



U.S. Department of Justice

United States Attorney
Southern District of New York

300 Quarropas Street
White Plains, New York 10601

February 25, 2019

Lee David Auerbach, Esq.
Auerbach Law Group, P.C.
81 Main Street, Suite 307
White Plains, New York 10601

Re: United States v. Keith Borge, __ Cr. ____ ()

Dear Mr. Auerbach:

This prosecution and the protection against prosecution, with respect to tax offenses, set forth below have been approved by the Tax Division, Department of Justice.

On the understandings specified below, the Office of the United States Attorney for the Southern District of New York ("this Office") will accept guilty pleas from Keith Borge ("the defendant") to Counts 1 and 2 of an Information.

Count 1 charges the defendant with failing to pay over payroll taxes, in violation of Title 26, United States Code, Section 7202, and carries a maximum term of imprisonment of five years, a maximum term of supervised release of three years, a maximum fine, pursuant to Title 18, United States Code, Section 3571 of the greatest of \$250,000, twice the gross pecuniary gain derived from the offense, or twice the gross pecuniary loss to persons other than the defendant resulting from the offense, a \$100 mandatory special assessment, and the costs of prosecution.

Count 2 charges the defendant with securities fraud, in violation of Title 15, United States Code, Sections 78j(b) and 78ff, and 17 CFR 240.10b-5, and carries a maximum term of imprisonment of twenty years, a maximum term of supervised release of three years, a maximum fine, pursuant to Title 18, United States Code, Section 3571 of the greatest of \$250,000, twice the gross pecuniary gain derived from the offense, or twice the gross pecuniary loss to persons other than the defendant resulting from the offense, and a \$100 mandatory special assessment. In addition to the foregoing, the Court must order restitution as specified below.

The total maximum term of imprisonment on Counts 1 and 2 is 25 years.

In consideration of his plea to the above offenses, the defendant will not be further prosecuted criminally by this Office and, with respect to tax offenses, the Tax Division, Department of Justice, for any crimes relating to the defendant's failure to pay over to taxing authorities payroll taxes withheld by the College of New Rochelle ("CNR") and for any crimes relating to his false statements regarding CNR's finances from 2013 to 2016 inclusive, it being understood that this agreement does not bar the use of such conduct as a predicate act or as the basis for a sentencing enhancement in a subsequent prosecution including, but not limited to, a prosecution pursuant to 18 U.S.C. §§ 1961 et seq. This Agreement does not provide any protection against prosecution except as set forth above. The defendant agrees that with respect to any and all dismissed charges he is not a "prevailing party" within the meaning of the "Hyde Amendment," Section 617, P.L. 105-119 (Nov. 26, 1997), and will not file any claim under that law.

The defendant further agrees to make restitution in an amount ordered by the Court in accordance with 18 U.S.C. §§ 3663, 3663A and 3664. The defendant further agrees that the obligation to make such restitution shall be made a condition of probation, see 18 USC §3563(b)(2), or of supervised release, see 18 USC §3583(d), as the case may be.

In consideration of the foregoing and pursuant to United States Sentencing Guidelines ("U.S.S.G." or "Guidelines") Section 6B1.4, the parties hereby stipulate to the following:

I. Offense Level

A. Grouping Analysis

1. Pursuant to United States v. Fitzgerald, 232 F.3d 315 (2d Cir. 2000), the tax count and the securities fraud count are combined into one group under U.S.S.G. § 3D1.2(d).

2. The loss from the tax count, including relevant conduct, is \$20,243,620.28.

3. The loss from the securities fraud count, including relevant conduct, is \$612,898.

4. The total loss from the fraud and tax offenses is \$20,856,518.98.

5. Pursuant to U.S.S.G. §§ 3D1.2(d) and 3D1.3(b), the applicable offense level is the higher of the two offense levels calculated, respectively, pursuant to U.S.S.G. § 2B1.1 and U.S.S.G. § 2T1.1.

B. Securities Fraud Offense Level Calculation

6. The base offense level is 7. U.S.S.G. § 2B1.1(a)(1).

7. The total loss, as calculated above, is more than \$9,500,000 and less than \$25,000,000. Accordingly, the offense level is increased by 20 levels. U.S.S.G. § 2B1.1(b)(1)(K).

8. The offense involved 10 or more victims. Accordingly, the offense level is increased by 2 levels. U.S.S.G. § 2B1.1(b)(2)(A)(i).

9. The offense involved sophisticated means and the defendant intentionally engaged in or caused the conduct constituting sophisticated means. Accordingly, the offense level is increased by 2 levels. U.S.S.G. § 2B1.1(b)(9)(C).

10. The defendant abused a position of public and private trust and used a special skill in a manner that significantly facilitated the commission and concealment of the offense. Accordingly, the offense level is increased by 2 levels. U.S.S.G. § 3B1.3.

