No. 15-13359-FF

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ELI RIESEL,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

BRIEF FOR THE APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

Counsel for appellant Eli Riesel certifies the following is a list of the persons and entities who may have an interest in the outcome of this case:

Airan-Pace, Rashmi

Anderson, R.J.

Arteaga-Gomez, Rossana

Benjamin, James S.

Bergman, Richard

Brannon, Hon. Dave Lee

Brantley, Lakiesha

Capone, Joseph A.

Cossio, Joaquin

Davis, Michael T.

Doakes, Chantel

Ferrer, Wifredo A.

Fleischman, Sidney Z.

Gayles, Darrin P. (U.S. District Judge)

Gross, Yeshaya

Hagberg, Robert

Hunt, Patrick M. (U.S. Magistrate Judge)

Kuehne, Benedict P.

Lewin, Nathan

Lester, Mark

Lockwood, Tim

Markus, David O.

Nelson-Caviglia, Regan

O'Sullivan, John J. (U.S. Magistrate Judge)

Otazo-Reyes, Alicia M. (U.S. Magistrate Judge)

Petrillo, Guy

Riesel, Eli

Rodriguez, Ernesto

Seltzer, Barry S. (U.S. Magistrate Judge)

Smachetti, Emily M.

Squitero, Wendy

Srebnick, Howard M.

Tarver, Paige

Tezanos, Florencio L.

Tobel, Jordana Ende

Zloch, William J. (U.S. District Judge0

Bank of America

Federal National Mortgage

HSBC Mortgage

JP Morgan Chase

STATEMENT REGARDING ORAL ARGUMENT

Appellant requests oral argument. This appeal presents difficult legal and factual issues.

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JURISDICTIONAL STATEMENT

This is an appeal from a final judgment of the United States District Court for the Southern District of Florida in a criminal case following a jury trial. The jury returned its verdict on April 16, 2015, and the appellant was sentenced on July 17, 2015. Doc. 212, 276. A timely Notice of Appeal was filed on July 27, 2015. Doc. 278. The District Court had jurisdiction pursuant to 18 U.S.C. § 3231. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

QUESTIONS PRESENTED

An experienced and credentialed real-estate attorney became the only lawyer for a Florida company that sold condominium units by representing to the company's owners that a "trust structure" she devised could lawfully provide financial incentives to individual buyers of the units such as "cash-to-close" and cash rebates after closing. She then took complete control of all closings, including the drafting and submission of loan applications to banks. When one bank rejected an application with a settlement sheet that specified a "beneficial interest disbursement" to a buyer, she removed that entry from all subsequent loan documents and, while continuing to draft and submit loan applications, she ceased preparing trust agreements. She testified that she took these steps after a telephone conversation with the appellant, who managed the company's finances and authorized payments pursuant to the lawyer's "trust scenario." Neither during the alleged conversation nor at any time thereafter did the lawyer suggest to the appellant that these changes were unlawful and could subject them to criminal prosecution. The lawyer pleaded guilty to bank fraud and testified as a government witness at appellant's trial. The jury found the appellant not guilty on 25 substantive bank-fraud counts and guilty only of conspiracy to commit bank fraud.

The Questions Presented are:

1. Whether the appellant was entitled to a Rule 29 judgment of acquittal because there was insufficient evidence to reject his defense that he had relied in good faith on advice of counsel.

2. Whether the trial judge committed reversible error in (a) allowing the prosecution to present testimony of the appellant's failure to honor a settlement he negotiated with buyers of the condominium units, and (b) excluding an opinion letter that the lawyer wrote to other counsel in her efforts to market her "trust structure" to other lawyers.

STATEMENT

The Appellant Is Currently Incarcerated.

1. The Berkowitz Companies Express Interest in Kensington Units

Abbey Berkowitz is a commercial real-estate, hotel, and shopping center owner headquartered in Miami Beach. In 2006 and 2007, through various corporate entities that have been called "the Berkowitz Companies" or "the Abbey Berkowitz Group," Mr. Berkowitz was principally in the condo conversion business and had a project he was pursuing in Tampa. The Berkowitz Companies'

salaried employees in 2007 were Yeshaya Gross, Marty Furst, and appellant Eli Riesel, who was then 26 years old. Tr. 4/8, Doc. 303, pp. 137-140, 182. [1]

In October 2007 Berkowitz became interested in purchasing and selling units in a building in West Palm Beach known as "the Kensington." He needed $600,000 to purchase the right to sell 103 units at the Kensington. Berkowitz ultimately received a loan in that amount [2] from an entity called Adken Investments that was composed of individuals named Ernesto Rodriguez, Jose Aller, and Yoel Damas. Tr. 4/8, Doc. 303, pp. 9-12.

2. Rashmi Airan-Pace Markets Her "Trust Structure"

Rashmi Airan-Pace is a Columbia Law School graduate who, after graduation, worked in a large California law firm, a small Miami litigation boutique, and in the Miami-Dade County Attorney's Office. She joined another lawyer in 2004 in a real-estate practice. Tr. 4/9, Doc. 304, pp. 187-189. In 2007 Airan-Pace met Paige Tarver, a former colleague at the County Attorney's Office, who subsequently called her and asked whether Airan-Pace was "familiar with trust agreements." When Airan-Pace replied that she was, Tarver asked her

[1] "Tr. _/_, Doc. __. p. __" refers to the transcript of the trial, the date of the transcript, the Document Number on the Docket Sheet, and the page number of the transcript.

[2] Rashmi Airan-Pace testified on cross-examination that the actual amount of the loan was $800,000. Tr. 4/14, Doc. 306, p. 194.

whether she would meet "with a developer who was interested in meeting an attorney or closing agent that knew how to use trust agreements for disbursements on a HUD." *Id.* at pp. 200-201.

