

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	No. 06 CR 964
	)	Magistrate Judge Michael Mason
	)	
MICHAEL E. KELLY	)	
	)	

**GOVERNMENT’S RESPONSE TO  
DEFENDANT’S MOTION FOR RELEASE ON BAIL**

The UNITED STATES OF AMERICA, by its attorney, PATRICK J. FITZGERALD, United States Attorney for the Northern District of Illinois, respectfully requests that this Court deny defendant Michael E. Kelly’s pending motion for release on bail. The defendant has been charged in a federal criminal complaint with engaging in a longstanding, international fraud scheme, which involved fraudulently raising over \$400,000,000 from thousands of investors throughout the United States. The seriousness of the charged offense (which carries a potential Guideline sentence of life imprisonment), the substantial weight of the evidence against the defendant including his own recorded statements, the location of most of his immediate family outside the United States, the location of the defendant’s residence and assets outside the United States, the defendant’s multiple citizenships and the approximately quarter of a billion dollars of proceeds from the scheme all point to the defendant being a very serious risk of flight. The conditions proposed by the defendant, including the posting of property purportedly valued at \$470,000, are woefully inadequate to reasonably assure his appearance if released. Therefore, as more fully discussed below, the defendant’s motion should be denied.

**A. Procedural Background**

On December 22, 2006, the defendant was arrested in Jacksonville, Florida after being

discharged from the Mayo Clinic. The defendant had arrived in the United States from Mexico on the evening of December 20, 2006 by chartered jet and was scheduled to return to Mexico on the same chartered jet on December 23, 2006.<sup>1</sup>

On the same day as the arrest, defendant Kelly had his initial appearance on the pending federal criminal complaint before United States Magistrate Judge Howard T. Snyder. The government moved for the defendant's detention and a hearing was scheduled for December 27, 2006.

On December 27, 2006, United States Pretrial Services for the Middle District of Florida issued a report on the defendant. The defendant reported earning only about \$55,000 per year as a consultant with assets of \$48,000. Although the defendant reported that he lived and traveled internationally, there was no mention of him being a citizen of Mexico or of Belize.

On December 27, 2006, the defendant waived his right to an identity hearing and a detention hearing in Jacksonville and reserved the right to have a detention hearing and preliminary hearing in the Northern District of Illinois.

On January 12, 2007, the defendant had his first hearing before this Court. The defendant requested that his detention hearing be set for January 22, 2007. This Court granted the request.

On January 16, 2007, the government moved for additional time in which to seek an indictment. The motion to extend the time to and including March 22, 2007 was granted by United States District Court Chief Judge James F. Holderman. The defendant through counsel took no

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<sup>1</sup> At the time of his arrest, defendant Kelly possessed several credit cards and identification cards - some in the name of Michael Kelly and others in the name of Michael Kelly Hodgson. For instance, he had a business card in the name of Michael E. Kelly identifying him as the chairman of Grupo Kelly and an American Express Corporate Platinum card in the name of Michael E. Kelly Hodgson, Operadora Hoteles Grand.

position on the motion.

On January 18, 2007, United States Pretrial Services in this district issued a report on the defendant. According to this report, the defendant informed Pretrial Services that he became a Mexican citizen in 2002 or 2003 and still was a United States citizen. The defendant's disclosure of his Mexican citizenship came only after the government discovered it and disclosed the defendant's arrest status to Mexican authorities and informed the defendant of his treaty rights. There is nothing in the report about the defendant being a citizen of Panama or Belize.

At the hearing on January 22, 2007, the defendant changed counsel and sought and received a continuance of the detention hearing to January 29, 2007.

On January 26, 2007, the defendant through counsel sought and received another continuance of the detention hearing to February 13, 2007. At the same time, the defendant waived his right to a preliminary examination and this Court entered a finding of probable cause.

On February 13, 2007, the Court gave the government to February 16, 2007 to file a response to the defendant's motion for release on bail and reset the detention hearing to February 20, 2007.

