

**CONFIDENTIAL**

**Case #19-0123**

**James Kellogg**

April 10, 2020

Lisa Lee  
Acting Gaming Inspector General

Marc P. Mousso  
Investigator

## **Origin of Case**

In October 2019, [REDACTED], [REDACTED], [REDACTED] informed this Office that [REDACTED], [REDACTED] found what appeared to be a Major League Baseball (“MLB”) pool parlay sheet<sup>1</sup> in Commission vehicle number [REDACTED]. Further, the parlay sheet identified the pool participant as James Kellogg, Principal Accountant for Racing. (See 2019 MLB Regular Season Wins Pool document, annexed hereto as Exhibit “1.”)

## **Nature of Allegation**

The MLB parlay sheet recovered in the Commission vehicle suggested that Kellogg may be actively wagering, or at a minimum, engaged in conduct that would appear to be in conflict with his duties or raise suspicion that he is in violation of Public Officers Law Section 74 and Commission policy.

## **Investigative Action**

In furtherance of this investigation, this Office reviewed Commission and Office of Information Technology Services (“ITS”) records, including but not limited to, internet usage reports, emails, and personnel files, and conducted Accurint searches. Additionally, interviews of Racing staff were conducted.

## **Relevant Authority**

### **Racing, Pari-Mutuel Wagering and Breeding Law (“PML”) §101 – Definitions**

PML Section 101(5) defines gaming activity as “the conduct of any form of legalized gaming, including but not limited to, Class III gaming under the Indian Gaming Regulatory Act 25 U.S.C. §2701 et seq., pari-mutuel wagering, both on-track and off-track, bingo and charitable games of chance and the state lottery for education.”

### **Penal Law (“PL”) Article 225.00 – Gambling Offenses**

Article 225 of the PL pertains to those that stand to profit from illegal gaming activity and does not include participants or players. Thus, the mere fact that one participates in an activity that may not be sanctioned by the State is insufficient to deem the activity to be criminal.<sup>2</sup>

### **Public Officers Law (“POL”) §74 – Code of Ethics**

In general, POL Sections 74(3) (b), (c), (d), and (h) prohibit any officer or employee of the State from engaging in any business or transaction which is in substantial conflict with the

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<sup>1</sup> A parlay bet is a single bet on multiple outcomes. In this instance, participants were asked to project season-long win totals for MLB teams.

<sup>2</sup> However, if an individual is engaged in such illegal gaming activity and is also a Commission employee, an examination of applicable conflicts of interest law and/or Commission policies must be undertaken.

proper discharge of ones' duties. This prohibition includes not only actual conflicts, but also perceived conflicts as well. Specifically, subsection 3(h) states that an employee should engage in "a course of conduct which will not raise suspicion among the public" that an employee is likely to have acted in a manner which violates his or her trust.

Relatedly, subsection 3(c) prohibits the disclosure of confidential information. One cannot disclose confidential information acquired in the course of one's official duties to outside entities, and/or engage in such conduct for personal gain.

### PML §107 – Conflicts Prohibited

PML Section 107(3) prohibits any member, officer, official, or employee of the Commission from wagering on any gaming activity conducted within the State.

### Commission Code HR-002 – Code of Ethics for Gaming Commission Employees

This policy establishes a code of ethics which governs the conduct and responsibilities of employees. The guiding principle is that employees are held to the highest standards of conduct and integrity and are expected to perform their duties promptly, courteously, thoughtfully, and free from improper influence or bias. Additionally, employees are expected to exhibit ethical behavior, both on and off the job, and are expected to perform their duties in an impartial manner and avoid any appearance of acting otherwise. This policy also prohibits employees from disclosing confidential information obtained because of one's position and explicitly states "no employee of a State agency shall disclose confidential information acquired by him or her in the course of his or her official duties nor use such information to further his or her personal interests."

### Commission Code INFO-SEC-001 – Information Security

This policy states that

information systems, data, and physical assets may be used for business purposes only, as required by job duties. Communication transmitted through information technology tools is intended for business purposes only; these tools may not be used for personal matters. Commission's management, in coordination with Information Security staff, will determine inappropriate use. Division directors and bureau/office heads will be the authority in responding to violations in this policy.

