THE HONORABLE RONALD B. LEIGHTON

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA, Plaintiff, vs. TROY X. KELLEY, Defendant.	Case No. 3:15-cr-05198-RBL MOTION FOR ACQUITTAL ON COUNT 1, OR, IN THE ALTERNATIVE, FOR A NEW TRIAL **ORAL ARGUMENT REQUESTED** **NOTE ON MOTION CALENDAR: MAY 3, 2018**

I. INTRODUCTION

Troy Kelley was convicted of stealing money that was willingly given to him. To prove that Troy Kelley stole money as charged in Count 1, the government was required to prove that Mr. Kelley took money that belonged to someone else, and that he knew it belonged to someone else. Jury Instruction No. 18. The evidence in this case showed just the opposite, however: Under the HUD-1s and escrow instructions—the contracts between the borrowers and the title companies—the borrowers agreed to pay the entire reconveyance fee to Mr. Kelley's company, PCD, in exchange for a service. Once closing occurred, the fees were paid to PCD and the borrowers had no further ownership interest in the fees. Because the borrowers unconditionally

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agreed to pay the reconveyance fees to Mr. Kelley, his acceptance and retention of those fees cannot be theft.[1]

II. BACKGROUND

According to the government, "Troy Kelley[] [wa]s on trial for stealing millions of dollars from thousands of Washington residents." Declaration of Angelo J. Calfo ("Calfo Decl."), Ex. A (Nov. 14, 2017 Tr). at 17:19-21. As the prosecution explained it, when borrowers closed their real estate transactions, they agreed to pay PCD "[a] $135 charge for something called 'reconveyance processing.'" *Id.* at 18:1-13. According to the prosecution, however, Mr. Kelley had agreed with the title companies—but not the borrowers—that he would pay refunds of some portion of that money. *Id.* at 19:5-16. But, the prosecution argued, Mr. Kelley did not pay the refunds he had promised the title companies he would pay. *Id.* at 21:2-5. Thus, the prosecution asserted, their theory of theft was "plan and simple": Mr. Kelley "promised the escrow companies he would return the customers' money, and he didn't." *Id.* at 22:2-4.

The prosecution's opening argument could hardly be more explicit: they believe Troy Kelley stole money from borrowers by breaching a contract with title companies.[2]

III. ARGUMENT

The government's theory is legally insufficient and unsupported by evidence. When borrowers paid PCD a reconveyance fee they no longer owned the money as a matter of law, even if Mr. Kelley was later obligated to pay them refunds under a contract with the title companies.

[1] Mr. Kelley moves for dismissal of Count 1 on all grounds previously argued in his briefing and on all other grounds available. This brief by Mr. Kelley is intended to elaborate on a single theory of dismissal but not to the exclusion of others that are available.

[2] The government has previously argued other theories of "theft," including a number of theories alleging that Mr. Kelley supposedly defrauded the title companies of property they owned. *See, e.g.*, Dkt Nos. 158, 159, 201, 210, 312, 418, 430. To the extent the government wishes to revisit any of those arguments, Mr. Kelley incorporates by reference his previous briefing on these issues. *See, e.g.*, Dkt Nos. 184, 214, 306, 394.

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Mr. Kelley's alleged breach of a contractual promise to pay money to third-party beneficiaries is not a federal crime.

A. Legal Standard

1. Federal Rule of Criminal Procedure 29

The Constitution "protects an accused against conviction except upon evidence that is sufficient fairly to support a conclusion that every element of the crime has been established beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 313–14 (1979). Accordingly, "the prevailing criterion for judging motions for acquittal in federal criminal trials" is whether "reasonable jurors must necessarily have [] a reasonable doubt as to guilt," in which case the judge "must require acquittal, because no other result is permissible within the fixed bounds of jury consideration." *Id.* at 318 n.11 (citation and internal quotation marks omitted).

