EXHIBIT A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff - Appellee*, v. JULIAN OMIDI, AKA Combiz Julian Omidi, AKA Combiz Omidi, AKA Kambiz Omidi, AKA Kambiz Beniamia Omidi, AKA Ben Omidi, *Defendant - Appellant*.	Nos. 23-1719 23-1959 D.C. No. 2:17-cr-00661-DMG-1 OPINION
UNITED STATES OF AMERICA, *Plaintiff - Appellee*, v. SURGERY CENTER MANAGEMENT, LLC, *Defendant - Appellant*.	No. 23-1941 D.C. No. 2:17-cr-00661-DMG-3

Appeal from the United States District Court
for the Central District of California
Dolly M. Gee, District Judge, Presiding

Argued and Submitted November 8, 2024
Phoenix, Arizona

Filed January 16, 2025

Before: Richard A. Paez and John B. Owens, Circuit Judges, and Richard Seeborg, Chief District Judge.*

Opinion by Judge Owens

SUMMARY**

Criminal Law / Forfeiture

The panel affirmed the district court's forfeiture judgment of nearly $100 million in a case in which Julian Omidi and his business, Surgery Center Management, LLC (SCM), were convicted of charges arising from their "Get Thin" scheme in which Omidi and SCM defrauded insurance companies by submitting false claims for reimbursement.

The panel held that in a forfeiture case seeking proceeds of a fraud scheme under 18 U.S.C. § 981(a)(1)(C), there is no so-called "100% Fraud Rule." All proceeds directly or indirectly derived from a health care fraud scheme like Get Thin—even if a downstream legitimate transaction

* The Honorable Richard Seeborg, United States Chief District Judge for the Northern District of California, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

conceivably generated some of those proceeds—must be forfeited. The district court did not err in so concluding.

The panel addressed other claims in a concurrently filed memorandum disposition.

COUNSEL

Suria M. Bahadue (argued), Kristen A. Williams, David Chao, Ali Moghaddas, David C. Lachman, David R. Friedman, and James E. Dochterman, Assistant United States Attorneys; Bram M. Alden, Assistant United States Attorney, Chief, Criminal Appeals Section; Mack E. Jenkins, Assistant United States Attorney, Chief, Criminal Division; E. Martin Estrada, United States Attorney; United States Department of Justice, Office of the United States Attorney, Los Angeles, California; for Plaintiff-Appellee.

Benjamin L. Coleman (argued), Benjamin L. Coleman Law PC, San Diego, California; Edmund W. Searby (argued), Porter Wright Morris & Arthur LLP, Cleveland, Ohio; Kevin M. Lally, McGuire Woods LLP, Los Angeles, California; Lawerence S. Robbins, Jeffrey C. Fourmaux, Priyanka Wityk, and Alexandra Elenowitz-Hess, Friedman Kapaln Seiler Adelman & Robbins LLP, New York, New York; Elon Berk, Gurovich Berk & Associates, Sherman Oaks, California; for Defendants-Appellants.

OPINION

OWENS, Circuit Judge:

Julian Omidi and his business, Surgery Center Management, LLC ("SCM"), appeal from the district court's forfeiture judgment of nearly $100 million, which came after a lengthy criminal health insurance fraud trial and years of litigation. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.[1]

I. BACKGROUND

A. The "Get Thin" Scheme

Before Ozempic and similar "wonder drugs," medically-assisted weight loss had to happen the old-fashioned way—surgical intervention. For Southern California residents in the 2010s (especially those stuck in traffic and staring at billboards), the Wizard of Loss was Dr. Julian Omidi.[2] To make a long story short, Omidi helmed a massive health insurance fraud scheme called "Get Thin." Omidi's scheme promised dramatic weight loss through Lap-Band surgery and other medical procedures.[3] Using catchy radio jingles

[1] Omidi and SCM also challenge the sufficiency of the evidence supporting their convictions, certain jury instructions, several evidentiary rulings, and the legality of the restitution awards. We address these claims in a concurrently filed memorandum disposition, in which we affirm.

[2] Omidi's medical license was revoked in 2009 due to unrelated misconduct.

[3] Lap-Band surgery is a weight loss surgery where a small balloon-like band is inserted into a patient's stomach to shrink its size and limit the amount of food the patient can digest.

and ubiquitous billboard ads, Omidi urged potential patients to call 1-800-GET-THIN and "Let Your New Life Begin."