Furthermore, "access to and use of Commission-authorized computer systems and information assets within those systems must be restricted to valid business use based on job duties." The policy also states that

access to the internet is provided for employees and affiliates for the efficient exchange of information and the completion of assigned responsibilities consistent with the Commission's statutory purposes. Incidental non-business use of the Internet may be permitted if it does not impede the ability of the individual or others to fulfill work-related responsibilities or violate policies.

This privilege may also be revoked at any time. ITS Policy NYS-P14-001 section 4.1 provides examples of unacceptable use.<sup>3</sup>

Commission Code 4F-101 – Wagering Prohibition for Gaming Commission Employees

This policy reiterates the statutory wagering prohibition for employees. As part of the onboarding process, each employee executes an acknowledgement of this prohibition.

**Personnel History**

Kellogg has been employed with the State for the past 34 years, spending the last 22 years with the New York State Racing and Wagering Board (“RWB”) and Commission. Kellogg currently serves as the Principal Accountant for Racing. According to his most recent performance evaluation dated March 4, 2017, Kellogg is primarily responsible for reviewing licensing applications from tracks, Off-Track Betting (“OTB”) Corporations, totalizator operators, and advance deposit wagering companies; performing background checks, lender suitability reviews, and credit analysis; developing audit plans and performing financial reviews; evaluating regulatory rule changes; supervising staff; and resolving disputes stemming from wagers, horse racing results, and licensing matters. [REDACTED]

Personnel records also indicate that on October 16, 2007, Kellogg acknowledged having received a copy of RWB’s Employee Handbook and that he understood its policies and procedures, including but not limited to, ethics and prohibition on gambling. On August 1, 2013, he received a certificate for completing the Joint Commission on Public Ethics (JCOPE)’s mandatory comprehensive ethics training course, in accordance with Public Officers Law Section 94(10)(a).<sup>5</sup> On February 24, 2016, Kellogg attended this Office’s “Corruption Awareness Training.” (See 2007 Receipt, 2013 Certificate, and 2016 Sign-In sheet, annexed hereto as Exhibit “3.”) It should be noted that this Office did not locate a signed attestation that he received the Commission’s policy on the wagering prohibition (Commission Code 4F-101), which should have been provided to all employees following the creation and establishment of the Commission.

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<sup>3</sup> The policy defines occasional and incidental personal use as “occasional and incidental personal use of information technology resources to schedule a lunch date, cancel a sports practice, check their bank accounts or other personal investments, or to communicate with a volunteer charity organization.” Section 4.1 provides guidance on what may be deemed “unacceptable use” of NYS technological equipment while Section 4.2 sets forth “Occasional and Incidental Personal Use.”

<sup>4</sup> [REDACTED]

<sup>5</sup> Although Kellogg should have attended a refresher JCOPE ethics training, as one is required every three years, there was no evidence of such in his personnel file.

## Records Review

### “2019 MLB Regular Season Wins Pool” Sheet

The MLB pool parlay sheet recovered from Commission vehicle number [REDACTED] listed each MLB team with space for players to fill-in the participant’s projected win totals for each team for the 2019 season. The instructions on the sheet advised each participant in the pool to list 10 teams and indicate whether the team is predicted to be “OVER/UNDER,” meaning whether the team will surpass or fall short of their projected wins. The sheet also advised the participant to return the sheet by April 15 along with “20 clams.” Further, participants may track the progress of all entries by visiting “www.mlbpool.org.” The sheet was completed, and the 10 teams identified were as follows:

- |                        |                       |
|------------------------|-----------------------|
| 1) Detroit – Under     | 6) Miami – Under      |
| 2) Milwaukee Over      | 7) Minnesota – Over   |
| 3) Philadelphia – Over | 8) St. Louis – Over   |
| 4) Baltimore – Under   | 9) Cincinnati – Under |
| 5) Toronto – Under     | 10) Houston – Over    |

More importantly, at the bottom of the parlay sheet, the name and contact information section was completed with the participant’s name as “Jim Kellogg” and “[REDACTED]” and “[REDACTED]” as the participant’s telephone number and email address respectively. Both the telephone number and email address belong to Kellogg. Kellogg provided the number to this Office and indicated that it was his personal cell phone number. Further, based upon a review of emails sent to and from Kellogg’s Commission email account, this Office determined that the [REDACTED] email address belongs to Kellogg. (See Sample emails, annexed hereto as Exhibit “4.”)