Federal Rule of Criminal Procedure 29(a) *requires* the Court to "enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." A defendant may move for a judgment of acquittal following discharge of the jury, and the court may set aside the verdict and enter an acquittal. Fed. R. Crim. P. 29(c)(2). The court must grant acquittal if, after viewing the evidence in the light most favorable to the government, no rational juror could have concluded beyond a reasonable doubt that the evidence was sufficient to convict the defendant. *United States v. Katakis*, 800 F.3d 1017, 1023 (9th Cir. 2015); *U.S. v. Grasso*, 724 F.3d 1077, 1085-86 (9th Cir. 2013). Although "the Government is entitled to every reasonable inference from the evidence," an inference is only *reasonable* when it is "'supported by a chain of logic, rather than mere speculation dressed up in the guise of evidence.'" *Katakis*, 800 F.3d at 1024 (quoting *United States v. Del Toro–Barboza*, 673 F.3d 1136, 1144 (9th Cir.2012)).

Rule 29 serves as an important safeguard for criminal defendants, allowing the court to stand between the defendant and an unjust guilty verdict. *See United States v. Tisor*, 96 F.3d 370, 379 (9th Cir. 1996). As the Supreme Court has explained:

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> [T]he application of the beyond-a-reasonable-doubt standard to the evidence is not irretrievably committed to jury discretion. To be sure, the factfinder in a criminal case has traditionally been permitted to enter an unassailable but unreasonable verdict of "not guilty." . . . The power of the factfinder to err upon the side of mercy, however, has never been thought to include a power to enter an unreasonable verdict of guilty. Any such premise is wholly belied by the settled practice of testing evidentiary sufficiency through a motion for judgment of acquittal and a postverdict appeal from the denial of such a motion.

Jackson, 443 U.S. at 317 n. 10 (1979) (citations omitted). In other words, "a defendant is entitled to protection against an improper or irrational verdict of the jury. . . . Rule 29 takes cognizance of the reality that jurors may not always be capable of applying strictly the instructions of the court, nor of basing their verdict entirely upon the evidence developed at the trial." *Tisor*, 96 F.3d at 379 (quoting 8A Moore's Federal Practice, Rules of Criminal Procedure ¶ 29.02, pp. 29–6, 29–7 (Bender 1995).

2. Federal Rule of Criminal Procedure 33

Under Federal Rule of Criminal Procedure 33, "the court may vacate any judgment and grant a new trial if the interest of justice so requires." The district court has discretion to grant a motion for a new trial. *United States v. Marques*, 600 F.2d 742, 747 (9th Cir. 1979).

"A district court's power to grant a motion for a new trial is much broader than its power to grant a motion for judgment of acquittal." *United States v. A. Lanoy Alston, D.M.D., P.C.*, 974 F.2d 1206, 1211 (9th Cir. 1992). "'The district court need not view the evidence in the light most favorable to the verdict; it may weigh the evidence and in so doing evaluate for itself the credibility of the witnesses. . . . If the court concludes that, despite the abstract sufficiency of the evidence to sustain the verdict, the evidence preponderates sufficiently heavily against the verdict that a serious miscarriage of justice may have occurred, it may set aside the verdict, grant a new trial, and submit the issues for determination by another jury.'" *Id.* at 1211–12 (quoting *United States v. Lincoln*, 630 F.2d 1313, 1319 (8th Cir.1980).

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B. The Borrowers Agreed to Pay Mr. Kelley the Entire Reconveyance Fee and Thereby Transferred Ownership of the Fee to Mr. Kelley.