#### **B. Applicable Law**

Title 18, United States Code, Section 3142(e) requires the Court to detain the defendant before trial, if the Court finds that "no condition or combination of conditions will reasonably assure the appearance" of the defendant as required. 18 U.S.C. § 3142(e). The burden is on the government to demonstrate this risk of flight by a preponderance of the evidence standard. United States v. Portes, 786 F.2d 758, 765 (7th Cir. 1985). The relevant factors to be considered are:

1. the nature and circumstances of the charged offense:
2. the weight of the evidence against the defendant; and,

3. the defendant's history and characteristics, including criminal history, person's character, family ties, financial resources, length of residence in the community, community ties, past conduct and physical condition.

18 U.S.C. § 3142(g).

The government may meet its burden "by offering evidence in a manner unconstrained by the normal rules of admissibility." United States v. Calabrese, 436 F. Supp. 2d 925, 926 (N.D. Ill. 2006).

**C. Factors Considered**

\_\_\_\_\_ 1. The nature and circumstances of the offense charged

The criminal complaint and accompanying affidavit detail the defendant's scheme to fraudulently raise over \$400,000,000 through the offer and sale of so-called universal losses to thousands of persons located throughout the United States. These so-called universal leases offered investors as much as an 11% return per year for 25 years with the option of selling back the investment for 100% of the purchase price in as little as two years.

As set out more fully below, the evidence gathered to date indicates that losses to investors exceed \$300,000,000. These proceeds from this fraud, all of which are outside the United States, provide a huge incentive for the defendant to flee if he is released on bond.

As a part of its own investigation of the universal leases the United States Securities and Exchange Commission (SEC) has been analyzing voluminous bank records in an attempt to identify the receipt of investors' funds by the defendant and his companies and the uses of those funds. Some of the preliminary figures generated by the SEC include the following:

- a. Approximately \$419,000,000 was raised from the sale of universal leases;
- b. Approximately \$104,000,000 has been paid to investors in principal and interest

payments; and,

c. Approximately \$73,000,000 has been paid out as commissions on the sales of the universal leases.<sup>2</sup>

In other words, potential losses to investors exceed \$300,000,000 (\$419,000,000 minus \$104,000,000).

The rough accuracy of these figures is substantiated by information the defendant through his then lawyers provided the United States Attorney's Office in South Bend, Indiana. In a September 30, 2004 letter,<sup>3</sup> the following representations were made:

a. sales of the universal leases ceased in the spring of 2004;

b. 9,978 universal leases had been sold in the United States and Central America;

c. 8,506 universal leases were outstanding;

d. the dollar value of total sales in the United States from the beginning in 1999 until the spring of 2004 was approximately \$424,000,000.

e. approximately \$60,200,800 worth of universal leases had been repurchased by February 2004.

f. from February to the end of July, approximately another \$13,000,000 had been paid out to leaseholders.

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<sup>2</sup> The defendant and his companies were paying as much as an 18% commission on the sale of the universal leases. The amount of these commissions was not disclosed in the universal lease sales materials. Nor was it disclosed that the defendant and his companies also paid additional commissions to some salesmen for keeping their customers in the investment for more than two years. The size of these commissions was material to the salesmen's bias and to the economic feasibility of the investment.

<sup>3</sup> See Government Exhibit 2.

g. commissions to sales agents totaled \$79,169,275.

Doing the math with the defendant's figures results in an even larger loss number of approximately \$350,000,000. (The difference in numbers may be at least in part explained by the fact that the SEC's figures concluded both principal and interest payments to investors.)

As further support for the scope of the defendant's scheme to defraud, the Federal Bureau of Investigation and the United States Attorney's Office already have had contact with over 1000 potential victims. These people are located all over the United States and many of them are senior citizens.<sup>4</sup>

As final support for the nature and circumstances of the offense favoring detention, the preliminary Guidelines calculation for the defendant's offense results in an offense level 53. The actual calculations are set out in Government Exhibit 4. An offense level 53 equates to a life sentence sentencing range. For that matter, any offense level over a 42 has a life imprisonment sentencing range.