Through the 800 number and an associated call center, Get Thin funneled patients to a network of consultants whom Omidi tasked to "close a sale." Omidi instructed these consultants, who lacked any medical credentials, to schedule patients for expensive medical tests and procedures, irrespective of medical need, to unearth comorbidities that could help get the lucrative Lap-Band surgery pre-approved by insurers. When patients opted out of the surgery or insurers declined coverage, consultants pushed other costly treatments that could still be billed, such as tummy tucks or nutritional advising. Consultants were trained to prioritize customers with the most generous insurance plans and follow up incessantly to ensure they attended their pre-operative appointments. Omidi carefully tracked patients' show rate and paid consultants commissions when their customers underwent procedures. Witnesses described Get Thin's call center as a "boiler room," with tactics akin to a "credit card collections agency."

Once patients were successfully recruited, Omidi directed his employees to falsify patient data, fabricate diagnoses, and misrepresent the extent of physician involvement in their treatments to deceive insurance companies into paying for thousands of sleep studies, endoscopies, Lap-Band insertions, and other costly treatments. Besides its 1-800-GET-THIN call center, Get Thin did not regularly obtain patients through any other avenues, such as referrals from other doctors or medical systems.

B. Procedural History

A grand jury indicted Omidi and SCM for mail fraud, wire fraud, money laundering, and other related charges arising from the Get Thin scheme. In a nutshell, the government alleged that Omidi and SCM defrauded insurance companies by submitting false claims for reimbursement. The claims included, among other misrepresentations, fraudulent patient test results and false assertions that a doctor had reviewed and approved the medical procedures at issue. After three-and-a-half years of pretrial litigation and a 48-day jury trial, the jury convicted Omidi and SCM of all charges. The district court sentenced Omidi to 84 months' imprisonment and fined SCM over $22 million.

At a subsequent hearing, the district court considered forfeiture for both defendants. The government argued that the total proceeds of Get Thin's business during the fraud period—$98,280,221—should be forfeited because the whole business was "permeated with fraud." In other words, even if some parts of Get Thin seemed legitimate, the government argued that "*all proceeds* of that business are forfeitable," as "the proceeds of that so-called 'legitimate' side of the business would not exist but for the 'fraudulent beginnings' of the entire operation" (namely, the call center). Omidi and SCM objected to the forfeiture amount, arguing that Get Thin was "not entirely a fraud," and the forfeiture amount should be limited to the proceeds traceable to falsified insurance claims.

Applying the requisite preponderance standard (and after hearing weeks of trial testimony), the district court agreed with the government. Reviewing the relevant statutes and persuasive out-of-circuit authority, it agreed that the

$98,280,221 in proceeds were directly or indirectly derived from the fraudulent Get Thin scheme. The district court reasoned that because patients "were recruited through the call center as part of the overall fraudulent billing scheme . . . proceeds from all services at least indirectly resulted from the scheme." This was true even though some patients were redirected to less invasive, cheaper procedures than the high-priced Lap-Band surgery, and even though some procedures may have been medically appropriate in individual cases.

II. DISCUSSION

A. Standard of Review

We review de novo a district court's interpretation of federal forfeiture law, and its calculation of the forfeitable amount for clear error. *See United States v. Alcaraz-Garcia*, 79 F.3d 769, 772 (9th Cir. 1996).

B. The District Court Correctly Assessed $98,280,221 in Forfeiture

Fraud convictions frequently require multiple determinations: the appropriate sentence, the restitution amount (which compensates victims for the harm caused), and the forfeiture judgment (which punishes defendants by depriving them of the proceeds of their crime). *See United States v. Davis*, 706 F.3d 1081, 1083 (9th Cir. 2013) ("Forfeiture is imposed as punishment for a crime; restitution makes the victim whole again."). This case requires us to examine forfeiture, which is "much broader" and "serves an entirely different purpose" than restitution. *United States v. Lo*, 839 F.3d 777, 789 (9th Cir. 2016) (citations omitted).