1. The Borrowers Contractually Agreed to Pay Reconveyance Fees to PCD without Any Promise of a Refund.

To prove that Mr. Kelley stole money, the government was required to prove that someone besides Mr. Kelley owned the money in his possession. This is because "'[s]tolen' as used in [the National Stolen Property Act (NSPA)] includes all felonious takings . . . with intent to deprive the *owner* of the rights and benefits of *ownership* . . . ." *United States v. Turley*, 352 U.S. 407, 417 (1957) (emphasis added); *see also United States v. Long Cove Seafood, Inc.*, 582 F.2d 159 (2d Cir. 1978) (dismissing § 2314 charges where the government could not prove ownership of the allegedly stolen goods); *United States v. Carman*, 577 F.2d 556, 565 (9th Cir. 1978) (to be stolen, property must be taken "from one having the attributes of an owner").

Crucially for this case, property transferred with the consent of the owner cannot be considered stolen. *United States v. Bennett*, 665 F.2d 16, 22 (2d Cir. 1981) ("Because the concept of 'stolen' property requires an interference with the property rights of its owner, property that has been transported, sold, or otherwise disposed of, with the consent of the owner cannot be considered 'stolen' within the meaning of [§§] 2312-2315."). Nor is it theft for someone acting at the owner's direction to take property from someone else in possession of the property. *United States v. Rogers*, 786 F.2d 1000, 1003 (10th Cir. 1986) ("[The NSPA] should not be expanded at the government's will beyond the connotation—depriving an owner of its rights in property—conventionally called to mind.") (quoting *United States v. McClain*, 545 F.2d 988, 1002 (5th Cir. 1977)).

Here, the evidence shows that borrowers entered into agreements with title companies—called escrow instructions—in which they agreed to pay PCD the entire reconveyance fee without any promise of a refund. Calfo Decl., Exs. B–D (Trial Exs. A-103, A-108, A-138); *see also Id.*, Exs. E–H (Trial Exs. 506, 564, 587, 595). In the supplement to the escrow instructions, the

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borrowers explicitly approved the fees itemized on the HUD-1s—including the reconveyance fee to PCD—and instructed the title companies to disburse the fees in accordance with the HUD-1s. *See, e.g.*, *Id.*, Ex. B at 11. Neither the escrow instructions nor the incorporated HUD-1s indicated that borrowers would be due a refund of any portion of the reconveyance fee. *Id.*, Exs. B–H.[3] The reconveyance fee to PCD was never listed as an estimate, deposit, or holdback; instead, it was presented to the borrowers as a pure fee. *Id.*

Nor was there any evidence introduced at trial that any borrowers were promised a refund of any portion of the reconveyance fees. To the contrary, the express terms of the contracts dictated that they could only be amended in writing. *See, e.g.*, *Id.* Ex. B at 9; Ex. I (Nov. 29, 2017 Tr.) at 104:1-25. Thus, even the government's purported expert was forced to concede that any oral promise that borrowers might receive a refund would be unenforceable. *Id.* at 115:4-116:25. And in fact, in its closing, the government *admitted* that "the borrowers didn't understand they were entitled to a refund," and that "[t]hey weren't promised" refunds. *Id.*, Ex. J (Dec. 18, 2017 Tr.) at 12:17-20.

Nor was there any evidence to suggest that Mr. Kelley or his company failed to ensure that reconveyances were completed. In short, the evidence showed that the reconveyance fees were properly disclosed to the homeowners, that the homeowners consented to pay the fee to PCD, and that the homeowners got the benefit of their bargain by receiving a service from PCD. Because the borrowers agreed to pay Mr. Kelley the full reconveyance fees, the money "cannot be considered 'stolen.'" *Bennett*, 665 F.2d at 22.

Moreover, as Mr. Kelley's real estate expert Mark Schedler testified, the escrow instructions transferred ownership of the reconveyance fees to PCD as a matter of law. The escrow instructions presented the reconveyance fees to borrowers as fees, not deposits; that is, they

[3] It is undisputed that the HUD-1 Settlement Statements listing the borrowers' payments to PCD for reconveyance fees is incorporated into the escrow instructions between the borrowers and the title companies. *See* Calfo Decl., Ex. I (Nov. 29, 2017 Tr.) at 98:15-23.

