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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 25th day of February, two thousand twenty-five.

PRESENT:

REENA RAGGI,
RICHARD C. WESLEY,
RAYMOND J. LOHIER, JR.,
Circuit Judges.

UNITED STATES OF AMERICA,
Appellee,
v.

Nos. 23-6440(L)
23-6474 (Con)
23-6879 (Con)

GEORGE CONSTANTINE,
ANDREW DOWD,
Defendants-Appellants,
MARC ELEFANT, SADY RIBERIO,
ADRIAN ALEXANDER,
Defendants.

FOR APPELLEE:	ALEXANDRA N. ROTHMAN, Assistant United States Attorney (Nicholas S. Folly, Danielle Kudla, David Abramowicz, Assistant United States Attorneys, *on the brief*) *for* Matthew Podolsky, Acting United States Attorney for the Southern District of New York, New York, NY
FOR DEFENDANT CONSTANTINE:	DONNA ALDEA (Matthew Keller, *on the brief*), Barket Epstein Kearon Aldea & LoTurco, LLP, Garden City, NY
FOR DEFENDANT DOWD:	JOHN P. ELWOOD, Arnold & Porter Kaye Scholer LLP, Washington, DC

(Kolya D. Glick, Matthew L. Farley, Arnold & Porter Kaye Scholer LLP, Washington, DC, Michael K. Krouse, Arnold & Porter Kaye Scholer LLP, New York, NY, *on the brief*)

Appeal from judgments of the United States District Court for the Southern District of New York (Sidney H. Stein, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgments of the District Court are AFFIRMED.

Defendants-Appellants George Constantine and Andrew Dowd appeal from amended judgments of conviction entered on July 20, 2023 in the United States District Court for the Southern District of New York (Stein, *J.*). The District Court sentenced each Appellant to 102 months' imprisonment for their part in a fraudulent slip-and-fall conspiracy. It also ordered restitution as to Constantine for $7,320,657, and as to Dowd for $8,117,011. We assume the parties' familiarity with the underlying facts and the record of prior proceedings, to which we refer only as necessary to explain our decision to affirm.

Five co-conspirators were indicted in 2019 for their roles in the same scheme at issue here. Two pleaded guilty, and three were convicted after a trial (the "*Duncan* trial"). The Appellants and three additional co-conspirators were indicted two years later. A jury found the Appellants guilty of mail fraud, wire fraud, and conspiracy in violation of 18 U.S.C. §§ 1341, 1343, and 1349. The Appellants appeal the amended judgments of conviction, and, in Dowd's case, the order of restitution.

Although the Appellants mount several challenges, none of which provide a basis for reversal, we focus on their principal arguments on appeal.

I. The Recusal Motion

A judge must "disqualify himself in any proceeding in which his impartiality might reasonably be questioned," 28 U.S.C. § 455(a), as when "an objective, disinterested observer fully informed of the underlying facts" would "entertain significant doubt that justice would be done absent recusal," *United States v. Bayless*, 201 F.3d 116, 126 (2d Cir. 2000) (quotation marks omitted). But "a judge's comments during a proceeding that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases," do not ordinarily require recusal. *United States v. Wedd*, 993 F.3d 104, 115 (2d Cir. 2021) (quotation marks omitted).

Both Appellants argue that Judge Stein should have granted Dowd's recusal motion given his comments at sentencing in the *Duncan* trial, over which he presided, that he "hope[s]" the government continues to investigate the "corrupt lawyers, the corrupt doctors who were involved in this scheme." Joint App'x 183–84. We conclude that the District Court did not abuse its discretion in denying the recusal motion based on these comments. *See LoCascio v. United States*, 473 F.3d 493, 497 (2d Cir. 2007). Viewed in context, the comments were not directed at and did not refer to the Appellants but, rather, generally referenced the scope of the criminal scheme and the propriety of a full investigation. The fact that Judge Stein imposed significantly below-Guidelines sentences on these Appellants further undermines their insistence that he harbored any bias against them.

