCIS), and the Securities and Exchange Commission (SEC) about the revenue and job prospects for the AnC project in order to get the project sold and approved. He furthered the process of misusing investor funds and covered up the misuse of investor funds to investors, the VRC, and the SEC.

The criminal conduct committed by Kelly and his co-defendants caused more widespread harm than any criminal case in this district’s history. Most of the victims of the charged crimes, the AnC investors, lost their entire investments before the Receiver provided partial restitution extracted from third parties. That investor group is still out

millions of dollars. The Stateside investors were left with a half-finished project before the Receiver completed that project with other funds. Hundreds of investors suffered tragic immigration consequences. The civil lawsuits resulting from the Jay Peak EB-5 projects have resulted in hundreds of millions of dollars in settlements, and some are still pending. The Northeast Kingdom had its hopes dashed. Newport is left with an open civic wound in the middle of town.

At the same time, Kelly provided important cooperation in Stenger's prosecution, described below. In light of all of the circumstances, the Court should accept the plea agreement and sentence Kelly to a substantial jail sentence but one well below Stenger's sentence.

I. Introduction

Kelly's criminal conduct was wide-ranging and central to the success of the fraud. While he had been an advisor to Quiros for years, Kelly was considering a move out of Quiros's orbit. Instead, Quiros offered Kelly a role in the AnC project. Kelly stepped into the action in 2011, as the scheme was getting up and running. Quiros told Kelly that he could share handsomely in the millions in construction supervision fees from the project. Ex. 1 (8/27/12 email). In 2011, Quiros was upset with Stenger's overspending on Phases I and II. Quiros asked Kelly to become his intermediary between Vermont and Miami; Quiros hardly visited Vermont. Ex. 2 (7/6/11 email). In addition to his share of the construction management fees, Kelly was paid consulting fees as Chief Operating Officer of Jay Peak. As a result of his roles in both Vermont and Miami, Kelly had a broad view over what was taking place in the Jay Peak EB-5 debacle.

One aspect of the fraud involved the defendants' lies about AnC job creation and future revenues to the investors, the VRC, and USCIS. Kelly helped with these lies from the beginning, as described below. These misrepresentations made the entire \$110 million AnC project a fraud. This aspect of the fraud supports a lengthy sentence.

The second aspect of the fraud, the misuse of investor funds, triggered the SEC and Vermont civil suits and generated the most public attention. The defendants used investors' money to pay debt that could not be legitimately covered. The defendants attempted to handle debts and cost overruns by misusing funds and hiding these financial problems from investors, the VRC, and the SEC. The defendants designed the EB-5 projects to include substantial "profits" for the owners of Jay Peak, and for the AnC project; Kelly, Quiros, and Stenger were entitled to split \$12 million in construction supervision fees. Although Kelly and Quiros wanted to reap AnC EB-5 profits for themselves, the defendants also understood that they needed to use those profits to pay off other costs. The misapplication of funds flowed from trying to do both and failing. This prong of the scheme alone also justifies a significant prison sentence.

The motivations and personalities of the three defendants played a critical role in the scheme. The crimes could not have occurred without the toxic mix of these three men's strong personalities. Each man took responsibility and ownership over certain aspects of the fraud and avoided or ignored their co-conspirators' actions in other areas. Kelly used his legal training to strengthen his role as the consummate fixer. He also wanted AnC and Burke to get funded because he hoped for huge profits from his company's "work" on those two projects. He carefully attended to executing Quiros's wishes and trying to outwit the regulators. Quiros was a wheeler-dealer who was in it for the money and wanted

the gravy train to keep rolling, however possible. He didn't care what Stenger and Kelly said. Stenger was the visionary, the deluded optimist, the trusted Vermonter, and the man responsible for the Jay Peak jewel. Stenger was motivated by glory, desperation, and also partly motivated by money.

All three defendants wanted EB-5 fundraising to continue, even if deceit was necessary to accomplish that goal. Their desperation only grew as the regulatory challenges mounted between 2013 and 2016.

II. The Advisory Sentencing Guidelines

The Presentence Report calculates the guideline offense level as 31. Kelly's advisory guideline range is 108 to 135 months. Neither party objects to this calculation. In light of Kelly's cooperation, the government moves for a departure from the advisory guideline pursuant to U.S.S.G. § 5K1.1.

III. Section 3553(a) Factors

Considering all the relevant circumstances, the Court should accept the parties' agreement, pursuant to Fed. R. Crim. P. 11(c)(1)(C), that the appropriate term of imprisonment is 36 months or less. Kelly should receive a significant jail sentence, but one well below the sentence that the Court imposes on Stenger. The various factors outlined in Section 3553(a) support this conclusion.