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"simply show[ed]" the amount "being paid" to PCD, without any of the provisos, paperwork, or additional contractual provisions that would be necessary to set up a deposit. Calfo Decl., Ex. K (Dec. 14, 2017 Tr.). at 23:16-17, 24:5-25:2, 25:22-26:5, 51:11-22. As Mr. Schedler explained, payment of a fee transfers ownership of the money to the recipient of the fee. *Id.* at 36:21-37:2, 51:23-52:12. Thus, once "the fee is paid at closing . . . [i]t is no longer the borrower's money[.]" *Id.* at 36:17-18. Summing up, Mr. Schedler explained:

> [T]he title company on its own drafted a document that proposed to the borrower that that money be a fee, and at the date of closing it would no longer be the borrower's money, and the borrower accepted it and instructed the title company to pay Post Closing -- So whatever promises anybody made to anybody else about that same fee would have nothing to do [with] . . . the borrower's ownership of that money.

Id. at 72:21-73:4.

2. The Government Presented No Evidence from Which a Rational Juror Could Infer that Ownership of the Reconveyance Fees Remained with Borrowers Even After they Agreed to Pay PCD.

The government failed to produce evidence from which a rational juror could conclude otherwise. Although the government called a purported expert, Fred Phillips, to testify that the escrow instructions did not transfer ownership of the funds to Mr. Kelley, Mr. Phillips' testimony was legally insufficient to support the government's preferred conclusion. This is because Mr. Phillips' purported "legal" opinion that the escrow instructions did not transfer ownership of the reconveyance fees was not in any way supported by the authorities Mr. Phillips cited.

First, Mr. Phillips claimed he based his opinion regarding ownership "primarily on the Rule of Professional Conduct for attorneys" which provide that "in the law practice . . . you cannot intermingle your funds with your client's funds." *Id.*, Ex. L (Nov. 30, 2017 Tr.) at 64:2-13. But no one argued that PCD was engaged in the practice of law or otherwise bound by the RPCs; the RPCs are totally irrelevant. Moreover, as Mr. Phillips repeatedly conceded, PCD's contracts with the title companies did not require PCD to set up a trust account to hold client funds. *Id.*, Ex. I (Nov. 29, 2017 Tr.) at 59:2-4, 60:23-25, 94:11-14.

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Second, Mr. Phillips claimed to rely on "WAC 308 something or other . . . [T]he Department of Financial Institutions regulations promulgated under the Escrow Agent Registration Act." *Id.* Ex. L (Nov. 30, 2017 Tr.) at 65:15-17. But the relevant regulation supported Mr. Schedler's conclusion, not Mr. Phillips'. Specifically, WAC 208-680D-040(3) provided that when escrow agents did not know for certain the amount of a third-party fee like a reconveyance fee, they could either estimate the fee and adjust the difference on the final settlement statement—which they did not do here—or they could "[a]ssume responsibility for performing the service and charge the principal parties to the transaction a one-time fee for performing the service" which would be earned upon payment. WAC 208-680D-040(3); *see also* Calfo Decl., Ex. K (Dec. 14, 2017 Tr.) at 42:9-43:24, 52:13-25 (Mark Schedler testimony discussing applicability of the regulation).[4] As between these two choices, the evidence shows that title companies opted to do the latter; as such, under Washington law, the reconveyance fee was properly considered a fee, not a deposit, and ownership therefore transferred to PCD upon payment.

Lastly, Mr. Phillips claimed his legal opinion on ownership was based on "just common sense." Calfo Decl., Ex. L (Nov. 30, 2017 Tr.) at 64:14-21. But to state the obvious, Mr. Phillips' view of what is or is not "common sense" is not the law nor the proper subject of expert testimony.