2. Weight of the evidence against the defendant

\_\_\_\_\_ As a preliminary matter, the defendant asserts that "the weight of the evidence against the accused should be the least significant factor in the conditions of release analysis." United States District Court Judge James Zagel recently rejected that assertion in United States v. Calabrese, 436 F. Supp 2d 925, 927 at footnote 3 (N.D. Ill. 2006):

I do not find support for minimizing the "weight of the evidence" factor in Seventh Circuit cases. The statute does not instruct that one or another factor is

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<sup>4</sup> Under the Justice for All Act, potential victims have a right to be heard at a detention hearing. Some have chosen to communicate with the Court in writing. Copies of those notes and letters are attached as Government Exhibit 3.

less important . . . . Judicial dicta stating that the weight of the evidence is least important is, in my view, an off-key but well-intentioned attempt to remind us of the rule that detention is not to be ordered simply because we are convinced that the accused is guilty; we are to detain only if we find that there is an unacceptable risk of flight or danger to others.

In defendant Kelly's case, the weight of the evidence favors his detention. A substantial evidentiary basis is contained in the affidavit in support of the criminal complaint. The defendant has waived a hearing on the issue of probable cause and this Court has entered a finding of probable cause.

To add to this mix, the government proffers the following:

a. Marcia Taplin was a certified public accountant and a senior forensic accountant employed by the Arizona Securities Division. On May 23, 2006. Taplin testified under oath about money tracing concerning the universal leases at issue here. We have attached a copy of excerpts of her transcript as Government Exhibit 1. Among other things, Ms. Taplin testified about funds from new universal lease investors being used to pay earlier investors:

Q. As a forensic accountant have you seen this type of flow of funds from investors to a single bank account and then out to other investors?

A. This type of program where you see money coming in from investors and using it to pay out as returns to investors is typically called a Ponzi, P-o-n-z-i, scheme.

(Government Ex. 1 at 2916)

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A. Basically it's the same program going on. What happened was originally the respondents started out with this Yucatan Resort account, this S-31. And originally money, all investor money was going into this account, and within the same account they were paying out investors, paying out commissions, paying these other entities all within this one account

Then a couple years down the road they decide, let's change thing a little bit. They open up

a new account at the National City Bank under the name Resort Holdings International, and that is where you see, actually on S-32, that account.

So both accounts are housing investor money. These are different investors; it's the same program. They just added another bank account. This time instead of paying investors out of the same account, there is this World Phantasy Tours account added in which money goes from the Resort Holdings International Lease account to World Phantasy Tours then to investors.

Q. Okay. But in your analysis you never saw any records of World Phantasy Tours which would show that they were gaining revenue from collecting from the leasing of the properties?

A. Correct. The sole source of income into that World Phantasy account came from the Resort Holdings International account, in which the vast majority of money from that account came from investors.

(Government Ex. 1 at 2929-2930)

b. The SEC's money tracing expanded on that done by the State of Arizona. As to the ponzi-nature of the scheme, the SEC's preliminary money tracing revealed that: (1) \$5,500,000 from universal lease investors was used to pay principal, interest and commissions to investors and salesmen in the defendant's earlier 9 month note program;<sup>5</sup> (2) substantially all principal and interest payments made to universal lease investors during the period from 2000 to at least August 2003 were paid using other investors' funds; and (3) substantially all of the funds in the World Phantasy Tours account in Florida used to pay investors were other investors' funds transferred from one of the defendant's other corporate accounts.

c. Part of the evidence in this case are video recordings of the defendant speaking with potential investors and with prospective salesmen. In those recordings, the defendant makes various representations about the universal leases including the 11% return, the 100% liquidity and the "sell

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<sup>5</sup> Before the sale of the universal leases, the defendant offered and sold nine month notes to the public.

back at any time” features.

In sum, it was almost as if Judge Zagel was discussing defendant Kelly when he opined in Calabrese:

Very strong evidence, when coupled with the possibility of a very long sentence, is relevant to the likelihood of the accused’s non-appearance at trial. Flight is always more likely when a defendant has little or nothing to lose by absconding.

United States v. Calabrese, 436 F. Supp. 2d at 927.

3. Defendant’s history and characteristics

As with the first two factors, the defendant’s history and characteristics weight heavily toward the defendant’s continued detention.

a. Family ties

Although the defendant is originally from the South Bend, Indiana area, almost his entire immediate family and part of his extended family resides in Mexico.

b. Residence in the community

Defendant Kelly resides in Cancun, Mexico and has become a citizen of Mexico.

c. Community ties

Defendant Kelly has no ties to the Northern District of Illinois. Travel records indicate that, before his most recent entry into the United States in December 2006, he had not been in the United States since May 2004.

d. Financial Resources

Although defendant Kelly reported only an income of \$55,000 and assets of \$48,000 to Pretrial Services, multiple witnesses have reported that he has lived a rather lavish lifestyle in

Cancun. Multiple homes in Cancun for himself and family members, a home in Panama, at least four boats including one described as “something out of James Bond,” a bevy of automobiles including a Porsche, a Ferrari, a Mercedes, a Prowler and a private jet all contribute to this lavish lifestyle.