Here, the government sought forfeiture of the proceeds of Omidi and SCM's mail and wire fraud violations under 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461(c). While 18 U.S.C. § 981 governs civil forfeiture actions, 28 U.S.C. § 2461(c) "permits the government to seek criminal forfeiture whenever civil forfeiture is available and the defendant is found guilty of the offense[.]" *United States v. Newman*, 659 F.3d 1235, 1239 (9th Cir. 2011) (emphasis omitted), *abrogated on other grounds by Honeycutt v. United States*, 581 U.S. 443, 454 (2017). When applicable, such forfeiture is mandatory. *Id*. at 1240; 28 U.S.C. § 2461(c). If the government seeks forfeiture of specific property, such as the proceeds at issue here, it must establish "the requisite nexus between the property and the offense," Fed. R. Crim. P. 32.2(b)(1)(A), by a preponderance of the evidence. *See United States v. Christensen*, 828 F.3d 763, 822 (9th Cir. 2016).

The question in this case is whether the district court erred in ordering the forfeiture of all Get Thin's proceeds, even though conceivably some of the incoming funds ultimately paid for legitimate and medically necessary procedures. After a review of the relevant law and facts, we conclude that the district court got it right.

We begin with the relevant statutory language. Under § 981(a)(1)(C), any property which "constitutes or is derived from proceeds traceable to" a mail or wire fraud scheme is subject to forfeiture. [4] Section 981(a)(2)(A) defines

[4] To be even more precise, § 981(a)(1)(C) makes forfeitable property "traceable to . . . any offense constituting 'specified unlawful activity'" under 18 U.S.C. § 1956(c)(7), and mail and wire fraud meet that definition. *See* 18 U.S.C. § 1956(c)(7)(A) (defining "specified unlawful

"proceeds" in a health care fraud scheme as "property of any kind obtained *directly or indirectly*, as the result of the commission of the offense giving rise to forfeiture, and any property traceable thereto, and is not limited to the net gain or profit realized from the offense" (emphasis added). Said more simply, any proceeds that directly or indirectly derive from the fraudulent scheme must be forfeited, even if particular proceeds were not profits from the offense itself.

Applying the above rules to this case, any money acquired via the fraudulent Get Thin funnel was subject to forfeiture. In its comprehensive review of the law and evidence, the district court found that to the extent certain proceeds derived from legitimate medical procedures, those proceeds still "were indirectly the result of the fraudulent portions of the business," and were thus subject to forfeiture. In other words, even though some patients who called 1-800-GET-THIN were ultimately redirected to non-Lap-Band treatments or could have qualified for Lap-Band surgery without Omidi's chicanery, the proceeds from those patients would never have existed but for Get Thin's fraudulent billing scheme, which began with the call center through which all patients were recruited. Our independent review of the extensive record confirms that the evidence supporting the district court's finding was overwhelming, and the district court did not clearly err by so concluding.

Rather than challenge this factual finding, Omidi and SCM argue that the district court applied the wrong legal standard. They contend that *United States v. Rutgard*, 116 F.3d 1270 (9th Cir. 1997), prevents the forfeiture of all the proceeds that flowed through Get Thin. In that case, the

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activity" to include "any act or activity constituting an offense listed in" 18 U.S.C. § 1961(1)); *id.* § 1961(1) (listing mail and wire fraud).

government had to prove Rutgard's entire ophthalmology practice was fraudulent to convict him of laundering its proceeds. *Id*. at 1287. We concluded that the medical practice at issue performed both legitimate and illegitimate procedures, so Rutgard was not guilty of money laundering under 18 U.S.C. § 1957. *Id.* at 1287-93. In fact, we determined "[t]he actually-proved instances of fraudulent pretense of medical necessity for cataract surgery [we]re a tiny fraction of a practice that did thousands of cataract surgeries." *Id*. at 1289. Accordingly, under a different forfeiture statute, we concluded the evidence was insufficient to support the forfeiture of 100 percent of the practice's proceeds involved in the alleged money laundering transactions. *Id.* at 1293.

Omidi and SCM seize on this unique holding to contend that under *Rutgard*, forfeiture of 100 percent of the Get Thin proceeds required the government to prove "100 percent of [Get Thin's] medical practice was fraudulent" (citing *id.* at 1289). Any proceeds generated from allegedly "untainted" or "appropriate" services initiated through Get Thin's call center would not be forfeited, the argument goes, as they would not be proximately traceable to falsified insurance claims.