II. The Bill of Particulars

Dowd contends that the District Court erred in denying his motion for a bill of particulars. *See* Fed. R. Crim. P. 7(f). We review for abuse of discretion. *United States v. Walsh*, 194 F.3d 37, 47 (2d Cir. 1999). A bill of particulars is appropriate where "[t]he relevance of key events was shrouded in mystery at the commencement of and throughout the trial," such that the "burden of proof impermissibly was shifted." *United States v. Bortnovsky*, 820 F.2d 572, 575 (2d Cir. 1987). In this case, however, the indictment alleged that Dowd "almost invariably recommended" unnecessary surgeries on patients referred by coconspirators. App'x 52. The Government also provided the records from the *Duncan* trial, thereby supplying the Appellants a roadmap of its trial strategy and an understanding of the charged conspiracy. *See United States v. Salazar*, 485 F.2d 1272, 1278 (2d Cir. 1973). Armed with this information, Dowd "was not unfairly surprised at trial as a consequence of the denial of the bill of particulars, [so] the trial court has not abused its discretion." *United States v. Torres*, 901 F.2d 205, 234 (2d Cir. 1990) (quotation marks omitted); *accord United States v. Chen*, 378 F.3d 151, 163 (2d Cir. 2004).

III. Evidentiary Challenges

A. Insurance Investigator Arce's Testimony

Dowd and Constantine argue that the District Court erred in admitting lay opinion testimony from Tara Arce, a claims investigator with Travelers Insurance. They argue that portions of Arce's testimony constituted expert opinion "based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Fed. R. Evid. 701(c). We review for abuse of discretion and apply a harmless error standard. *See Bank of China, N.Y. Branch v. NBM LLC*, 359 F.3d 171, 183 (2d Cir. 2004).

We assume without deciding that Arce's testimony crossed the line into providing an expert opinion that was improperly admitted at trial. Dowd and Constantine claim to be especially prejudiced by Arce's testimony that the insurance claims associated with Dowd and Constantine raised obvious "red flags." App'x 887. That testimony in particular, they assert, supported the Government's conscious avoidance theory of the Appellants' guilt.

We conclude that any error in admitting Arce's testimony was harmless. Importantly, the District Court struck most of the "red flags" part of Arce's testimony and instructed the jury to disregard it. App'x 888. Moreover, the Government never mentioned the testimony in its closing argument to the jury, referring instead to other "red flags" that alerted the Appellants to the fraudulent scheme.

There was also significant proof besides Arce's testimony that the Appellants knowingly participated in the charged scheme. For example, Dowd routinely paid Peter Kalkanis, a cooperating witness, $1,000 in referral fees for uninjured patients who were brought to Dowd's office. Kalkanis and other witnesses testified that paid runners drove several patients at a time to Dowd's office. And Dowd repeatedly conducted surgery on patients after no or only cursory physical examinations and also falsified his medical records.

There was likewise strong proof of Constantine's knowing participation in the fraudulent scheme. This included evidence that Constantine paid runners $1,000 per client to bring him several low-income patients at a time who falsely claimed to have had trip-and-fall accidents, instructed them to lie in depositions, and filed hundreds of lawsuits alleging the same type of accident and resulting in the same type of medical treatment. Finally, in

determining that any error in admitting Arce's testimony was harmless, we note that the District Court offered to give a limiting instruction that Arce was not opining that the Appellants had engaged in any fraud, but the Appellants declined the instruction.

B. Legal and Medical Ethics Evidence

Dowd argues that Dr. Neil Roth's testimony regarding professional rules prohibiting doctors from paying for referrals was irrelevant and thus improperly admitted. Both Constantine and Dowd also contend that the District Court erred in instructing the jury that it could consider the improper payment of referral fees in determining whether either Appellant knew he was participating in an illegal conspiracy. We review evidentiary rulings for abuse of discretion, *United States v. Cummings*, 858 F.3d 763, 771 (2d Cir. 2017), and jury instructions *de novo*, *United States v. Quattrone*, 441 F.3d 153, 177 (2d Cir. 2006).

We start with the testimony of Dr. Roth, which Dowd maintains improperly invited the jury to speculate that Dowd violated professional ethical rules and therefore had a propensity for being dishonest. We disagree that evidence of the professional rules relating to referral fees was improperly admitted. The Appellants argue that they had no reason to think that there was anything wrong with this particular set of clients or patients. That each Appellant was prepared to risk incurring professional sanctions in order to obtain their clients or patients was relevant, however, to show that they knew or had reason to know that those individuals' cases were not legitimate. In addition, the District Court's instruction that the Appellants were "not on trial for violating any professional rules" against referral fees made clear to the jury that it needed more than a violation of those rules to find the Appellants guilty of participating in the charged fraud. App'x 1167.