As to the location of the defendant’s assets, there are none disclosed in the United States. All of his assets appear to be either in Mexico or Panama.

Finally, as to financial resources, the defendant has had access to the funds raised through the offer and sale of the universal leases. This means that there are potentially a few hundred million dollars or assets purchased with the funds available to the defendant.

e. International travel

Defendant Kelly informed Pretrial Services that he traveled internationally. Passport records support that defendant Kelly is a frequent international traveler. This is undoubtedly facilitated by his dual citizenship. Moreover, at least one witness has disclosed that the defendant also has claimed to be a citizen of Belize.

f. Physical condition

The defendant’s physical condition is the major focus of his argument to be released on bond. As an initial matter, the government is fully supportive of this defendant and other prisoners receiving proper medical care.

The defendant’s medical complaint is based on medical information that has been available to both his personal physician and his cardiac specialist at the Mayo Clinic since at least 2002. It may have been prudent for the defendant to have at least his cardiologist from the Mayo Clinic weigh in on his complaint before asking the Court to have him examined and tested on an

emergency basis.

In any event, the United States Marshal's Office and the Bureau of Prisons did respond fully to the defendant's complaint and has had the defendant examined and tested on an inpatient basis. The medical "emergency" has now passed and there is no reason to believe that the defendant cannot receive adequate medical care while detained.

g. Criminal History

The defendant has no criminal history, which weights in favor of his release on its face. The weight of this point, however, is diminished by the longstanding nature of the charged fraud scheme.

In summary, the defendant's history and characteristics point to the defendant being a serious risk of flight. Although some of the affidavits he provided with his filing indicate that certain family members and friends like him, there really is nothing else to keep him in the United States. Residence, citizenship, assets, family ties and lifestyle all point to Mexico and potentially beyond.<sup>6</sup>

**D. Defendant Kelly's Proposed Conditions of Release**

Under the circumstances described above, a rational man in the defendant's position would find few reasons not to flee if afforded the chance. None of the conditions or combination of conditions offered by the defendant should reasonably assure anyone that the defendant will not flee.

For instance, the defendant offers to live in Chicago with his wife Lory or daughter Gwen acting as a third part custodian. Neither Lory Kelly nor Gwen Beem has any connection to Chicago nor do either have any financial incentive to keep the defendant from fleeing.

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<sup>6</sup> Pretrial Services in this district found that defendant Kelly presented both a risk of flight and a financial danger to the community. The government at this time is seeking the defendant's continued detention as a serious risk of flight. The government's investigation as to the defendant posing a continuing financial danger to the community is ongoing.

The defendant's offer to have his whereabouts electronically monitored while traveling throughout the district presumes a technology that is not currently available.

Finally, the posting of property with an appraisal value of \$470,000 in a case involving hundreds of millions of dollars seems woefully inadequate to encourage the defendant to stay and face a potential life sentence.

The government has suggested to both the defendant's former lawyers and current lawyers that the first steps in attempting to design a combination of release conditions should include a full and accurate accounting of the defendant's financial condition and a repatriation of assets to the United States. The defendant has chosen not to offer either of these steps.

**E. Conclusion**

Based on the foregoing, the government respectfully requests that the Court deny the defendant's motion for release on bail.

Respectfully submitted.

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**CERTIFICATE OF SERVICE**

\_\_\_\_\_The undersigned Assistant United States Attorney certifies that in accordance with FED. R. CIV. P. 5, LR5.5, and the General Order on Electronic Case Filing (ECF), the following documents:

\_\_\_\_\_ **GOVERNMENT'S RESPONSE TO**  
\_\_\_\_\_ **DEFENDANT'S MOTION FOR RELEASE ON BAIL**

was served pursuant to the district court's ECF system as to ECF filers, if any, and was served by hand delivery on February 16, 2007, to the following:

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