[4] WAC 208-680D-040(3) provides, in full:

> When the cost of a third-party service cannot be known with certainty at the time of closing, an escrow agent may:
>
> (a) Provide an estimate of the justifiable cost of the third-party service on the preliminary closing statement, disclose the actual justifiable cost of the third-party service on the final disclosure statement, and refund any amounts collected in excess of the actual justifiable cost of the third-party service to the principal parties to the transaction; or
>
> (b) Assume responsibility for performing the service and charge the principal parties to the transaction a one-time fee for performing the service. The one-time fee must be reasonably related to the value of the service provided. The escrow agent may contract with a third party to perform the service. The escrow agent must disclose to the principal parties to the transaction in the preliminary and final settlement statement that the fee is being paid to the escrow agent. The escrow agent may transfer such fees earned into the general account in compliance with WAC 208-680E-011 (12)(a).

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Notwithstanding Mr. Phillips' claim to speak "common sense," the contracts between the title companies and the borrowers undermine his conclusions as a matter of law. The HUD-1s incorporated into the escrow instructions plainly detailed the reconveyance fees to be paid to PCD. The reconveyance fees were not listed on the HUD-1 statements as estimates, holdbacks, or deposits; they were presented to the borrowers as flat fees. Nor did any provision of the escrow instructions indicate that the reconveyance fees were merely deposits over which borrowers maintained ownership interests. This is highly probative evidence that the escrow agreements did not contemplate that the borrowers would retain ownership of the money because, as Mr. Schedler explained, the title companies' fiduciary duties to the borrowers would require them to disclose if someone else was holding their money. *Id.*, Ex. K (Dec. 14, 2017 Tr.) at 24:5-25:2, 78:14-23, 86:23-87:16. As Mr. Phillips conceded, the escrow instructions *never* indicated to borrowers that they would retain ownership of any funds paid to PCD, nor that they might be entitled to a refund of any portion of the fee. *Id.*, Ex. I (Nov. 29, 2017 Tr.) at 109:17-110:2.

Moreover, as Mr. Phillips repeatedly admitted on cross-examination, his claim that the escrow instructions did not transfer ownership of the reconveyance fees was contradicted over and over by the title companies themselves—the entities who actually prepared and signed the escrow instructions, and who, in defending against class action suits, characterized the entire amount paid to PCD as a fee. *Id.* at 124:8-127:18, 128:10-21, 130:8-12, 133:21-134:1, 135:25-136:9, 155:16-158:6. For example, in reviewing Old Republic's motion for summary judgment, Mr. Phillips had to admit that Old Republic characterized the reconveyance fee as a fee, and not a deposit, but nonetheless asserted, based on his own say-so, that "Old Republic was mistaken in calling it a fee." *Id.* at 125:3-14. Similarly, he conceded that "Fidelity . . . [took] the position that the $135 [reconveyance fee] is appropriately characterized as a fee to Post Closing Department," *id.* at 127:11-14, but nonetheless baldly asserted, "I think it was mischaracterized," *id.* at 128:14-15. *See also id.* at 136:5–9 (admitting his testimony that reconveyance fees are "a hybrid type of payment"

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comprising both fees and deposits is contradicted by the title companies). Naturally, he was unable to provide any legal or factual basis for why his characterization should overrule the understandings of the contracting parties because "[u]nder the 'cardinal principle' of contract interpretation, 'the intention of the parties'"—not Fred Phillips—"'must prevail.'" *M & G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926, 937 (2015) (Ginsburg, J., concurring) (quoting 11 R. Lord, Williston on Contracts § 30:2, p. 27 (4th ed. 2012)). Mr. Phillips' view of what the contracts *really* mean is simply not competent, as a matter of law, to undermine the title companies' interpretation of their own contracts.[5]

Having failed to substantiate his argument that the borrowers owned the fees after they paid them to PCD, Mr. Phillips fell back on the argument that ownership was immaterial. He testified that "[w]hoever owns the funds—If somebody is obligated to refund a portion of that, that obligation trumps the ownership of the funds in any event." Calfo Decl., Ex. L (Nov. 30, 2017 Tr.) at 65:2-4; *see also* Ex. I (Nov. 29, 2017 Tr.) at 142:4-6 ("The reconveyance fees may not have been owned by the borrowers, but the borrowers may have been entitled to a refund of some of the fees."). This if, of course, incorrect. Ownership of the funds is *the* central question in Count 1, as this Court's Instruction No. 18 recognized. *See also Carman* 577 F.2d at 565 (to be stolen, property must be taken "from one having the attributes of an owner").