Airan-Pace then met with Marty Furst, Ms. Tarver, and Mr. Riesel. According to her testimony, Mr. Riesel discussed closings on the projects in Tampa and "problems with getting the settlement statements approved," referring specifically to the fact that "Wells Fargo had started to deny these HUDS." Airan-Pace testified that Mr. Riesel had discussed "buyer incentives" used in Tampa including, according to her testimony, "guaranteed rents, using lease agreements and other types of agreements, as well as he discussed cash-to-close help and moneys being sent directly back to the buyers." Tr. 4/13, Doc. 305, pp. 200-203. [3]

Although she had never used trust agreements, Airan-Pace testified that she told Mr. Riesel "that I had used trust agreements, that I am definitely familiar with the actual documents" and that she would talk with her underwriter "to see how it should be disclosed and what it should show on the settlement statement so it would be satisfactory to them." After leaving the meeting to call the underwriters,

[3] Ms. Tarver testified as a defense witness that before the meeting Tarver received from Airan-Pace "a document regarding a structure for what's called the trust scenario," and at the meeting "Rashmi gave her presentation." Tarver testified that Airan-Pace "discussed how to use the trust scenario which she considered to be proprietary." She identified Defendant's Exhibit 16 as a description of Airan-Pace's proposal. Tr. 4/15, Doc. 307, pp. 87-96.

she returned and reported to Mr. Riesel the "actual process" the underwriters had told her to perform and "that we would get the settlement statements approved and that the underwriter would feel comfortable in this manner of getting third-party disbursements and showing them on the settlement statement." Tr. 4/13, Doc. 305, pp. 204-206.

Mr. Riesel then took her into Mr. Berkowitz's office where, according to Airan-Pace's testimony, they discussed the buyer incentives – "all three, guaranteed rents, cash-to-close, as well as moneys being paid back to the buyers." Tr. 4/13, Doc. 305, p. 208. Mr. Berkowitz said that he wanted to move the transactions forward and indicated that Mr. Riesel was to be Airan-Pace's principal contact. Mr. Riesel then told Airan-Pace that Jordana Tobel and Yoel Damas were to be the real-estate brokers for the closings and sent her, on October 15, 2007, a "master lease program" and on October 23, 2007, a copy of the "Declaration of Trust" that was being used in Tampa. Tr. 4/13, Doc. 305, pp. 209-216. Airan-Pace described her trust scenario in a detailed memorandum that she e-mailed to Yoel Damas, with a copy to Mr. Riesel. Gov't Ex. 257; Tr. 4/13, Doc. 305, pp. 218-225.

3. Airan-Pace Becomes Kensington's Lawyer

After the meeting, Airan-Pace called Tarver to tell her, "I got the job." Tr. 4/15, Doc. 307, p. 97. About one month later, Airan-Pace attended a meeting at which the contract to purchase the Kensington units was discussed. As an attorney, Airan-Pace then created Kensington Trust, LLC, as the corporate entity that would sell the Kensington units, and she became its registered agent. Tr. 4/13, Doc. 305, pp. 229-233. The "managing members" of Kensington, LLC, were designated as Yoel Damas, Abbey Berkowitz, and Eli Riesel. *Id.* The sales contract between Carmelken (the owner of the Kensington units) and Kensington, LLC, was reviewed by Airan-Pace as Kensington's attorney. Tr. 4/13, Doc. 305, p. 235; Tr. 4/14, Doc. 306, pp. 99-103.

Airan-Pace then acted as Kensington's lawyer in generating the legal documents for the $600,000 loan from Adken to Kensington and in concluding the agreement by which Kensington purchased the 103 units from Carmelken (Tr. 4/13, Doc. 305, p. 229-230, 235-236; Tr. 4/14, Doc. 306, pp. 118-125). In April 2008, while the Kensington units were being marketed, Airan-Pace was interviewed by the media and described herself as the attorney for Kensington. Tr. 4/14, Doc. 306, pp. 198-201.

4. Airan-Pace Manages All Closings for Kensington

Once individual buyers were found for the Kensington units, Airan-Pace had exclusive control over the closings and was remunerated for her services as "closing agent." No other person handled the closings for the Kensington transactions. Tr. 4/8, Doc. 303, p. 16; Tr. 4/14, Doc. 306, p. 209. Airan-Pace created and maintained all the closing files. Tr. 4/14, Doc. 306, p. 19. She prepared a general power of attorney under which she signed for Mr. Riesel whenever his signature was needed on a document. Gov't Exs. 5F, 27F, 29F, Tr. 4/9, Doc. 304, pp. 148-150. Airan-Pace testified that copies of the HUD-1 forms were always sent for advance review to Mr. Riesel's office, but acknowledged that approval may have been given by Donya Litowitz, who worked in Mr. Riesel's office rather than by Mr. Riesel personally. Tr. 4/14, Doc. 306, pp. 46-50.

The trust "structure" arranged by Airan-Pace called for Kensington to provide the "buyer incentives" by first transferring funds to an entity called Arbors Management Guarantee, LLC ("Arbors"), which had been created by Yeshaya Gross to oversee the rental guarantee program at Kensington. Tr. 4/8, Doc. 303, p. 143. Arbors would then wire funds to a company formed by Ernesto Rodriguez and Jose Aller, called "JAER" after the initials of their names. JAER would purchase a cashier's check in the buyer's name and give the buyer the check. Tr.

4/8, Doc. 303, p. 15. The funds given to the buyer were shown on the settlement statement forms as "beneficial interest disbursement." Tr. 4/14, Doc. 306, p. 227. Airan-Pace explained this term as "a disbursement to the trustee for the benefit of the third-party beneficiary of a trust agreement." Tr. 4/14, Doc., 306, p. 24.