This argument overreads *Rutgard*, which concerned money laundering convictions and an entirely different forfeiture statute—18 U.S.C. § 982(a)(1).[5] *See id.* at 1293. Section 982(a)(1) specifically targets laundered funds and requires proof that the funds at issue were either "involved in" the particular illegal transaction or "traceable to such

[5] The statute is materially the same today as it was at the time of Rutgard's forfeiture judgment in March 1995. *Compare* 18 U.S.C. § 982(a)(1) (2018) *with id.* (1994).

property" before forfeiture can occur—it never mentions proceeds and lacks the more expansive "derived from" and "directly and indirectly" language from § 981(a)(1)(C) and § 981(a)(2)(A). Thus, the district court correctly concluded that *Rutgard*'s strict § 1957 money laundering analysis—featuring very different facts and statutes—had no application here.

And although there is no precise Ninth Circuit law on point, our sister circuits (which, unlike the court in *Rutgard*, have analyzed forfeiture in the fraud context) reject Omidi's proposed "100% Fraud Rule" and support the district court's approach. For example, in *United States v. Warshak*, 631 F.3d 266 (6th Cir. 2010), the Sixth Circuit faced a very similar argument. There, the mail and wire fraud defendants contended that certain sales from their fraudulent herbal supplements business were legitimate, so the proceeds from those transactions were not subject to forfeiture. *Id.* at 330-31. Their theory had "no traction," the Sixth Circuit explained, because the "very nucleus of [the defendants'] business model [was] rotten and malignant" and "[a]ny money generated through these potentially legitimate sales . . . resulted 'directly or indirectly'" from the fraudulent scheme. *Id.* at 332. Thus, forfeiture of "money generated through supposedly legitimate transactions[] was appropriate." *Id.* at 333.[6] We reach the same conclusion in

[6] *See also United States v. Gladden*, 78 F.4th 1232, 1251 (11th Cir. 2023) (affirming forfeiture of gross proceeds because "the evidence demonstrates that [the company's] legitimate operations were facilitated by the illegitimate operations"); *United States v. Bikundi*, 926 F.3d 761, 792 (D.C. Cir. 2019) (rejecting identical argument as "overlook[ing] the breadth" of a similarly-worded forfeiture statute, given that "'[g]ross proceeds traceable' to the fraud include 'the total amount of money

this case, in which all Get Thin proceeds were derived from a single intake process that, by design, disregarded medical necessity in favor of profit as part of the larger fraudulent billing scheme.

Accordingly, we follow our sister circuits to conclude that in a forfeiture case seeking proceeds of a fraud scheme under § 981(a)(1)(C), there is no so-called "100% Fraud Rule." All proceeds directly or indirectly derived from a health care fraud scheme like Get Thin—even if a downstream legitimate transaction conceivably generated some of those proceeds—must be forfeited. The district court did not err in so concluding.

AFFIRMED.

brought in through the fraudulent activity, with no costs deducted or set-offs applied'" (quoting *United States v. Poulin*, 461 F. App'x 272, 288 (4th Cir. 2012))); *United States v. Sanders*, 952 F.3d 263, 286 (5th Cir. 2020) ("If the business couldn't have existed absent the fraud, then even [funds from legitimate business] trace[] to it.").

NOT FOR PUBLICATION

FILED

JAN 16 2025

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. JULIAN OMIDI, AKA Combiz Julian Omidi, AKA Combiz Omidi, AKA Kambiz Omidi, AKA Kambiz Beniamia Omidi, AKA Ben Omidi, Defendant - Appellant.	Nos. 23-1719 23-1959 D.C. No. 2:17-cr-00661-DMG-1 MEMORANDUM*
UNITED STATES OF AMERICA, Plaintiff - Appellee, v. SURGERY CENTER MANAGEMENT, LLC, Defendant - Appellant.	No. 23-1941 D.C. No. 2:17-cr-00661-DMG-3

Appeal from the United States District Court
for the Central District of California
Dolly M. Gee, District Judge, Presiding

Argued and Submitted November 8, 2024

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Phoenix, Arizona

Before: PAEZ and OWENS, Circuit Judges, and SEEBORG, Chief District Judge.**

Following a lengthy criminal health insurance fraud trial, Julian Omidi and his company, Surgery Center Management, LLC ("SCM") (together, "Appellants") jointly appeal from their convictions of mail fraud in violation of 18 U.S.C. § 1341, wire fraud in violation of 18 U.S.C. § 1343, and conspiracy to commit money laundering in violation of 18 U.S.C. § 1956(h), as well as the restitution award issued against them.[1] Omidi individually appeals from his convictions of aggravated identity theft in violation of 18 U.S.C. § 1028A(a)(1), false statements relating to health care matters in violation of 18 U.S.C. § 1035, and promotional money laundering in violation of 18 U.S.C. § 1956(a)(1)(A)(i). As the parties are familiar with the facts, we do not recount them here. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

1. First, Appellants argue there was insufficient evidence of materiality to sustain the mail fraud, wire fraud, and false statement convictions.[2] To find

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** The Honorable Richard Seeborg, United States Chief District Judge for the Northern District of California, sitting by designation.