C. Evidence of Underreported Income Tax

Dowd next argues that the District Court erred in admitting evidence pertaining to *underreported* income in his tax returns. He claims that only a defendant's failure to disclose *all* income, thereby concealing the source of the income entirely, is admissible. *See, e.g.*, *United States v. Valenti*, 60 F.3d 941, 946 (2d Cir. 1995). We disagree. That Dowd failed to report approximately half of the income he derived from the scheme is some evidence of consciousness of guilt and an effort to conceal his participation in the fraudulent scheme. In any event, given "the overall strength of the prosecution's case" against Dowd, any error in admitting the income tax evidence was harmless. *United States v. Natal*, 849 F.3d 530, 537 (2d Cir. 2017) (quotation marks omitted).

D. Sufficiency of the Evidence Challenge

For the same reasons, we conclude that there was sufficient evidence that Constantine was aware of the fraudulent scheme. We need look no further than Kalkanis's testimony that he and Constantine agreed to bring fraudulent cases. Viewed in the light most favorable to the government, Kalkanis's testimony alone, which the jury was entitled to credit, is sufficient to support the verdict. *See United States v. Silver*, 864 F.3d 102, 113 (2d Cir. 2017).

IV. Sentencing Guidelines

Constantine challenges his sentence as procedurally unreasonable. The District Court adopted the presentence investigation report ("PSR") recommendation of a Guidelines offense level of 37 based in part on a 22-level increase under U.S.S.G. § 2B1.1(b)(1)(L) for an offense involving a total loss of more than $25 million, resulting in a Guidelines range of 210 to 262 months' imprisonment. To reach the total loss amount, the PSR properly included the *intended* loss from unsettled fraudulent cases, consistent

with the Guidelines commentary. *See* U.S.S.G. § 2B1.1(b)(1)(C)(ii). The Guidelines commentary is "binding authority" unless it is inconsistent with the Guideline it interprets. *United States v. Pedragh*, 225 F.3d 240, 244 (2d Cir. 2000). Constantine contends that they are no longer binding in light of *Kisor v. Wilkie*, 588 U.S. 558 (2019). That argument is foreclosed by our precedent. *See United States v. Rainford*, 110 F.4th 455, 475 & n.5 (2d Cir. 2024).

For the first time on appeal, Constantine separately argues that the District Court's calculation of his Guidelines range based on intended loss was unreasonable because it was not supported by record evidence. *See United States v. Coppola*, 671 F.3d 220, 249 (2d Cir. 2012). Because Constantine failed to raise this objection at sentencing, we review for plain error. *United States v. Verkhoglyad*, 516 F.3d 122, 128 (2d Cir. 2008). We find no error in the District Court's calculation. The District Court used a method for calculating loss that we have approved, *see United States v. Moseley*, 980 F.3d 9, 29 (2d Cir. 2020) (approving calculation based on percentage of business revenue derived from criminal activity); *Rainford*, 110 F.4th at 476, and the figures it used in the calculation are adequately supported by the record, *see United States v. Cramer*, 777 F.3d 597, 602 (2d Cir. 2015).

Nor did the District Court, which enjoys broad discretion to grant or deny evidentiary hearings at sentencing, *see United States v. Prescott*, 920 F.2d 139, 144 (2d Cir. 1990), err in denying Constantine's request for a *Fatico* hearing to determine factual issues underlying the Guidelines calculations. This is especially true where the District Court stated that Constantine's sentence, which was well below the calculated Guidelines range, would be the same even without the challenged enhancements.

V. Restitution

Dowd principally argues that the District Court's order of restitution should be vacated because it was imposed without notice or opportunity to be heard. We disagree. The District Court entered the restitution order on July 20, 2023, ten days after the Government submitted a proposed order that it had sent to Dowd two weeks earlier. All this comported with the District Court's statement at sentencing on April 25, 2023 that it planned to order restitution within 90 days. Dowd had ample notice and opportunity to object.