Evidence was introduced that Mr. Riesel calculated the amounts due to the buyers and to the "trustees" for each closing and instructed Yeshaya Gross to make the payments according to these calculations. Gross complied with Mr. Riesel's instructions. Tr. 4/8, Doc. 303, pp. 147-173.

5. Airan-Pace Drops the "Beneficial Interest Disbursement"

Airan-Pace testified that the first three Kensington closings followed her trust structure with contemporaneous declarations of trust that she prepared. Tr. 4/14, Doc. 306, p. 205. She prepared HUD-1 forms that listed "beneficial interest disbursements" for these three closings. Gov't Exhibits 2F, 4F, 27G. When Wells Fargo rejected a loan that indicated a "beneficial interest disbursement," she re-submitted the forms after she "crossed out the beneficial interest disbursement on this page." Tr. 4/14, Doc. 306, p.31. She testified that she took this step after a telephone conversation with Mr. Riesel "where he stated that Wells Fargo was not approving this loan because of the trust, and then he asked me if I could just take off the beneficial interests disbursements from all settlement statement for

Kensington and disburse all the funds directly to Kensington Trust, LLC." Tr. 4/14, Doc. 306, p. 31. When asked by the prosecutor what she did thereafter "going forward," she replied that she eliminated the "trust" payment and "[a]ll of the funds after the payoff would go to Kensington Trust, LLC." The next question was, "Who asked you to do that?" and she replied, "Eli." Tr. 4/14, Doc. 306, pp. 31-32. Airan-Pace continued thereafter to draft and submit loan-application documents to banks under her revised procedures.

Airan-Pace testified again regarding the alleged conversation with Mr. Riesel as follows: "He called me, as I had explained, and he indicated that Wells was having an issue with the trust disbursement on the settlement statement, he didn't think they would get approved. So he asked me to take this disbursement off the settlement statements and we discussed we would remove them going forward." Tr. 4/14, Doc. 306, p. 37. She also testified, "[W]hen Eli asked me to take the trust off the settlement statement, then I also stopped preparing and creating the trust agreements." Tr. 4/14, Doc. 306, p. 56. She did not, however, stop drafting and submitting loan applications for Kensington or handling all aspects of closings on Kensington units.

Airan-Pace did not testify that she provided any legal opinion to Mr. Riesel during their alleged telephone conversation or that, at any time thereafter, she told

Mr. Riesel or suggested in any manner that removing the reference to "beneficial interest disbursement" from the HUD-1 and settlement statement forms disrupted her "trust scenario" and could, if discovered, subject them to criminal prosecution.

6. Airan-Pace Explains Her Trust Structure to Freddie Mac

On September 24, 2008 – while Kensington units were still being sold – Airan-Pace was visited by agents of the Federal Home Loan Mortgage Corporation ("Freddie Mac"). They interviewed her regarding the trust structure being used in both Tampa and Kensington. She explained the trust structure to them. Airan-Pace then called Mr. Riesel who, according to her testimony, said "it wasn't something to get worried about and he would take care of it." Tr. 4/14, Doc. 306, pp. 54-55, 212-216. When asked what she and Mr. Riesel talked about with regard to Kensington, Airan-Pace testified, "He stated that the trust agreements needed to get put in the files and make sure that they were completed." *Id.* at 56. Attorney Airan-Pace – the lawyer for Kensington on all matters – again did not say or suggest to Mr. Riesel that their conduct in not having completed contemporaneous trust agreements was unlawful and could subject them to criminal prosecution.

7. The FBI Visits Airan-Pace; She Lies and Destroys Documents

FBI Special Agents came to visit Airan-Pace in her office on April 28, 2011. In the FBI interview, Airan-Pace described and defended her "trust structure." She

acknowledged in her testimony that she lied to the FBI in the interview and that, in response to a grand jury subpoena served on her she destroyed documents. Tr. 4/14, Doc. 306, pp. 65-69, 225-226, 233-234, 237-238.

Airan-Pace also acknowledged in her testimony that after the visit from the FBI she fabricated a false document "to make it seem like a memorandum came from Eli Riesel . . . advising [her] that they would no longer pay incentives to the buyer and directing [her] to no longer show the beneficial interest disbursement on the HUDs for Kensington." Tr. 4/14, Doc. 306, pp. 235-237. The fabricated document, which Airan-Pace gave to her lawyer but which was not submitted to the government, was designed as "instructions" to the lawyer on "how to handle" the beneficial interest disbursement. *Id.* at 235-236.

8. Airan-Pace and Mr. Riesel Are Indicted

On April 10, 2014, a 37-count indictment was returned against four defendants alleging that banks were defrauded by Kensington's concealment of incentives provided to buyers of condominium units. Doc. 3. The first 24 counts charged Airan-Pace, Mr. Riesel, Jordana Ende Tobel, and Florencio Luis Tezanos with conspiracy to commit bank fraud (18 U.S.C. § 1349) and with 23 counts of substantive bank fraud (18 U.S.C. § 1344(1) and (2)).[4] The 23 bank-fraud counts

[4] No Count 11 is alleged in the original indictment.

alleged that fraud had been committed by Airan-Pace, Mr. Riesel, and Tobel in closings between December 27, 2007, and September 25, 2008. [5]

A Superseding Indictment that added two substantive bank fraud counts and corrected the omission of Count 11 was returned on August 7, 2014. Doc. 96.

9. Airan-Pace and Tobel Plead Guilty and Testify Against Mr. Riesel

Airan-Pace pleaded guilty on December 17, 2014, to a Section 371 conspiracy (18 U.S.C. § 371) which carries a maximum 5-year prison sentence. Doc. 132. The conspiracy count in the Superseding Indictment (18 U.S.C. § 1349), which was dismissed pursuant to the plea agreement, carried a maximum 30-year prison sentence. The plea agreement provided that Airan-Pace would testify as a prosecution witness in Mr. Riesel's trial. She acknowledged that had she not entered into a plea agreement under which she was to testify against Mr. Riesel, she was facing a possible maximum sentence of 30 years' imprisonment. Tr. 4/14, Doc. 306, p. 76.