[1] Appellants also challenge the district court's forfeiture judgment of nearly $100 million. We address this claim in a concurrently filed opinion, in which we affirm.

[2] Because the aggravated identity theft and money laundering convictions are predicated on the fraud and false statement convictions, Omidi and SCM argue all convictions fall together.

materiality, the jury had to conclude Appellants' false statements had "a natural tendency to influence, or [were] capable of influencing," the insurers to whom the statements "w[ere] addressed." *United States v. Lindsey*, 850 F.3d 1009, 1013 (9th Cir. 2017) (quoting *Neder v. United States*, 527 U.S. 1, 16 (1999)). We cannot disturb the jury's verdict for insufficient evidence of materiality unless we determine that no "rational trier of fact could have found [materiality] beyond a reasonable doubt." *United States v. Luong*, 965 F.3d 973, 980-81 (9th Cir. 2020) (citation omitted). Because Appellants failed to renew their motion for acquittal at the close of all evidence, we review for plain error. *See United States v. Pelisamen*, 641 F.3d 399, 408-09 & n.6 (9th Cir. 2011).

On appeal, Appellants emphasize the government's failure to introduce individual insurance plans into evidence, which they argue prevented a reasonable jury from determining whether a falsity impacted a coverage decision. But substantial evidence supports the jury's conclusion that Get Thin's misrepresentations had the "natural tendency to influence" insurers even without the individual insurance plans in evidence. *Lindsey*, 850 F.3d at 1013.

For example, multiple insurance representatives testified that they rely completely on medical providers to provide accurate information about the medical necessity of claimed procedures, and they would deny claims containing false or misleading information about the service performed or its medical necessity. Get

Thin's myriad misrepresentations, which included fabricated diagnoses, forged provider signatures, and falsified patient data, spoke directly to the medical necessity of the claimed procedures and thus implicated "essential aspects of the transaction[s]" between Get Thin and insurers. *United States v. Milheiser*, 98 F.4th 935, 944 (9th Cir. 2024). On this record, and even without individual insurance plans in evidence, a reasonable jury could find Get Thin's misrepresentations material.

Appellants also argue the government's solicitation of testimony from insurance representatives that knowledge of Get Thin's lies would have prompted them to merely "investigate further" introduced the jury to a materiality theory prohibited by *Kungys v. United States*, 485 U.S. 759 (1988). We need not reach the propriety of this alternate theory of materiality because of the ample evidence demonstrating that fraudulent claims would not only have been investigated but also denied. Thus, we conclude the evidence of materiality was sufficient to sustain Appellants' mail fraud, wire fraud, and false statement convictions.

2. Second, Appellants argue the district court erred by instructing the jury that knowledge and intent to defraud could be shown through defendants' "reckless indifference to the truth or falsity of their statements," and then compounded that error by declining to define recklessness for the jury. We review de novo whether a jury instruction "misstate[d]" an element of the crime, and the district court's

"precise formulation" of an instruction for abuse of discretion. *United States v. Lloyd*, 807 F.3d 1128, 1164-65 (9th Cir. 2015) (citations omitted). If we determine an error occurred, we reverse unless, after a "thorough examination of the record," we conclude "the district court's error was harmless beyond a reasonable doubt." *United States v. Bachmeier*, 8 F.4th 1059, 1065 (9th Cir. 2021) (citation omitted). Here, assuming arguendo that the district court's instruction misstated this circuit's law, we conclude any error would be harmless due to the overwhelming evidence of Omidi's actual knowledge of fraud, which was the focus of the government's case.

3. Third, Appellants argue the district court's jury instructions on deliberate ignorance and reckless indifference constructively amended the indictment, or in the alternative, constituted a variance. A constructive amendment occurs when the "complex of facts" at trial differs "distinctly" from those in the indictment, or when "the crime charged [in the indictment] was substantially altered at trial." *United States v. Soto-Barraza*, 947 F.3d 1111, 1118 (9th Cir. 2020) (citation omitted). Alternatively, "we have generally found a variance where the indictment and the proof involve only a single, though materially different, set of facts." *United States v. Adamson*, 291 F.3d 606, 614-15 (9th Cir. 2020). We review these claims de novo. *Id*. at 612, 615.