### Review of Kellogg’s Commission Email Account

As noted above, this Office conducted a review of Kellogg’s Commission email account. There were several emails sent from [REDACTED] to Kellogg’s Commission email, including Boston Red Sox ticket guides, personal vacation reservations, and health care-related documents submitted on behalf of another family member. One such email came from [REDACTED] and lists “James Kellogg” as the customer name, with an email address of [REDACTED] was forwarded to Kellogg’s Commission email.

There were also 2019 emails with PDF attachments from Equibase<sup>6</sup> entitled, “Speed Figure Analysis for Pimlico,” “Speed Figure Analysis for Churchill Downs (May 3),” and “Speed Analysis for Churchill Downs (May 4).” (See Exhibit “4.” Emails with excerpts of PDFs.) Although these emails may arguably be related to Commission business, this Office was made

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<sup>6</sup> Equibase provides “Thoroughbred racetracks of North America with a uniform, industry-owned database of racing information and statistics” and “offers a comprehensive menu of handicapping products, statistical information and video race replays in support of the North American Thoroughbred racing industry.” (See [http://www.equibase.com/about/overview.cfm?utm\\_source=siteindex&utm\\_medium=cpm&utm\\_content=about&utm\\_campaign=about%2Bequibase](http://www.equibase.com/about/overview.cfm?utm_source=siteindex&utm_medium=cpm&utm_content=about&utm_campaign=about%2Bequibase), last accessed Apr. 5, 2020.)

aware during an unrelated investigation that Kellogg traveled to the Breeders Cup that year for vacation. It should be noted that Kellogg's access to the Equibase database is due to his employment with the Commission, and if these analyses were obtained for business purposes, it is unclear why Kellogg would send them to his personal email account. Thus, his conduct may be construed to be in violation of Commission policies, as well as POL Section 74.

[www.mlbpool.org](http://www.mlbpool.org)

The parlay sheet directed players to "www.mlbpool.org" to see players' selections and final payouts. The website claims to be the "Home of THE MLB Totals pool..." and interfaces as a topic and discussion-style platform. A review of the site reveals links at the top of the page for access to the current standings of MLB teams, contestant entries, and blank parlay forms. Under the "Announcements" tab, there are two topics for 2019 entitled, "Pool Returns for 2019" and "Final Pool Information for 2019." Both posts were generated by [REDACTED]. There is no contact information listed on the site for [REDACTED] nor is there any indication where the pool is physically being hosted.

According to posts on the site, it appears that this pool is open to the general public. The website indicates that the pool originated in 2009 and ceased temporarily in 2014. In 2014, the Site Administrator posted "[w]e got it off on the wrong foot this year, not enough bar entries to bring this one together... We'll be back next year, earlier and better!" In another post entitled, "Pool Returns for 2019," the message reads, "[t]he Pool is back. Good luck to everyone playing! Cheers!" In order to participate in the pool, the participant is instructed to submit their picks along with "20 clams" to the site administrator, presumably [REDACTED]. [REDACTED] then uploads the selections to the website. Furthermore, in the "Final Pool Information for 2019" post, it advised that "[t]here are a total of 40 entries this year, for a prize pool total of \$800. 1<sup>st</sup> Place: \$500 2<sup>nd</sup> Place: \$200 3<sup>rd</sup> Place: \$100." Undoubtedly, the reference to "20 clams" on the parlay sheet meant that each participant paid \$20 to enter the pool and stood to win the above noted amounts. None of the posts on the website identified the bar where the parlay sheets were returned.<sup>7</sup> (See Screenshots from website, annexed hereto as Exhibit "5.")