Jordana Tobel pleaded guilty to conspiracy on March 19, 2015. Doc. 173; Tr. 4/9, Doc. 304, pp. 64-65. She testified at Mr. Riesel's trial that he had authorized various payments and other incentives from Kensington to buyers of

[5] Florenzo Luis Tezanos, a Wells Fargo employee, was charged in Counts 26-37 with violations of 18 U.S.C. § 215 for allegedly having received corrupt payments of between $2000 and $5000. Neither Airan-Pace nor Mr. Riesel was charged in these Counts.

condominium units. Tr. 4/9, Doc. 304, pp. 91-135. She did not testify that Mr. Riesel had made any statement to her indicating that he thought at any time during the sale of Kensington condominium units that the HUD-1 or settlement statement forms being drafted and submitted by Airan-Pace pursuant to her "trust scenario" were unlawful or could subject them to criminal prosecution. On cross-examination she testified that Airan-Pace had told her that "the trust was actually being disclosed to the banks" and "that the disbursements were happening after closing" and did not, therefore, "need to be disclosed to the banks." Tr. 4/9, Doc. 304, p. 171.

10. Evidentiary Trial Rulings Prejudice the Defense

Joaquin Cossio was a realtor and mortgage broker who solicited potential buyers for Kensington units. Cossio pleaded guilty to a Section 371 conspiracy and, pursuant to a plea agreement, testified as a prosecution witness. The prosecutor described Cossio's anticipated testimony as follows: "The witness is going to testify to the number of borrowers that he brought in, the buyers weren't given the rental guarantees. They began to complain and that caused Mr. Cossio to raise the issue with Mr. Riesel who eventually began to try to negotiate a settlement in order to pay off each of the buyers." Tr. 4/9, Doc. 304, p. 8. Defense counsel objected to testimony "of what happened after the fraud with respect to

Mr. Riesel's negotiations with the buyers and things that he did after the fraud." Tr. 4/9, Doc. 304, p. 8. The District Court overruled the defense objection and permitted Cossio to testify regarding the mortgage-guarantee negotiations with Mr. Riesel. Cossio's testimony was that Mr. Riesel made an oral agreement to settle the mortgage-guarantee claim with the buyers for $216,000, but that after making one payment of $72,000 (one-third of the total on which they had agreed), Mr. Riesel defaulted in paying the rest of the amount that had been agreed. Tr. 4/9, Doc. 304, pp. 28-30.

Prosecution witness Jordana Ende Tobel testified during cross-examination that she asked Airan-Pace for a written legal opinion describing her "trust structure." Defense counsel moved to admit Airan-Pace's opinion letter to Tobel, but the prosecution objected on the ground that "this document has a high potential to confuse and mislead the jury." Tr. 4/13, Doc. 305, p. 157. The District Judge sustained the prosecution's objection because the opinion letter was written to Ms. Tobel (who was testifying) and not to Mr. Riesel. The District Judge also refused to admit the letter with a limiting instruction to the jury. *Id.* at 157-159.

During Airan-Pace's cross-examination, defense counsel again offered into evidence the written legal opinion Airan-Pace had sent to Tobel. The District Judge

sustained the prosecutor's objection and the document was not admitted. Tr. 4/14, Doc. 306, pp. 128-131.

11.The Jury Returns a Guilty Verdict on Only the Conspiracy Count

On April 16, 2014, the jury rendered a verdict finding Mr. Riesel guilty of the conspiracy to commit bank fraud alleged in Count 1 and not guilty of bank fraud alleged in Counts 2 to 26. His release on a personal surety bond was continued with the modification that he could travel only in the Southern District of Florida. Tr. 4/16, Doc. 308, pp. 78-79.

12. Mr. Riesel Is Sentenced, and Bail Pending Appeal Is Denied

On July 17, 2015, Mr. Riesel was sentenced to imprisonment for 36 months followed by three years of supervised release. Restitution of $12,500,000 was ordered. He was directed to self-surrender on October 7, 2015. Doc. 276.

On September 21, 2015, Mr. Riesel moved for release on bond pending appeal. Doc. 311. The prosecution filed an opposition to the motion in which it contended that the potential appellate issues were not sufficiently substantial to warrant release under 18 U.S.C. § 3143(b). The prosecution did not assert that there was any risk whatever that Mr. Riesel would flee or pose a danger to the community. On October 2, 2015, the motion for release pending appeal was denied because the District Judge said that he "cannot find by clear and convincing

evidence that the defendant is not likely to flee or pose a danger to the community." He added, "[t]here is a significant difference between a voluntary surrender for a short, definite period of time and the indefinite time period for appeals." He also found "that there is no substantial question of law or fact which is likely to result in reversal of the defendant's conviction and sentence on appeal." Doc. 316.

Mr. Riesel moved on October 4, 2015, for a brief stay of his surrender so that he could appeal to this Court from the District Court's order denying bail pending appeal. Doc. 318. The motion stated that this request was consistent with the District Court's denial of the earlier motion because it was "for only 'a short, definite period of time.'" The prosecution opposed the short stay of surrender requested by the motion (Doc. 319), and on October 6, 2015, the District Court denied the requested stay. Doc. 321. Mr. Riesel is currently incarcerated and serving his sentence.

INTRODUCTION

The jury had many reasons to disbelieve the testimony of attorney Airan-Pace that she had a telephone conversation with her client, Mr. Riesel, in which he said that she should drop the reference to "beneficial interest disbursement" from future settlement sheets in order to obtain approval of future loans by the banks.