Here, the facts charged in the indictment and presented at trial were

materially consistent; both placed Omidi at the helm of the fraudulent billing scheme. Additionally, the jury instructions on deliberate ignorance and reckless indifference did not "substantially alter[]" the crimes charged in the indictment, but rather informed the jury about how the mens rea elements of those crimes can be proven. *Accord United States v. Love*, 535 F.2d 1152, 1157-58 (9th Cir. 1976) (rejecting a claim that the district court "rewrote the indictment" by giving a reckless indifference instruction); *Lloyd*, 807 F.3d at 1164 (rejecting a similar constructive amendment argument). Thus, we hold that neither constructive amendment nor variance occurred here.

4. Fourth, Appellants argue they are entitled to a new trial due to three erroneous evidentiary rulings, which we review for abuse of discretion. *See United States v. Hankey*, 203 F.3d 1160, 1166-67 (9th Cir. 2000). We can affirm the admission of evidence "on any basis supported by the record." *United States v. Alexander*, 48 F.3d 1477, 1487 (9th Cir. 1995).

Appellants first argue the draft sleep study reports prepared by Get Thin's only registered polysomnographic technologist (RPSGT) should not have been admitted under Rule 803(6) as business records nor Rule 801(d)(2)(C) as nonhearsay party admissions. Under Rule 801(d)(2)(C), a statement is a nonhearsay party admission if it is "offered against an opposing party and . . . was made by a person whom the party authorized to make a statement on the subject."

Fed. R. Evid. 801(d)(2)(C). Here, the record reveals that Omidi hired the RPSGT to, according to his contract, "prepare detailed written reports of professional sleep study scoring." On this record, we conclude that the district court was within its discretion to admit these sleep study reports as statements authorized by Omidi under Rule 801(d)(2)(C), and we do not reach the question of their admissibility as business records.

Next, Appellants argue the testimony of a forensic accountant, who estimated the amount Appellants billed and received for fraudulent insurance claims, was inadmissible under Rule 702 as unreliable and under Rule 403 as irrelevant. We have counseled, however, that the Rule 702 admissibility inquiry is "a flexible one," and "[s]haky but admissible evidence is to be attacked by cross-examination, contrary evidence, and attention to the burden of proof, not exclusion." *Primiano v. Cook*, 598 F.3d 558, 564 & nn. 17-18 (9th Cir. 2010) (citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592-96 (1993)). Moreover, evidence "concerning the financial impact of [a fraud] . . . may be relevant to show that a scheme to defraud existed," *United States v. Rasheed*, 663 F.2d 843, 849-50 (9th Cir. 1981), as well as a defendant's intent to defraud. *See Lloyd*, 807 F.3d at 1152 & n.6. Thus, the district court did not abuse its discretion by admitting the loss testimony.

The final evidentiary ruling Appellants challenge is the admission of several

out-of-court statements by Omidi's "litigation coordinator," Brian Oxman, which were described during the testimonies of three trial witnesses. Appellants argue Oxman's statements, which evidenced Omidi's attempts to cover up and obstruct the investigation into the fraudulent billing scheme, were irrelevant, inadmissible hearsay.

Oxman's out-of-court statement recounted by the first witness, Charles Klasky, was an instruction, not offered for the truth of the matter asserted, and thus not hearsay. *See United States v. Chung*, 659 F.3d 815, 833 (9th Cir. 2011). Oxman's statements to the second two witnesses, Larry Twersky and Jaffy Palacios, were admitted after the government introduced substantial evidence establishing Oxman and Omidi's agency relationship and were admissible as party admissions. *See* Fed. R. Evid. 801(d)(2)(D); *United States v. Bonds*, 608 F.3d 495, 506 (9th Cir. 2010). Given this relationship, Oxman's attempts to induce witnesses to lie or cover up the crimes were probative of Omidi's consciousness of guilt. *See United States v. Collins*, 90 F.3d 1420, 1428 (9th Cir. 1996). Thus, the district court did not abuse its discretion by admitting Oxman's out-of-court statements.