Mr. Phillips'—and the government's—argument that Mr. Kelley owed a contractual duty to refund money is insufficient to prove theft. *See, e.g., United States v. Handakas*, 286 F.3d 92, 107 (2d Cir. 2002) *overruled on other grounds by United States v. Rybicki*, 354 F.3d 124 (2d Cir. 2003) (overturning conviction for mail fraud premised on breach of contractual promise to pay prevailing rate of wages); *United States v. Chandler*, 376 F.3d 1303, 1314 (11th Cir. 2004) ("Breach of contract . . . even fraudulent breach of contract, is not a crime."); *see also Dowling v. United States*. 473 U.S. 207, 227 (1985) (holding that the National Stolen Property Act did not

[5] The government elected not to call borrowers to testify as to their view of the contracts.

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reach willful copyright infringement because "[t]he rationale supporting application of the statute under the circumstances of this case would equally justify its use in wide expanses of the law which Congress has evidenced no intention to enter by way of criminal sanction.").

The government's attempt to convert an ordinary breach of contract claim into federal theft is particularly troublesome here because the alleged victims of the theft, the borrowers, were not even parties to the contracts Mr. Kelley supposedly breached. Instead, those contracts were solely between PCD and the title companies. There is no evidence the borrowers were aware of these contracts, let alone that they were supposedly entitled to a refund. There was certainly not evidence that any borrower relied on the promise of a refund in agreeing to pay a fee to Mr. Kelley's company. Indeed, their rights (if any) in the PCD-title company contracts were not even vested, and could have been extinguished at any time at the pleasure of the contracting parties. *Karo v. San Diego Symphony Orchestra Ass'n*, 762 F.2d 819, 822 (9th Cir. 1985) (noting that until a third-party "beneficiary materially changes position in justifiable reliance on the promise," "the promisor and promisee retain power to discharge or modify the duty by subsequent agreement"). Because these supposed contractual rights could be extinguished without the borrowers' consent, Mr. Kelley's alleged failure to honor these rights did not deprive the borrowers of anything they actually owned.

Under the government's reasoning, every party to a contract that believes it is owed funds or property could petition the United States Attorney to bring criminal charges. The government's theory would dramatically expand criminal liability well beyond Congress' intent and well beyond any common-sense understanding of criminal law. Here, the only thing the borrowers even arguably lost out on was not any tangible property, but merely a conditional legal right, as third-party beneficiaries, to a contract.

Throughout these proceedings, the government has tried to add substance to its breach of contract allegations by purporting to show that Mr. Kelley made false statements or changed his

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story regarding the fees he would charge. But the government's claims that Mr. Kelley acted dishonestly are immaterial to the dispositive issue underlying Count 1: Whether the borrowers consented to pay the entire reconveyance fee in their escrow instructions. As the Ninth Circuit has emphasized, it is the court's role in ruling on a Rule 29 motion to ensure "that the evidence of [bad] intent," even if sufficient to prove *mens rea*, not permit the "jur[y] to overlook the factual gaps in the government's proof." *United States v. Katakis*, 800 F.3d 1017, 1026 (9th Cir. 2015) (citing *United States v. Lo*, 231 F.3d 471, 477 (9th Cir. 2000)). In this case, the unchallenged evidence shows the borrowers agreed to pay Mr. Kelley the entire reconveyance fee—this consent negates any argument that he stole. If the government wants to contend that Mr. Kelley breached a contractual promise to pay refunds, the proper remedy would be a civil judgment—not prison.