The jury could also, for these same reasons, have rejected Airan-Pace's testimony that Mr. Riesel knew, before Airan-Pace was visited by Freddie Mac investigators, that she had stopped preparing trust agreements. The reasons for disbelieving Airan-Pace's testimony include the following:

(a) Airan-Pace gave testimony incriminating Mr. Riesel only after striking a plea bargain with the prosecutor in which she agreed to testify against Mr. Riesel in exchange for a reduction in her maximum sentence from 30 years' imprisonment to 5 years.

(b) Airan-Pace acknowledged that she had, after the FBI began an investigation, fabricated a false document so as to shift the blame for concealment of the "beneficial interest disbursement" from herself to Mr. Riesel.

(c) Airan-Pace admitted having lied repeatedly to federal investigators and to the FBI and destroying subpoenaed documents.

(d) Even during interrogations in 2008 and 2011 by the federal Investigators, Airan-Pace tried to justify the payments that were made by Kensington to buyers through two intermediaries as lawful "trust" proceeds under the "scenario" she had devised and persuasively marketed to Messrs. Berkowitz and Riesel.

The evidence provided a firm basis for concluding that Airan-Pace's testimony regarding incriminatory conversations with Mr. Riesel was a lie, just as was the document she fabricated and gave to her lawyer in order to have investigators believe that it was Mr. Riesel, rather than she – as Kensington's lawyer in ***all*** matters – who decided that the HUD-1 documents and settlement sheets should be altered so that banks would approve future loans. The trial testimony would have supported a finding that Airan-Pace acted in her own interest – to preserve the highly profitable "job" she had secured after a meeting with Messrs. Berkowitz and Riesel – without consulting Mr. Riesel. The jury could justifiably have concluded that Airan-Pace unilaterally, without notifying anyone else, modified entries on the settlement sheets and in other loan documentation that she prepared.

Attorney Paige Tarver, who testified as a defense witness, noticed that the "beneficial interest disbursement" had been removed from the HUD documents, and she asked Airan-Pace why that had been done. Airan-Pace replied that "***she*** had figured out another way to comply with the requirements." Tr. 4/15, Doc. 307, p. 104 (emphasis added). Airan-Pace did not suggest to Ms. Tarver that Mr. Riesel played any role in this decision. Ms. Tarver testified that Airan-Price had told her that "her office disclosed to the lending institutions the existence of the trust." *Id.*

at 105. When Attorney Tarver disagreed with Airan-Pace "over whether or not it was appropriate," Airan-Pace "explained to me that ***she*** had resolved it." *Id.* (emphasis added). There was no suggestion by Airan-Pace in that conversation that Mr. Riesel participated in any way in that decision. The trial testimony supports the conclusion that Mr. Riesel thought throughout the time that Kensington units were being sold that Airan-Pace was continuing the "trust structure" that she had devised as a lawful technique for providing buyer incentives in the sale of Kensington units.

This is, we submit, why the jury found Mr. Riesel not guilty of the 25 substantive counts in the Superseding Indictment. But on this appeal we are confronted with the jury's verdict of guilty on Count 1, which charged a conspiracy to commit bank fraud. We recognize that this Court's standard in determining whether the evidence was sufficient to support an appellant's guilt is to weigh the evidence "in the light most favorable to the government and draw all reasonable inferences ***and make all credibility determinations*** in support of the jury's verdict." *United States v. Odoni*, 782 F.3d 1226, 1232 (11th Cir. 2015), quoting *United States v. Thomas*, 987 F.2d 697, 701 (11th Cir. 1993) (emphasis added). Consequently, for purposes of this appeal, we must assume that the jury believed Airan-Pace's testimony. Nonetheless, for the reasons that follow, the

evidence was insufficient to support a verdict that Mr. Riesel was guilty of conspiracy to commit bank fraud, and he should have received a verdict of acquittal pursuant to Rule 29.

SUMMARY OF ARGUMENT

(1) The jury's verdict regarding Mr. Riesel was demonstrably inconsistent. The jury found Mr. Riesel not guilty on 25 counts alleging that he and Airan-Pace had defrauded the banks by concealing buyer incentives, but found him guilty of conspiring with her to do so. This Court observed in *United States v. Brito*, 721 F.2d 743, 749-750 (11th Cir. 1983), that if a jury renders "inconsistent verdicts in conspiracy cases" such verdicts "can be analytically troubling" so that "when such verdicts occur this Court should give particular attention to its review of the sufficiency of the evidence." The jury's verdict in this case is "analytically troubling." [6] Hence this Court must review the trial evidence with particular care. See also *United States v. Caro*, 569 F.2d 411, 418 (5th Cir. 1978).

Airan-Pace was Kensington's attorney for ***all*** purposes and Mr. Riesel relied on her advice for any step he took that had legal consequences. She was authorized by him under a power of attorney to sign his name to documents that were needed

[6] The prosecution acknowledged the troubling nature of this inconsistent verdict and said in a pleading in the District Court that "[t]he most likely explanation for the jury's verdicts on Counts 2-26 is that they misunderstood the law of coconspirator liability." United States' Response in Opposition to Defendant Riesel's Motion For Release Pending Appeal, Doc. 313, p. 6.

for sale of the Kensington units. According to her trial testimony, however, he was ***never*** told by her that the "trust structure" used to provide incentives to buyers was legally deficient in any way, either before or after the incident with Wells Fargo that resulted in changes in loan documents submitted to the banks.

Because of the legal standard governing review of the denial of motions under Rule 29, we cannot, at this juncture, contest Airan-Pace's testimony that, after Wells Fargo had rejected a loan application indicating a "beneficial interest disbursement," Mr. Riesel said in a telephone conversation with Airan-Pace that she should drop this item from future settlement statements. But Airan-Pace – whose legal advice was, for Mr. Riesel, the final word on all legal issues – had previously assured him that under her aegis, utilizing her "trust structure," the documents submitted to banks were proper and lawful. Her own trial testimony acknowledged that she failed to disclose to Mr. Riesel the legal consequences that she knew would result from the change in the HUD-1 forms and the settlement statements and from the discontinuance of written trust agreements – *i.e.*, that such changes would nullify her "trust scenario" and would be deemed criminal fraud on the banks.