A. The Nature and Circumstances of the Offense

As noted above, the criminal conduct here was egregious and created massive harm. This factor counsels for a considerable prison sentence for Kelly.

1. The Misuse of Investor Funds

Kelly was heavily involved in QResorts' 2008 purchase of Jay Peak, in which Quiros and Stenger purchased the resort with borrowed funds. *See* PSR ¶ 94. Kelly was not actively involved in Jay Peak operations or the EB-5 projects before 2011. Kelly's involvement increased significantly in 2011, when the defendants tried to address the EB-5 projects' extensive financial problems. This is when the scheme began in earnest, and all three were culpable from then on.

In mid-2011, based on an idea from Hulme, the defendants set up JCM. JCM had multiple functions. First and foremost, it was a vehicle to cover the cost overruns by using later project money to pay overruns and by inflating the costs of the remaining three Jay Peak projects (Golf and Mountain, Lodge and Townhouse, and Stateside), so that the defendants could use JCM "profits" to cover the cost overruns. PSR ¶¶ 105-07. Second, JCM allowed Quiros and Kelly to directly manage the construction, allowing Stenger to focus more attention on fundraising. PSR ¶ 105. Third, Quiros and Kelly wanted to have more control over the construction spending. They used George Gulisano to track and manage the spending through JCM. All three defendants were deeply involved in the JCM plan and each had a specific role to play. Quiros remained in control of the money after it got to JCM. Kelly met with Hulme to discuss his conception of the plan. Kelly created the invoice template for JCM. Kelly monitored Gulisano's work on JCM. Stenger, who remained the general partner for all Jay Peak EB-5 partnerships, authorized the payments to JCM. PSR ¶ 109.

The Hulme rupture and its aftermath in early 2012 vividly illustrates the differing but critical roles played by the defendants. Although Hulme apparently had the idea for JCM,

he became concerned about how Quiros and Kelly were moving funds through JCM. PSR ¶ 113. He made Stenger aware of his concerns. PSR ¶ 114. Hulme hired a lawyer to demand information from the defendants. PSR ¶¶ 118-19. In the defendants' efforts to placate Hulme, Kelly drafted Stenger's script. PSR ¶¶ 120-21. These roles were continued during the defendants' reactions to Hulme's separation from Jay Peak. Hulme's vague but public allegations raised questions throughout the EB-5 community and at the VRC. Again, Kelly managed the false message delivered by Stenger and Gulisano. Quiros moved the money: paying off the earlier Raymond James margin loan that Hulme asked about, opening a new margin loan, and using some of the new funds to buy Burke Mountain. PSR ¶¶ 121-22. Quiros, however, let Kelly and Stenger take the lead in dealing with others. Kelly helped Gulisano falsify the accounting so that Stenger could assure the VRC and investors that all was well and that the projects were successful. PSR ¶¶ 124-25.

Kelly was also deeply involved in the execution of the lapping scheme between 2011 and 2016. Kelly was kept informed about the problems with the JCM plans, which were intended to cover the Phase I and Phase II cost overruns. Kelly was informed and consulted about the shortfalls in 2012 and 2013. Kelly knew that only additional EB-5 projects could cover the costs of the Stateside Project. In August 2013, when Gulisano made clear that the plan was over \$30 million in the hole, Kelly had the idea of creating promissory notes to "pay off" the Phase I investors with the unrequited hope that the promissory notes could be used to collateralize new financing. Ex. 3 (8/21/13 Gulisano Letter).¹

¹ This plan ended up costing additional funds, rather than leading to additional funds, because the notes required hundreds of thousands in payments to the Phase I investors per year. Moreover, it led to a revolt by Phase I investors in 2014.

Kelly's important role continued during the misuse of AnC investor funds. Quiros and Kelly designed the AnC project budget that contained inflated cost figures hiding secret profits. PSR ¶ 132. Stenger authorized the movement of tens of millions to JCM, knowing that some of the money would be used to cover the cascading financial problems. PSR ¶ 136. In the meantime, Kelly invoiced millions to NECS for "construction supervision" even though the construction had not started.

JCM also became the vehicle through which to misuse tens of millions of dollars in AnC investor funds. The largest single misuse of funds was Quiros's 2014 payoff of the \$21 million Raymond James margin loan after the SEC began its investigation. Kelly helped Gulisano design this transaction. Stenger authorized the payments to JCM. Quiros transferred the money. Initially, Kelly and Gulisano planned to cover up the payment by calling the margin loan payoff a "services fee" that JCM owed to QResorts. PSR ¶¶ 142, 146. Kelly then orchestrated the coverup of the margin loan payoff after the SEC figured it out. Kelly helped draft the fraudulent Korean official declarations, which were falsely designed to make it look like AnC Korea authorized the margin loan payoff. Kelly also led the drafting and providing of other false documents to the SEC, including a Services Agreement falsely backdated and signed by Quiros, as well as bogus promissory notes and an Asset Transfer Agreement all falsely backdated and signed by Stenger.