5. Fifth, Appellants raise three challenges to the district court's restitution award of $11,207,773.96 to the defrauded insurers under the Mandatory Restitution to Victims Act (MVRA). First, Appellants argue that the insurers serving as administrators for employer-funded plans are not "victims" under the

MVRA. *See* 18 U.S.C. § 3663A(a)(1), (a)(2). We review the district court's determination of whether a person or entity is a victim for abuse of discretion. *United States v. Luis*, 765 F.3d 1061, 1066 (9th Cir. 2014).

Here, the district court concluded these insurers were victims because they were contractually obligated to recover and return any overpayment to Appellants on behalf of the employers whose plans they administered. We have previously approved of third parties assuming the role of victim under the MVRA in analogous circumstances. *See, e.g.*, *United States v. Yeung*, 672 F.3d 594, 602-03 (9th Cir. 2012), *overruled on other grounds by Robers v. United States*, 572 U.S. 639 (2014); *United States v. Smith*, 944 F.2d 618, 621-22 (9th Cir. 1991). Supported by both facts and law, the district court's conclusion was not an abuse of discretion.

Second, Appellants argue the government did not prove "actual loss" as required by the MVRA due to its failure to produce the individual insurance plans. We review the factual findings underlying a district court's restitution award for clear error. *Luis*, 765 F.3d at 1065. Here, the district court concluded that "uncontradicted trial testimony" established that fraudulent claims would not have been paid, regardless of individual plan terms. We agree and conclude the district court did not clearly err by calculating actual loss without the plan documents.

Third, Appellants argue the district court erred by awarding restitution

predicated on negligent, rather than criminal, conduct. *See* 18 U.S.C. § 3663A(a)(2) (providing restitution only for harm that resulted from "the defendant's criminal conduct in the course of the scheme"). Based on our independent review of the record, however, we conclude that the district court's restitution award compensated insurers for their reimbursement of insurance claims riddled with fraud, or those for medically unnecessary services, and not for Appellants' mere negligence. Thus, we affirm the court's restitution award in full.

6. Sixth, Omidi challenges the sufficiency of the evidence underlying his conviction of aggravated identity theft in violation of 18 U.S.C. § 1028A. Because of Omidi's failure to renew his Rule 29 motion at the close of all evidence, we review for plain error. *Pelisamen*, 641 F.3d at 408-09 & n.6.

Omidi specifically argues the government failed to prove the identity theft was at the "crux" of the underlying fraud offense as required by *Dubin v. United States*, 599 U.S. 110 (2023). But the signature of Dr. Mirali Zarrabi misled insurers into believing a physician was involved in the billed service, which was necessary for Omidi to be paid for the fabricated claim. *Accord Dubin*, 599 U.S. at 131-32 (explaining identity theft is at the crux of a healthcare fraud when it obfuscates "'who' is involved" in the services provided). Thus, a rational trier of fact could conclude the identity theft was at the "crux" of the scheme to defraud.

Omidi also argues there was insufficient evidence of his direct involvement

in the misuse of Dr. Zarrabi's identity. Trial witnesses clearly established, however, that Omidi micromanaged every aspect of the sleep study program, created its protocols, and reviewed every insurance claim before submission. Thus, a rational trier of fact could also conclude Omidi was personally involved in the unlawful use of Dr. Zarrabi's signature.

7. Seventh, Omidi argues the district court erred by instructing the jury that the government need not prove Omidi stole Dr. Zarrabi's identity to convict him of aggravated identity theft. Even though the district court's instruction is an accurate statement of this court's holding in *United States v. Osuna-Alvarez*, 788 F.3d 1183 (9th Cir. 2015), Omidi argues the Supreme Court "effectively overruled" *Osuna-Alvarez* in *Dubin*. *Dubin* and *Osuna-Alvarez*, however, interpret different statutory language. *Compare Osuna-Alvarez*, 788 F.3d at 1185-86 (construing the phrase "without lawful authority") *with Dubin*, 599 U.S. at 128 n.8 (declining to do so). Because these holdings are not "clearly irreconcilable," we remain bound by *Osuna-Alvarez*. *See Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc). The instruction was not in error.

8. Eighth, and finally, Omidi argues the district court's co-schemer liability instruction, which mirrored the Ninth Circuit's model instruction, "tainted" the § 1028A conviction. The ample evidence of Omidi's direct involvement in the offense, however, dispels any notion that Omidi's § 1028A conviction depended

upon a co-schemer liability theory. Thus, any potential error would be harmless.

AFFIRMED.