A 26-year-old layman with no legal training who had been advised by his experienced lawyer that incentives, including "cash-to-close" payments to buyers,

were legal if arranged circuitously through Airan-Pace's "trust scenario" had no reason to know, without being so advised by his lawyer, that the lawyer's modification of complex bank application forms could have such cataclysmic ramifications. In the absence of a specific warning from his lawyer that there were serious legal consequences to the alteration of documentation that she had been drafting for Kensington and had submitted for the first three loan applications, Mr. Riesel did, in good faith, believe that his conduct was lawful pursuant to Airan-Pace's "trust scenario."

(2) The trial judge erred when, during trial, (a) he permitted the prosecution to introduce evidence regarding Mr. Riesel's default in settling protests by Kensington buyers who complained that buyer-incentive mortgage guarantees had not been paid, and (b) he excluded exhibits offered during Tobel's and Airan-Pace's cross-examinations to demonstrate Airan-Pace's efforts to market her "trust scenario" to other lawyers. It was undisputed that mortgage-guarantee incentives were not provided. Mr. Riesel's role in 2009 in attempting to settle a dispute with the buyers had only remote relevance to the alleged fraud on the lending banks. But the implication that Mr. Riesel entered dishonestly into a settlement with the buyers surely prejudiced the jury against him. That testimony should have been excluded.

Similarly damaging to Mr. Riesel's defense was the restriction placed on his counsel's effort to demonstrate the aggressiveness with which Airan-Pace pursued the "trust scenario" she devised. Airan-Pace's marketing efforts with other lawyers demonstrated her commitment to the unusual structure that she believed could be used to camouflage buyer incentives. If she was ready to "market" this notion to other counsel, it is not surprising that a 26-year-old layman had no doubt that it was legitimate.

ARGUMENT

I.

SINCE MR. RIESEL WAS NEVER TOLD BY AIRAN-PACE, THE ATTORNEY WHO DRAFTED AND SUBMITTED ALL THE LOAN APPLICATIONS, THAT HER SUBMISSIONS WERE CRIMINALLY FRAUDULENT, HE WAS FOLLOWING ADVICE OF COUNSEL IN DISBURSING KENSINGTON'S FUNDS AND HE LACKED INTENT TO DEFRAUD

A. Mr. Riesel's Defense From the Beginning of the Trial To Its Conclusion Was That He Relied in Good Faith on the Advice of Airan-Pace, Who Was His and Kensington's Sole Lawyer.

Mr. Riesel's trial counsel told the jury in his opening statement that Mr. Riesel's defense was that he "relied . . . on Rashmi Airan-Pace to develop the structure for the sale of these condominium conversions and every step of the way

in these transactions, Rashmi Airan-Pace provided guidance and direction to the company and to Eli Riesel, who relied in good faith on this trained, sophisticated, knowledgeable lawyer who was doing what she was supposed to do, develop the legal mechanism framework for these transactions." Tr. 4/7, Doc. 302, p. 100. Counsel continued: "She had contact with the banks. She made disclosures to the banks. She is the one who interacted with the realtors, the people on the buyer's side, and she put together the documentation required. She made the determination what was necessary to be disclosed and what was not necessary to be disclosed. Eli Riesel made none of these determinations because that wasn't his knowledge, the evidence is going to show, and that wasn't his role. The lawyer was involved in these transactions every step of the way." Tr. 4/7, Doc. 302, p. 102. On this basis, said counsel, Mr. Riesel "accepted her guidance." Tr. 4/7, Doc. 302, p. 104.

The same defense was emphasized in the closing summation to the jury when counsel stated that Mr. Riesel "reache[d] out to a lawyer. Not just a lawyer, a lawyer with experience, with significant involvement, with an expertise in the very kind of complicated market-specific business that he has and searches out and finds a lawyer and informs the lawyer of the business. He seeks advice and counsel from the lawyer about getting into the business and every step of the way is guided by a lawyer who then purports to be and is known as not just a professional, but a

recognized expert in this area of Florida real estate law." Tr. 4/16, Doc. 308, pp. 32-33. Counsel summed up the applicable legal rule for the jury in terms that the District Judge used in his instructions: "Good faith is a complete defense to the charge in the indictment because the Government must prove beyond a reasonable doubt that Eli Riesel acted with the intent to defraud. And evidence that Eli Riesel in good faith followed the advice of counsel is inconsistent with unlawful intent." Tr. 4/16, Doc. 308, p. 36.

Mr. Riesel did not contest the evidence that he managed Kensington's bank account and directed when and to whom money should be paid. In the one-hour interview Mr. Riesel had in November 2008, with Mr. Hagberg, the Freddie Mac investigator, Mr. Riesel did not deny his task in authorizing the disbursement of Kensington funds. He described the buyer incentives that Kensington offered and "expressed some uncertainty about how to handle buyer incentives." Tr. 4/15, Doc, 307, p. 17. He told Freddie Mac that he had sought legal advice on this subject and named Airan-Pace and Paige Tarver as the lawyers who were consulted by Kensington. *Id.* at 17-19. The Freddie Mac investigator testified on cross-examination, "It was our understanding that here in – actually, throughout the State of Florida there were multiple incentives being offered to purchasers of condominium units." Tr. 4/15, Doc. 307, p. 19.

B. If a Jury Finds an Accused Not Guilty of Substantive Offenses and Guilty Only of Conspiracy, This Court Must Examine the Evidence With "Particular Attention."