3. Fred Phillips' Incompetent Testimony Should be Stricken.

Mr. Phillips testimony regarding the ownership of reconveyance fees should be stricken in any event because his "expert" opinion was not supported by the sources on which he professed to rely. In *General Eletric v. Joiner*, the Supreme Court held that "nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997). Instead, the Court held, "expert" evidence is subject to exclusion where "there is simply too great an analytical gap between the data [relied on by the expert] and the opinion proffered." *Id.*

As discussed above, the gap—the yawning chasm—between the sources Mr. Phillips claimed to rely on and the opinions he gave under oath was unbridgeable. In his testimony, Mr. Phillips admitted that his opinions were not based on *any* legal research, but rather "common sense," the patently inapplicable (to PCD) Rules of Professional Conduct, and a DFI regulation that in fact contradicted his opinion. *Supra*. As he explained, he "did not do any legal research on ownership of funds" because in his view, he "do[es]n't think it matters all that much." Calfo

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Decl., Ex. L (Nov. 30, 2017 Tr.) at 64:23-25. In other words, the government's purported expert mistakenly believed—and told the jury—that the single most important issue in this case—who owned the money in Mr. Kelley's possession—did not matter. Mr. Phillips' unsupported opinion on the legal issues of ownership and contract interpretation should be stricken.

Generally speaking, "an erroneous admission of expert testimony, absent a showing the error was harmless, requires a new trial." *Estate of Barabin v. AstenJohnson, Inc.*, 740 F.3d 457, 467 (9th Cir. 2014); *see also United States v. Christian*, 749 F.3d 806, 808 (9th Cir. 2014) (applying *Barabin* to criminal trial). But here, once Mr. Phillips' unsupported opinion testimony is stricken, the government's case is entirely bereft of any evidence from which a rational juror could infer that the borrowers maintained ownership of the money they agreed to pay to PCD. Thus, once Mr. Phillips' incompetent testimony is stricken, this Court must acquit Mr. Kelley on Count 1 of the Superseding Indictment, or, at a minimum, order a new trial.

As the government will surely note, Mr. Kelley did not object to the admission of Mr. Phillips' testimony during trial. That is because the government's Rule 16 disclosure of Mr. Phillips' testimony failed to include the information any mention of the patent defects in his testimony that rendered it incompetent.

Federal Rule of Criminal Procedure 16(a)(1)(G) requires the government to "the witness's opinions[and] *the bases and reasons for those opinions*[.]" (Emphasis added). The government's Rule 16 disclosure stated that Mr. Phillips would testify that the escrow instructions did not transfer ownership of reconveyance fees to PCD, but in no way did they indicate that his opinions would be based on the Rules of Professional Conduct, "common sense," or anything else he claimed at trial supported his opinion. Calfo Decl., Ex. M. Nor did his disclosure provide notice of his bizarre opinion at trial that ownership was *immaterial*. *Id.* And the government did not elicit this testimony in its direct examination of Mr. Phillips, at which point defense counsel could have objected. The baselessness of Mr. Phillips' "legal" opinion only became apparent during cross-

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examination, when he admitted he had not done any legal research and was unable to provide a give any reasoned basis for his testimony. As a result, Mr. Kelley had no basis to challenge Mr. Phillips' testimony until the proverbial cat was already out of the bag. Thus, even if this Court is disinclined to order acquittal on Count 1 because of Mr. Phillips' inadmissible testimony, the fair thing to do would be to order a new trial at which his clearly inadmissible testimony could be challenged in advance. *Barabin*, 740 F.3d at 467; *Christian*, 749 F.3d at 808.

IV. CONCLUSION

For the foregoing reasons, Mr. Kelley respectfully requests that the Court acquit him on Count 1 of the Superseding Indictment, or, in the alternative, grant a new trial.

DATED this 22nd day of March, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on March 22, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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