Moreover, when the VRC asked questions about how the AnC investor funds that paid off the margin loan were used, Kelly again assumed the role as principal drafter. In November of 2014 and again in February and March of 2015, Kelly helped draft the misrepresentations to the VRC about how AnC funds were spent. Kelly made it look like AnC Korea had been paid the \$21 million used to pay off the margin loan.

Later in 2014, Kelly helped funnel millions more in investor funds to JCM. Quiros used this money in 2015 to fund a \$15 million Citibank line of credit, which was used for costs unrelated to AnC. Kelly helped Quiros with the Citibank paperwork. Kelly understood that Stenger had been badgering Quiros for months to use AnC funds to pay for Stateside construction. PSR ¶¶ 150-54. Stenger's text messaging illustrates the difference in the relationship between Stenger and Quiros and the relationship between Stenger and Kelly. Between 2013 and April 2016, Stenger had five times as many text messages with Kelly as with Quiros.

2. Jobs and Revenue

The AnC project depended on investors believing that the defendants would create sufficient jobs for project approval by USCIS and that the business would earn enough to pay off the investors within five years or so. Kelly bears significant culpability for this aspect of the scheme.

Kelly continued working with Quiros in large part to earn money on the AnC project, which was to deliver millions to Kelly. Soon after becoming involved, Kelly spoke at Stenger's 2011 AnC press conference. PSR ¶ 24. He was described as "counsel." He took on the role of touting the business plan for AnC, without any information that the project could create enough jobs for even a \$50 million project, let alone the \$100 million they described in 2011. Ex. 4 (AnC video).

In 2012, with Hulme gone, Kelly had to organize the efforts to assemble the project documents necessary to get AnC into the market. He and Stenger organized the jobs and revenue projections for the AnC project. PSR ¶¶ 34-43. Quiros went along with the project, but he had little involvement in executing the jobs and revenue projections. Kelly and

Stenger are equally culpable for making up the bogus jobs and revenue numbers in the original marketing materials. Kelly inflated the figures in Alex Choi's business plan, which Stenger then used in his early marketing material and which became the source for the initial AnC Private Placement Memorandum business plan. Doc. 372, Ex. 36 (Choi) vs. Ex. 23 (containing Kelly revisions). Kelly helped create the inflated revenue projections. PSR ¶¶ 31-33. Kelly and Stenger worked with a hired economist to create the inflated jobs estimate. PSR ¶¶ 35-40. Kelly understood that the defendants had to justify raising over \$100 million in investor funds by showing significant job creation, and that they would have to fudge the numbers to make this happen. From the beginning, the three defendants had no idea how many jobs could be created but repeatedly misrepresented their confidence in the projections.

Kelly did not avoid assisting Stenger with marketing. When questions were posed by investors about the business plan, Kelly proposed fashioning a "party line" hiding the truth about the problems with revenue and actual job creation. Ex. 5 (12/14/12 email). Even when a local expert relayed prescient concerns about the AnC project, Kelly chimed in to propose the fraudulent rebuttal to the expert. Ex. 6 (1/2/13 email).

The only people considering actual job creation were the members of the Korean team who were working with the design firm to build the facility. Kelly was being paid to shepherd this process. Kelly was repeatedly made aware, from his supervision of this process, that the revenue and jobs projections Stenger was using for marketing were unrealistically inflated. From 2013 to 2016, the Koreans maintained a spreadsheet they called "Launching Forecast," Doc. 372, Ex. 43, which tracked the estimate of the number of workers in the facility over the period of several years. Kelly regularly received this

information. He ignored it, even when USCIS asked pointed questions about the business plan in two Requests for Evidence. Kelly ignored it because this real forecast conflicted with the bogus jobs forecast in the marketing materials. Recognizing the problem would have meant that USCIS would not approve the project. Stenger, Kelly, Quiros, and the Korean team focused first on getting the building built, even though the job plan presented to investors and USCIS had revenue and jobs booming as soon as the building was finished. Kelly could not get the building designed, let alone built. PSR ¶¶ 191-95. Even if the defendants had been able to build the facility, there was no plan to employ the required number of employees. Kelly and Stenger discussed an entirely revised business plan in early 2016, when the AnC project did not even have the funds to build the facility. PSR ¶¶ 193-97.