Circuit Judge Goldberg of the Court of Appeals for the Fifth Circuit observed in his opinion for a unanimous court in *United States v. Caro*, 569 F.2d 411, 418 (5th Cir. 1978), that if a jury acquits a defendant of substantive offenses and finds him guilty only of conspiracy "such a result should engage our judicial skepticism" and that "[a] critical analysis of the facts is required when such a contrariety of results does appear." This Court discussed that standard in *United States v. Brito*, 721 F.2d 743, 749-750 (11th Cir. 1983), noting that "inconsistent verdicts in conspiracy cases can be analytically troubling" and that when they occur, "this Court should give particular attention to its review of the sufficiency of the evidence."

C. Since Conspiracy To Commit Bank Fraud Does Not Require Allegation or Proof of an Overt Act, Specific Evidence of an Accused's Criminal Conduct Is Required To Sustain Such a Conviction.

The jury found Mr. Riesel guilty of violating 18 U.S.C. § 1349, a law enacted in 2002 that prohibits conspiracies to commit bank fraud but does not require the commission of an overt act as an essential element of the offense.

Compare *Whitfield v. United States*, 543 U.S. 209 (2005); *United States v. Shabani*, 513 U.S. 10 (1994). See, *e.g.*, *United States v. Roy*, 783 F.3d 418 (2d Cir. 2015); *United States v. Chinasa*, 789 F. Supp. 2d 691, 695 (E.D. Va. 2011). The Superseding Indictment on which Mr. Riesel was tried did not allege in its conspiracy count that any overt act had been committed by Mr. Riesel or by any conspirator.

Hence the jury was not instructed that it could only find Mr. Riesel guilty of conspiracy if he or a co-conspirator had committed an act in furtherance of the conspiracy. One cannot tell from the jury's verdict whether it believed that ***any*** conspirator had committed ***any*** overt act. This gap increases the likelihood that the jury returned a verdict of guilty against an innocent accused.

In *United States v. Corley*, 824 F.2d 931, 936-937 (11th Cir. 1987), this Court found that in a conspiracy case brought under 18 U.S.C. § 371 (which requires allegation and proof of an overt act), "the overt acts excluded by the district court are the only evidence of [the defendant's] involvement in a conspiracy." In the present case the prosecution did not charge a Section 371 conspiracy; it charged only that Mr. Riesel's conduct violated Section 1349 so that it did not have to allege or prove an overt act. No overt acts were alleged and no overt acts were necessarily found by the jury in its verdict. The jury's guilty verdict

on the conspiracy count cannot, therefore, be sustained as resting on any finding of an overt act.

D. Although the Correct Standard of Review Requires This Court To Accept the Trial Testimony of Airan-Pace, It Should Do So With "Judicial Skepticism" and With "Particular Attention."

We recognize that this Court is not authorized under the standard for review of denials of Rule 29 motions by criminal defendants to disbelieve the testimony of a prosecution witness. This Court declared most recently in *United States v. Odoni*, 782 F.3d 1226, 1232 (11th Cir. 2015), that a reviewing court must "make all credibility determinations in support of the jury's verdict." But in applying that standard of review, it should bear in mind the caution expressed in the *Caro* and *Brito* cases and the absence of any allegation or necessary finding that an overt act was committed.

E. Airan-Pace Never Told Mr. Riesel That Her "Trust Scenario" Was Discontinued After Wells Fargo's Denial of a Loan Application and After Her Removal of "Beneficial Loan Disbursements" From the HUD-1 Forms and Settlement Statements.

A careful examination of Airan-Pace's testimony (obtained by the prosecution in exchange for its promise to her of a lenient sentence) establishes

that she never testified that she told Mr. Riesel that she had discontinued her "trust scenario" and that loan documentation was fraudulent if the "beneficial interest disbursements" were not shown on the HUD-1 forms and on the settlement statements. Even if the jury credited Airan-Pace's contrived and disputed testimony that she had a telephone conversation with Mr. Riesel after the denial of a loan application by Wells Fargo, there is absolutely no evidence whatever that Mr. Riesel knew that Airan-Pace thought that her "trust scenario" was terminated and that her conduct was illegal when she continued to draft loan applications and other documentation for banks without explicitly mentioning or hinting at buyer incentives.

Airan-Pace was an attorney representing both Kensington and Mr. Riesel – clients who relied exclusively on her legal judgment. She had informed her clients that it was legal and acceptable to provide buyer incentives (including "cash-to-close") through circuitous payments employing third-party "trustees." Indeed, she had "gotten the job" of being Kensington's lawyer on all matters (and received authority to sign Mr. Riesel's name under a power of attorney) because she had devised this legal method of providing funds to buyers. The clients left the details of the loan documentation to her because she was the clients' lawyer, and they

were entitled to continue to believe that what was being done was lawful until and unless their lawyer explicitly advised them to the contrary.

F. Mr. Riesel Disclosed All Relevant Facts to Airan-Pace and Relied in Good Faith on Her Advice.

This Court has said that the defense of good-faith reliance on counsel "is designed to refute the government's proof that the defendant intended to commit the offense." *United States v. Kottwitz*, 614 F.3d 1241, 1271 (11th Cir. 2010), *modified on rehearing*, 627 F.3d 1383 (11th Cir. 2010), quoting from *United States v. Johnson*, 730 F.2d 683, 688 (11th Cir. 1984). The relevant factual issues in the assertion of this defense were enumerated in this Court's *Kottwitz* opinion as "[w]hether the defendant fully disclosed the relevant facts, failed to disclose all relevant facts, or concealed information from his advisor, and relied in good faith on his advisor." 614 F.3d at 1272, quoted approvingly in *United States v. Vernon*, 723 F.3d 1234, 1269 (11th Cir. 2013). Mr. Riesel indisputably fully disclosed all relevant facts to Airan-Pace, concealed nothing from her, and relied in good faith on her legal judgment.