More importantly, the website shows that there is a user by the name of "Jim\_K" whose selection of teams and corresponding over/under exactly matched the selections listed on the parlay sheet. Hence, it is reasonable to draw the conclusion that the "Jim\_K" listed on the site is indeed Kellogg. (See Screenshot of Participants, annexed hereto as Exhibit "6A, 6B, and 6C.")

Given Kellogg's supervisory status and coupled with the fact that the Commission is the State's regulator for gaming activity, including sports books that have partnered with casinos, there may exist the perception that Kellogg has access to confidential or "insider" information. The risk of such an impression, in conjunction with his participation in a sports pool organized by a bar that is open to its patrons/the public, is troubling. Although the possibility that such a conflict actually exists is minimal, the very prospect that such a conflict *may* exist is enough to raise doubts about

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<sup>7</sup> In general, bars and restaurants offer sports pools at their locations in order to generate more business. These establishments typically administer the pool with all the money going back as winnings to the participants. Since the establishment does not profit from this activity, it is not deemed to be in violation of PL Article 225. However, it is customary for the winners to "tip" the bar a portion of their winnings.

the Commission's integrity and could negatively impact the Commission. Hence, even if Kellogg was a mere participant in the MLB pool and nothing else, this conduct may be construed to be a violation of Commission policies and Code of Ethics.

### Vehicle Logs

This Office reviewed the Commission vehicle logbook maintained by the Fleet and Facilities Management Unit and confirmed that Kellogg utilized vehicle [REDACTED] on multiple dates and that the same vehicle was subsequently utilized by [REDACTED], [REDACTED], who recovered the MLB parlay sheet.

### Internet Usage

This Office also reviewed a three-month period of internet usage for Kellogg, namely, from July 29, 2019, through October 28, 2019. These records show that Kellogg visited "www.mlbpools.org" on 11 occasions between September 17, 2019, and September 23, 2019, during the MLB season.

In addition to the www.mlbpools.org site, the report revealed that Kellogg also frequently visited the following sites, which were unrelated to Commission business:

<b>Website Name<sup>8</sup></b>	<b>Number of Times Visited</b>	<b>Category</b>
Mail2Web	301	Web-Hosting
Facebook	184	Social Networking
YouTube	134	Streaming – media
American Funds	87	Stock Advice and Tools
Southwest	80	Travel
JH Investments	74	Stock Advice and Tools
Backstreets	66	Entertainment and Arts
Jackson Lewis	51	Business and Economy

This review also showed that Kellogg accessed the following gaming sites which are unrelated to his primary duties: Derby Lane, a greyhound racing track in Florida; Hollywood Races an online horse racing betting site; and SA Casino, which appears to be related to online gaming sites in South Africa.

Kellogg's access to these sites during business hours on his Commission computer, in conjunction with his known involvement with a sports pool, and the forwarding of analyses from

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<sup>8</sup> Mail2Web is an email retrieval service. This site can be used as a workaround to access personal email services. Facebook and YouTube are social networking and streaming websites. American Funds and JH Investments are personal wealth management services. Southwest is a travel website. Backstreets is a blog and forum dedicated to Bruce Springsteen. Jackson Lewis is a law firm in the Albany, New York region.

Equibase to his personal email, at a minimum, raises concerns that Kellogg is violating the State and Commission's internet use policy, if not also engaging in prohibited and/or unregulated gaming activity.

### **Interviews**

This Office interviewed Racing staff to determine what resources and websites are utilized to conduct their work. In general, staff stated that the Commission's daily clippings are helpful, as is BloodHorse, Daily Racing Form and other similar racing websites, so many of them read the articles. One staff member noted that it would not be unusual for Racing employees to visit other non-racing gaming sites since the Commission is occasionally notified of unregulated sports betting sites, and if appropriate, the Commission may issue "cease and desist" letters to those sites.<sup>9</sup>

#### *James Kellogg*

This Office scheduled an interview with Kellogg and his counsel, [REDACTED]. At his interview, Kellogg asserted his right to decline to answer any questions that may incriminate him, in the absence of immunity being conferred. As such, the interview was terminated, and no statements were obtained from Kellogg.