Dowd next relies on *United States v. Aumais*, 656 F.3d 147 (2d Cir. 2011), to argue that the Mandatory Victims Restitution Act, 18 U.S.C. § 3664(h), forbids imposing joint and several liability on defendants indicted and tried separately. But *Aumais* involved hundreds of defendants tried separately in hundreds of different jurisdictions, interpreted a different statute, and was concerned with administrability and double recovery. *Aumais*, 656 F.3d at 155–56. It is inapposite in this case where ten defendants involved in the same criminal conspiracy were convicted and sentenced in two cases handled by the same judge. *See generally id.* at 156 (suggesting that joint and several liability may still be imposed "when a single district judge is dealing with multiple defendants in a single case (or indictment)").

Finally, Dowd argues that the District Court erred in apportioning his level of contribution without regard to the harm caused by a co-defendant, Dr. Ribeiro. Again, we disagree and conclude that the District Court did not abuse its discretion in apportioning liability based on the fraudulent cases involving Dowd as a surgeon, especially when the court could have held Dowd "liable for payment

of the full amount of restitution," for all the fraudulent cases involved in the conspiracy. 18 U.S.C. § 3664(h).

We have considered Dowd's and Constantine's remaining arguments and conclude that they are without merit. For the foregoing reasons, the judgments of the District Court are AFFIRMED.

FOR THE COURT:
Catherine O'Hagan Wolfe,
Clerk of Court
[SEAL]
/s/ Catherine O'Hagan Wolfe

APPENDIX B

UNITED STATES COURT OF APPEALS
for the
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 17th day of April, two thousand twenty-five,

PRESENT: Reena Raggi,
Richard C. Wesley,
Raymond J. Lohier, Jr.,

Circuit Judges,

United States of America,
Appellee,

ORDER

Docket No. 23-6440(L),
23-6474 (Con), 23-6879 (Con)

Marc Elefant, Sady Riberio, Adrian Alexander,
Defendants,

George Constantine, Andrew Dowd,
Defendants - Appellants.

Appellant Andrew Dowd having filed a petition for panel rehearing and the panel that determined the appeal having considered the request,

IT IS HEREBY ORDERED that the petition is DENIED.

FOR THE COURT:
Catherine O'Hagan Wolfe,
Clerk of Court
[SEAL]
/s/ Catherine O'Hagan Wolfe

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	21-CR-530 (SHS)
v.	:	OPINION
GEORGE CONSTANTINE ET AL.,	:	
Defendants.	:	

SIDNEY H. STEIN, U.S. District Judge.

In October 2022, Dr. Andrew Dowd moved to recuse this Court from presiding over the impending trial of this action on the grounds that the court's impartiality might reasonably be questioned under 28 U.S.C. § 455(a). The Court denied that motion on the record during the final pretrial conference on November 17. The trial of Dr. Dowd and George Constantine, Esq., commenced on November 28 and continued through December 16, when the jury returned a guilty verdict against both defendants on counts of conspiring to commit mail fraud and wire fraud, as well as substantive mail fraud and wire fraud counts. This Opinion sets forth in fuller measure the reasons given orally by the Court for denying Dowd' s motion to recuse the Court.

I. Statement of Facts

Dr. Andrew Dowd is an orthopedic surgeon who has been found by a jury to have participated in an

elaborate and extensive fraud scheme. From 2013 to 2018, hundreds of individuals were recruited to serve as "victims" of orchestrated trip-and-fall accidents and obtain millions of dollars in personal injury damages from property owners and their insurance carriers. Five defendants who planned and operated the scheme had been indicted in April 2019 for conspiracy to commit mail and wire fraud. Defendant Peter Kalkanis managed the conspiracy, while defendants Kerry Gordon, Bryan Duncan, Robert Locust, and Ryan Rainford served as "runners" who identified accident sites, recruited patients, transported them to and from medical and legal appointments, and instructed the patients how to fake injuries. Kalkanis and Gordon pleaded guilty before trial, and Duncan, Locust, and Rainford were each found guilty following a trial in May 2019. The evidence at that trial included testimony from Kalkanis that two doctors, Sady Ribeiro and Andrew Dowd, knew full well that many of the patients they treated were involved in staged accidents, and that two lawyers, George Constantine and Marc Elefant, knew the cases they took on were staged. (18-cr-289, ECF Nos. 159, 161, Tr. 1057, 1065-66, 1072, 1212.)