He was under no obligation to ask and receive a written or articulated verbal judgment from his lawyer. Mr. Riesel could infer from Airan-Pace's failure to tell him that the loan documentation was unlawful after it was modified that she was

continuing with the lawful "trust scenario" that she had aggressively marketed to him and to Abbey Berkowitz, as well as to other lawyers. In *Featsent v. City of Youngstown*, 70 F.3d 900, 906-907 (6th Cir. 1995), the Sixth Circuit observed that ***"[f]rom its attorney's silence***, the City was entitled to the reasonable belief that the Agreement did not violate the law, including the FLSA." (Emphasis added.) Mr. Riesel was entitled to draw a similar inference of lawfulness from his attorney's silence.

II.

THE DISTRICT COURT SHOULD NOT HAVE ALLOWED THE JURY TO HEAR BARELY RELEVANT TESTIMONY THAT DEPICTED MR. RIESEL AS DISHONEST AND SHOULD HAVE ADMITTED A DOCUMENT THAT DEMONSTRATED AIRAN-PACE'S CONFIDENCE IN HER "TRUST SCENARIO"

The legal standard that governs this Court's review of asserted errors by a District Court in admitting or excluding evidence in a criminal trial is "clear abuse of discretion." *United States v. House*, 684 F.3d 1173, 1197 (11th Cir. 2012); *United States v. Perez-Oliveros*, 479 F.3d 779, 783 (11th Cir. 2007). The term "abuse of discretion" was further defined in *United States v. Wilk*, 572 F.3d 1229, 1234 (11th Cir. 2009), as occurring "if the district court applies an incorrect legal standard or makes findings of fact that are clearly erroneous."

During Mr. Riesel's trial there were numerous instances in which the District Judge rejected the defense position on the admissibility of evidence. Two such rulings had a "substantial influence" on the jury's verdict, and they significantly prejudiced Mr. Riesel's defense.

A. The Cossio Testimony Regarding Mr. Riesel's Failure To Comply With a Settlement Agreement Was Barely Relevant to the Indictment's Fraud Allegation and Was Designed Primarily To Discredit Mr. Riesel.

Joaquin Cossio's testimony began with his account of the protest by condominium purchasers who had not received funds they were promised as "guaranteed rent and condominium fees." Tr. 4/9, Doc. 304, pp. 5-19. This protest was not relevant to the allegation that lending banks were defrauded by the concealment of buyer incentives. To be sure, the Superseding Indictment described payments made by Mr. Riesel and Airan-Pace to settle the buyers' claims in May and June 2009 – after the sale of units (and the alleged fraud on the banks) was terminated. But in deciding whether to let the jury hear Cossio's testimony, the District Judge was obliged by Rule 403 of the Federal Rules of Evidence to weigh the prejudicial impact of the testimony.

The objective of Cossio's testimony regarding settlement efforts with Mr. Riesel became apparent with the prosecutor's concluding questions on this subject.

Cossio testified that he had negotiated an agreement under which $216,000 was to be paid to the group of buyers. Mr. Riesel sent Cossio a payment of one-third of the amount, but his second payment was only $20,700. Cossio testified that he returned the second payment because "[t]hey did not send the money that was on the agreement and this amount of $20,700 seemed to me to be a ridiculous amount and it made me understand that they were not going to comply with the agreement." Tr. 4/9, Doc. 304, p. 30.

This testimony conveyed to the jury that Mr. Riesel was a person who was dishonest and could not be trusted. His failure to implement the settlement had no relevance to the issue whether banks were defrauded by the HUD documentation. The settlement negotiation occurred in 2009, after the period when buyer incentives were allegedly concealed from the banks that made loans to the buyers. Permitting this highly prejudicial testimony that was designed only to influence the jury to view Mr. Riesel as untrustworthy was an abuse of discretion that, we submit, had a powerful effect on the jury.

B. Airan-Pace's Oral and Written Efforts To Market Her "Trust Structure" to Other Lawyers Supported the Reasonableness of Mr. Riesel's Total Reliance on Her Legal Judgment.

In addition to the defense's two efforts to place in evidence the opinion letter Airan-Pace wrote to Ms. Tobel regarding her "trust scenario" (see p. 15, *supra*), defense counsel sought to question Airan-Pace about her discussions of the "trust structure" with other lawyers. The prosecution objected, and the District Judge sustained the objection. Tr. 4/14, Doc. 306, pp. 134-137. Airan-Pace's confidence in her "scenario" and the fact that she marketed it aggressively to other lawyers was important corroboration for Mr. Riesel's total acceptance of her plan and his reliance on her. Without the evidence that was excluded, the prosecutor was able to argue to the jury – as he did in his rebuttal summation – that Mr. Riesel retained Airan-Pace because "he needed a lawyer who would not blow the whistle. He needed a lawyer who would keep it secret. He needed a lawyer who would go along with the scheme." Tr. 4/16, Doc. 308, p. 64. That argument could not have been made had the jury known that Airan-Pace was prepared to present and defend her "trust scenario" to respected lawyers.

The District Judge abused his discretion when he prevented defense counsel from questioning either or both of the parties who had communicated regarding

Airan-Pace's scenario and when he prevented defense counsel from questioning Airan-Pace about other lawyers with whom she discussed her proposal.

CONCLUSION

For the foregoing reasons, the judgment of conviction should be reversed with directions either (1) to enter a judgment of acquittal or (2) to conduct a new trial.

Respectfully submitted,

By /s/ *Nathan Lewin*

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I hereby certify that this brief uses a proportionately spaced font and contains 7,702 words exclusive of those portions that are excluded under Rule 32(a)(7)(B)(iii).

By /s/ *Nathan Lewin*

Dated: November 30, 2015

CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2015, the foregoing ***Brief for the Appellant*** was served on all counsel of record by CM/ECF.

By /s/ *Nathan Lewin*