It should be noted that Kellogg was not advised of the matters to be discussed during his interview. Thus, no inference can be drawn as to what concerns he may have had that led him to assert his privilege against self-incrimination.

### **Findings**

This investigation determined the following:

- 1) On or about October 9, 2019, [REDACTED], [REDACTED], found an MLB parlay sheet under the seat of Commission vehicle [REDACTED];
- 2) Commission vehicle records show that James Kellogg, Principal Accountant for Racing, had used vehicle [REDACTED] before [REDACTED] discovery;
- 3) The MLB parlay sheet recovered in vehicle [REDACTED] clearly identified Kellogg as the participant and listed Kellogg's cell phone number [REDACTED] and his personal email address [REDACTED].

The pool's website "www.mlbpools.org" also identified a user for the 2019 season as "Jim\_K" with the same 10 MLB teams selected as listed on the parlay sheet recovered in vehicle [REDACTED]. Further, the website displays the payout information for the top three players: 1<sup>st</sup> Place: \$500, 2<sup>nd</sup> Place: \$200, and 3<sup>rd</sup> Place: \$100" indicating that the pool was for money;

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<sup>9</sup> This activity, however, is not reflected in Kellogg's Performance Evaluation's tasks and standards, nor a reported job function for Kellogg as it does not involve horse racing.



- 4) The internet usage report for Kellogg revealed that he accessed the “www.mlbpools.org” site on 11 occasions between September 17, 2019, and September 23, 2019;
- 5) The internet usage report showed that Kellogg frequently logged onto sites unrelated to his work, including but not limited to, personal email, travel, financial websites, and gambling. These sites included Facebook, YouTube and music blogs. Kellogg’s access to these sites may be construed to be contrary to State and Commission policies;
- 6) A review of Kellogg’s email account revealed that he sent information from Equibase, a database to which he has access by virtue of his Commission employment, to his personal email account. Given that he forwarded analyses related to horse races at the Breeders Cup, which he attended that year, it is likely that he accessed the database for personal and not business purposes; and
- 7) A review of Kellogg’s Human Resources file contained no attestation regarding the Commission’s 2013 policy on wagering prohibition.

### **Conclusions & Recommendations**

As a result of the above findings, it is recommended that this case be closed as SUBSTANTIATED. This investigation yielded sufficient evidence to support the allegation that the parlay sheet recovered from the Commission’s vehicle belonged to Kellogg. Kellogg’s participation in such a pool, at the very least, presents the appearance of a conflict of interest. Although the pool is not a regulated gaming activity, the Commission is responsible for enforcing regulations pertaining to casinos that have partnerships with entities that are involved in sports wagering. Given Kellogg’s tenure with the Commission, and his position, it would be reasonable for the public to perceive that he may have access to confidential information, which may diminish the public’s confidence in the Commission’s integrity. Kellogg is keenly aware of the rationale behind the Commission’s wagering prohibition, and as such, should refrain from engaging in activity that would undermine the Commission.

This investigation also determined that Kellogg’s internet usage may be construed to be in violation of the State and Commission’s internet usage policies. Kellogg frequently used his assigned work computer to access sites for personal reasons, including travel, entertainment, and investment sites. Further, Kellogg used his subscription to Equibase, a subscription he has access to because of his position, for personal reasons including the possibility of wagering.

Accordingly, the following are recommended:

- 1) The findings as they pertain to Kellogg’s conduct are referred to the Executive Director and/or Human Resources for review and any other action deemed appropriate;
- 2) The Commission should conduct periodic reviews and monitor employee internet usage to ensure compliance. This practice will also serve as a deterrent to employees and limit the potential for abuse of such access;

- 3) All Commission staff should be reminded periodically of the Commission's acceptable use policy as it relates to the internet and email usage;
- 4) All Commission staff should be reminded periodically that access provided to internal and external proprietary databases for business purposes should not be used for personal reasons; and
- 5) The Commission should ensure that all current employees have received, and executed an acknowledgement of such receipt, of requisite policies and procedures, including the 2013 wagering prohibition policy.