In sum, there is plenty of blame to share in this huge fraud. Each of the three defendants contributed significantly to the scope of the damage to investors and the public.

3. Victim Impacts

The AnC investors were on a financial collision course. While the defendants hoped to construct some building, they lacked the money to finish it and they lacked a plan to fund a serious biotechnology start-up. Such a business would have taken tens of millions more. But on top of a lack of a real business plan, the multi-million-dollar deficits spreading through the Jay Peak EB-5 projects infected the AnC project. By the time the SEC began its investigation in mid-2013, it was clear that that the entire house of cards would eventually tumble. Instead of preserving the AnC investments, the defendants spent them. These spent proceeds meant actual losses for the AnC investors. Only those who invested after April 2015 had their equity investments protected by the VRC. The only reason the earlier AnC investors recovered their equity investments is because the SEC filed suit and the Receiver

worked diligently to recoup the many losses caused by the defendants. But those recoveries took time. During that period, the investors faced huge financial uncertainty, vividly illustrated in the Victim Impact Statements from Antonio Ascarate, Luca Talarico, and Rasha Mesharafa. Even though the Receiver was able to address the AnC investors' equity investment losses, all AnC investors have still not recovered the administrative fees they paid (\$50,000 each in most cases). These administrative fee losses still require restitution. Kelly should be held jointly and severally responsible for the AnC investors' administrative fee losses.

Direct financial losses to the EB-5 investors represent only a portion of their suffering. The uncertainty connected to the collapse of the EB-5 project led to other adverse financial impacts, such as those suffered by Mr. Ascarate. Further, the defendants understood that immigration benefits drove investor interest in the EB-5 program. For the AnC project, the only AnC investors who appear able to obtain legal status in the United States through the EB-5 program are those whose initial applications (I-526s) were approved before 2016. Their ability to gain legal status is due to the Receiver's efforts to move their investments into a totally separate EB-5 project. AnC investors, whose initial EB-5 applications were not approved before 2016, are not able to realize their immigration dreams through their AnC EB-5 investments. These adverse immigration impacts underscore the massive and unusual harms caused by the defendants' conduct. Some investors lost not only their investments but also the lives in America they had hoped and planned for.

B. Defendant's Cooperation

Kelly's deep knowledge of and participation in the fraud scheme made him an important witness. His value was bolstered by the careful and expansive detail of his recollections. He spent many hours working with the prosecutors and agents to review the hundreds of events and documents relevant to the case. His cooperation, his explanation of the scope and range of the scheme, and his acceptance of responsibility for his role in the scheme all would have been significant in Stenger's trial.

The government would have faced some challenges using Kelly as witness. For example, his lies and deceit during the scheme, as well as his false statements to law enforcement prior to indictment, would have been fodder for cross examination. Despite these challenges, the government intended to call Kelly as a witness at the Stenger trial. We believe that he would have provided critical and important testimony about all aspects of the scheme.

The government took Kelly's cooperation into consideration in fashioning the 36-month cap. The government agreed to the cap based on its anticipation of Kelly being a witness at the Stenger trial. The plea agreement requires Kelly to truthfully cooperate, and the government had the right under the agreement to void the cap if Kelly failed to cooperate or lied to the government. The government views a sentence within the 36-month cap as appropriate in light of Kelly's cooperation. The Court should not begin its consideration of mitigating factors or grounds for departure from the three-year cap but from the advisory guideline range.

C. Defendant's History and Characteristics

Kelly's principal motivation for his criminal conduct was financial. He took on jobs for Quiros to launch the AnC project and to be Quiros's eyes, ears, and voice in Vermont. At the same time, he appears to have relished his job as the problem solver. Instead of using his legal training to reign in or stop the fraud, he used his skills and hard work to keep the fraud moving and growing.

To be sure, Kelly has many friends and has earned the respect and affection of his family and friends. These positive attributes, as well as his cooperation, provide the basis for the Court to approve the cap in the plea agreement. While an appropriate sentence for Kelly might otherwise be in the ten-year range, these mitigating factors make a much lower sentence appropriate.

D. Deterrence

Specific deterrence is not a concern in this case. There is no reason to think that Kelly will defraud others in the future. At the same time, general deterrence strongly supports a lengthy prison sentence. All Vermonters should know that engaging in a massive fraud like this one will come at a heavy price. Many eyes are cast on the sentencing here. The Court should send a loud and clear message that this type of fraud will not be tolerated.

IV. Conclusion

For the foregoing reasons, the Court should sentence Kelly to a substantial period of incarceration, yet a sentence below that imposed on Stenger; and restitution in the amount of \$8,338,600.77, jointly and severally with the other defendants.

Respectfully submitted,

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