11. The offense level calculated pursuant to U.S.S.G. § 2B1.1 and Parts A, B and C of Chapter 3 is 33. U.S.S.G. § 3D1.3(b).

C. Tax Offense Level Calculation

12. The base offense level is 26. U.S.S.G. §§ 2T1.1(a)(1); 2T4.1(K).

13. The offense involved sophisticated means. Accordingly, the offense level is increased by 2 levels. U.S.S.G. § 2T1.1(b)(2).

14. The defendant abused a position of public and private trust and used a special skill in a manner that significantly facilitated the commission and concealment of the offense.

Accordingly, the offense level is increased by 2 levels.
U.S.S.G. § 3B1.3.

15. The offense level calculated pursuant to U.S.S.G. § 2T1.1 and Parts A, B and C of Chapter 3 is 30. U.S.S.G. § 3D1.3(b).

D. Group Offense Level

16. The offense level for the group is 33.

E. Acceptance of Responsibility

17. Assuming the defendant clearly demonstrates acceptance of responsibility, to the satisfaction of the Government, through his allocution and subsequent conduct prior to the imposition of sentence, a two-level reduction will be warranted, pursuant to U.S.S.G. § 3E1.1(a). Furthermore, assuming the defendant has accepted responsibility as described in the previous sentence, the Government will move at sentencing for an additional one-level reduction, pursuant to U.S.S.G. § 3E1.1(b), because the defendant gave timely notice of his intention to enter a plea of guilty, thereby permitting the Government to avoid preparing for trial and permitting the Court to allocate its resources efficiently.

In accordance with the above, the applicable Guidelines offense level is 30.

II. Criminal History Category

Based upon the information now available to this Office (including representations by the defense), the defendant has no applicable criminal history.

In accordance with the above, the defendant's Criminal History Category is I.

III. Sentencing Range

Based upon the calculations set forth above, the defendant's stipulated Guidelines range is 97 to 121 months' imprisonment (the "Stipulated Guidelines Range"). In addition, after determining the defendant's ability to pay, the Court may impose a fine pursuant to U.S.S.G. § 5E1.2. At Guidelines level 30, the applicable fine range is \$30,000 to \$300,000.

The parties agree that neither a downward nor an upward departure from the Stipulated Guidelines Range set forth above is warranted. Accordingly, neither party will seek any departure or adjustment pursuant to the Guidelines that is not set forth herein. Nor will either party in any way suggest that the Probation Office or the Court consider such a departure or adjustment under the Guidelines.

The parties agree that either party may seek a sentence outside of the Stipulated Guidelines Range based upon the factors to be considered in imposing a sentence pursuant to Title 18, United States Code, Section 3553(a).

Except as provided in any written Proffer Agreements that may have been entered into between this Office and the defendant, nothing in this Agreement limits the right of the parties (i) to present to the Probation Office or the Court any facts relevant to sentencing; (ii) to make any arguments regarding where within the Stipulated Guidelines Range (or such other range as the Court may determine) the defendant should be sentenced and regarding the factors to be considered in imposing a sentence pursuant to Title 18, United States Code, Section 3553(a); (iii) to seek an appropriately adjusted Guidelines range if it is determined based upon new information that the defendant's criminal history category is different from that set forth above; and (iv) to seek an appropriately adjusted Guidelines range or mandatory minimum term of imprisonment if it is subsequently determined that the defendant qualifies as a career offender under U.S.S.G. § 4B1.1. Nothing in this Agreement limits the right of the Government to seek denial of the adjustment for acceptance of responsibility, see U.S.S.G. § 3E1.1, regardless of any stipulation set forth above, if the defendant fails clearly to demonstrate acceptance of responsibility, to the satisfaction of the Government, through his/her allocution and subsequent conduct prior to the imposition of sentence. Similarly, nothing in this Agreement limits the right of the Government to seek an enhancement for obstruction of justice, see U.S.S.G. § 3C1.1, regardless of any stipulation set forth above, should it be determined that the defendant has either (i) engaged in conduct, unknown to the Government at the time of the signing of this Agreement, that constitutes obstruction of justice or (ii) committed another crime after signing this Agreement.

It is understood that pursuant to U.S.S.G. § 6B1.4(d), neither the Probation Office nor the Court is bound by the above Guidelines stipulation, either as to questions of fact or as to

the determination of the proper Guidelines to apply to the facts. In the event that the Probation Office or the Court contemplates any Guidelines adjustments, departures, or calculations different from those stipulated to above, or contemplates any sentence outside of the stipulated Guidelines range, the parties reserve the right to answer any inquiries and to make all appropriate arguments concerning the same.

It is understood that the sentence to be imposed upon the defendant is determined solely by the Court. It is further understood that the Guidelines are not binding on the Court. The defendant acknowledges that his entry of a guilty plea to the charged offenses authorizes the sentencing court to impose any sentence, up to and including the statutory maximum sentence. This Office cannot, and does not, make any promise or representation as to what sentence the defendant will receive. Moreover, it is understood that the defendant will have no right to withdraw his pleas of guilty should the sentence imposed by the Court be outside the Guidelines range set forth above.