Two years later, in August 2021, the Government indicted another set of five defendants in connection with their participation in the scheme: attorneys George Constantine and Marc Elefant were indicted for allegedly filing fraudulent lawsuits on behalf of the recruited individuals to obtain personal injury settlements, while loan provider and owner of an MRI facility Dr. Adrian Alexander, Dr. Sady Ribeiro, and Dr. Andrew Dowd were charged with performing unnecessary medical procedures, including surgeries, on the participants in order to inflate the settlement values of the personal injury lawsuits. Defendants Alexander,

Ribeiro, and Elefant each pled guilty prior to trial, while defendants Constantine and Dowd were tried last month and, as noted, found guilty by a jury.

Dowd claims that statements made by this Court during the earlier sentencing proceedings of Duncan and Locust as well as during Alexander's plea allocution indicate that the Court is not impartial and should recuse itself. Dowd first notes that during the trial and sentencing of Duncan and Locust, "lawyers for these defendants argued that the runners were at the bottom of the conspiracy ladder, and that the most culpable individuals – the lawyers, doctors, and funders – had gone unpunished." (18-cr-289, ECF No. 86 at 4.) He then points to the Duncan sentencing in January 2020, during which the Court "urge[d] the government to continue their investigation here," because, based on the testimony during the Duncan and Locust trial, "the lawyers and the doctors were heavily involved in this." (18-cr-289, ECF No. 252, 27:12-14.) A year later, at Locust's sentencing in July 2021, defense counsel contended that the "worst people involved in this conspiracy were people who had never, ever been prosecuted." (18-cr-289, ECF No. 368, 15:18-19.) The Court responded by saying:

> I assume, I would hope, and I made it clear to the government during the trial and at other proceedings in this case, that the government is pursuing the corrupt lawyers, the corrupt doctors who were involved in this scheme. That was a theme during the [Duncan and Locust] trial . . . I'm not disagreeing with you, but I'm not a prosecutor, I'm a judge. I would hope the government is following through on a continuing

investigation. I don't know whether they are or not.

(*Id.*, 15:23-16:8.)

Finally, at Dr. Alexander's plea allocution in August 2022, the Court noted, "[t]his is one of those cases that confounds me. Highly educated professionals – doctors, lawyers, others are involved – were involved in a scheme . . . And the funders and the lawyers and the doctors profited normally handsomely, and the patients did not. It's a frightening insight into human nature." (21-cr-530, ECF No. 79, 25:3-6.)

II. Discussion

28 U.S.C. § 455(a) states that "[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Judges generally "determine appearance of impropriety [] not by considering what a straw poll of the only partly informed man-in-the-street would show[,] but by examining the record facts and the law, and then deciding whether a reasonable person knowing and understanding all the relevant facts would recuse the judge." *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1313 (2d Cir. 1988). However, because "[l]itigants are entitled to an unbiased judge; not to a judge of their choosing . . . [a] judge is as much obliged not to recuse himself when it is not called for as he is obliged to when it is." *Id.* at 1312.

When an opinion expressed by the court is based on testimony and evidence presented at trial, whether that trial concerns the defendant seeking recusal or other defendants in related proceedings, it will only represent grounds for recusal in extremely rare circumstances. The Supreme Court has held that "opinions formed by judges on the basis of facts introduced or events

occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky v. United States*, 510 U.S. 540, 555 (1994); *see also United States v. Bernstein*, 533 F.2d 775, 785 (2d Cir. 1976) ("The rule of law . . . is that what a judge learns in his judicial capacity[,] whether by way of guilty pleas of codefendants or alleged coconspirators, or by way of pretrial proceedings, or both is a proper basis for judicial observations, and the use of such information is not the kind of matter that results in disqualification."). The Second Circuit has declined to require recusal when the judge "had undoubtedly formed opinions about [the defendant's] likely guilt during the course of [a co-conspirator's] trial at which the judge presided[.]" *McMahon v. Hodges*, 382 F.3d 284, 290 (2d Cir. 2004). And "[a] judge's comments during a proceeding that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge." *United States v. Carlton*, 534 F.3d 97, 100 (2d Cir. 2008) (internal citation omitted).