It is agreed (i) that the defendant will not file a direct appeal; nor bring a collateral challenge, including but not limited to an application under Title 28, United States Code, Section 2255 and/or Section 2241; nor seek a sentence modification pursuant to Title 18, United States Code, Section 3582(c), of any sentence within or below the Stipulated Guidelines Range of 97 to 121 months' imprisonment; and (ii) that the Government will not appeal any sentence within or above the Stipulated Guidelines Range. This provision is binding on the parties even if the Court employs a Guidelines analysis different from that stipulated to herein. Furthermore, it is agreed that any appeal as to the defendant's sentence that is not foreclosed by this provision will be limited to that portion of the sentencing calculation that is inconsistent with (or not addressed by) the above stipulation. The parties agree that this waiver applies regardless of whether the term of imprisonment is imposed to run consecutively to or concurrently with the undischarged portion of any other sentence of imprisonment that has been imposed on the defendant at the time of sentencing in this case. The defendant further agrees not to appeal any term of supervised release that is less than or equal to the statutory maximum. [The defendant also agrees not to appeal any fine that is less than or equal to \$300,000, and the Government agrees not to appeal any fine that is greater than or equal to \$30,000. Notwithstanding the foregoing, nothing in this paragraph shall be construed to be a waiver of whatever rights the defendant may have to assert claims of ineffective

assistance of counsel, whether on direct appeal, collateral review, or otherwise. Rather, it is expressly agreed that the defendant reserves those rights.

The defendant hereby acknowledges that he has accepted this Agreement and decided to plead guilty because he is in fact guilty. By entering this plea of guilty, the defendant waives any and all right to withdraw his plea or to attack his conviction, either on direct appeal or collaterally, on the ground that the Government has failed to produce any discovery material, *Jencks* Act material, exculpatory material pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), other than information establishing the factual innocence of the defendant, or impeachment material pursuant to *Giglio v. United States*, 405 U.S. 150 (1972), that has not already been produced as of the date of the signing of this Agreement.

The defendant recognizes that, if he is not a citizen of the United States, his guilty plea and conviction make it very likely that his deportation from the United States is presumptively mandatory and that, at a minimum, he is at risk of being deported or suffering other adverse immigration consequences. The defendant acknowledges that he has discussed the possible immigration consequences (including deportation) of his guilty plea and conviction with defense counsel. The defendant affirms that he wants to plead guilty regardless of any immigration consequences that may result from the guilty plea and conviction, even if those consequences include deportation from the United States. It is agreed that the defendant will have no right to withdraw his guilty plea based on any actual or perceived adverse immigration consequences (including deportation) resulting from the guilty plea and conviction. It is further agreed that the defendant will not challenge his conviction or sentence on direct appeal, or through litigation under Title 28, United States Code, Section 2255 and/or Section 2241, on the basis of any actual or perceived adverse immigration consequences (including deportation) resulting from his guilty plea and conviction.

It is further agreed that should the convictions following the defendant's pleas of guilty pursuant to this Agreement be vacated for any reason, then any prosecution that is not time-barred by the applicable statute of limitations on the date of the signing of this agreement (including any counts that the Government has agreed to dismiss at sentencing pursuant to this Agreement) may be commenced or reinstated against the defendant, notwithstanding the expiration of the statute of

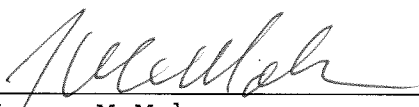
limitations between the signing of this Agreement and the commencement or reinstatement of such prosecution. It is the intent of this Agreement to waive all defenses based on the statute of limitations with respect to any prosecution that is not time-barred on the date that this Agreement is signed.

It is further understood that this Agreement does not bind any federal, state, or local prosecuting authority other than this Office and, to the extent set forth above, the Tax Division, Department of Justice.

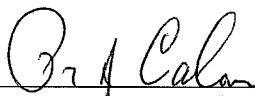
Apart from any written Proffer Agreements that may have been entered into between this Office and defendant, this Agreement supersedes any prior understandings, promises, or conditions between this Office and the defendant. No additional understandings, promises, or conditions have been entered into other than those set forth in this Agreement, and none will be entered into unless in writing and signed by all parties.

Very truly yours,

GEOFFREY S. BERMAN
United States Attorney

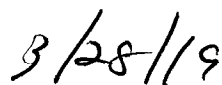
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APPROVED:



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Chief, White Plains Division

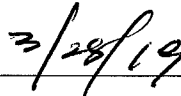
AGREED AND CONSENTED TO:


Keith Borge


DATE

APPROVED:


Lee David Auerbach, Esq.
Attorney for Keith Borge


DATE