The Second Circuit recently applied this standard in *United States v. Wedd*, 993 F.3d 104, 115 (2d Cir. 2021). Following the conviction at trial of a co-defendant of Wedd's, the district judge stated to counsel regarding that co-defendant's impending sentencing: "if I were to rank people in terms of their levels of culpability, [the co-defendant] would be at the very bottom of all of these defendants, including [two other co-defendants], and far below Mr. Wedd." Brief on Behalf of Defendant-Appellant Darcy Wedd, 2019 WL 2173505, at *13. Wedd argued, *inter alia*, that the district court's statement comparing the culpability of a codefendant

and Wedd "created the appearance of partiality." *Wedd*, 993 F.3d at 116.

The trial court judge denied Wedd's motion to recuse herself, and the Second Circuit affirmed, writing that "[a] judge cannot be said to have manifested partiality simply by expressing a view of a particular defendant's culpability based on information that has been presented to the court." *Wedd*, 993 F.3d at 115. The panel specifically noted that, "[i]n multidefendant cases, judges are often called upon to sentence one or more co-defendants while others are still awaiting trial. Questions of relative culpability may sometimes be unavoidable, particularly when the defendant being sentenced claims to have played a lesser role in an overall conspiracy." *Id.* at 117. Thus, the trial court's comments in *Wedd* did not demonstrate "'a deep-seated favoritism or antagonism that would make fair judgment impossible,'" and therefore recusal was not required. *Id.* (citing *Liteky*, 510 U.S. at 555.)

Here, in response to questions of relative culpability in a multi-defendant conspiracy, this Court stated that it assumed and hoped the Government would "pursu[e] the corrupt lawyers, the corrupt doctors," and "follow[] through on a continuing investigation" of those actors. (18-cr-289, ECF No. 368, 15:23-16:8.) The Court made plain that the source of its view that the lawyers and doctors were heavily involved in the trip-and-fall conspiracy was the testimony adduced during the Duncan trial concerning how the conspiracy functioned, and recalled that that was "a theme during the trial." (*Id.*; *see also* 18-cr-289, ECF No. 252, 27:10- 18.)

The Court made clear that the decision of whether to investigate and charge potential defendants was not for the Court, when it said, 'Tm not the prosecutor, I'm

the judge," and "those people are not in front of me." (18-cr-289, ECF No. 368, 16:5-8.) As in *Wedd*, "based on information that ha[d] been presented to the court" and when speaking to coconspirators who when "being sentenced claim[ed] to have played a lesser role in an overall conspiracy" than others, including lawyers and doctors, the Court quite appropriately opined on "questions of relative culpability." *Wedd*, 993 F.3d at 115, 117. These comments were a fair summary of the testimony adduced during the *Duncan* trial and in the course of the sentencing proceedings following that trial. No reasonable person apprised of the facts in that case, which was the source of the Court's opinion, would conclude, based on these comments, that the Court harbors the requisite "antagonism that would make fair judgment impossible" to warrant recusal.[1]

Although recusal may be appropriate "when a judge expresses a personal bias concerning the outcome of the case at issue," *United States v. Lovaglia*, 954 F.2d 811, 815 (2d Cir. 1992), the Court here has not expressed any interest in seeing a particular outcome as to any specific defendant. *United States v. Diaz*, 797 F.2d 99, 100 (2d Cir. 1986) (per curiam), illustrates impermissible bias concerning the outcome of a case as distinguished from the facts here. The district judge in *Diaz*, together with the prosecutor, wrote to their U.S. Senator to suggest an amendment to the law under which Diaz's conviction of that count had been vacated on appeal, in order that the conduct of the defendant

[1] Moreover, "comments made at pretrial hearings" or other proceedings like those in question here where "no jury was present, could not prejudice petitioners at *trial*." *A.S. Goldmen, Inc. v. Phillips*, No. 05-cv-4385, 2006 WL 1881146, at *44, *55 (S.D.N.Y. July 6, 2006) *report and recommendation adopted*, 2007 WL 2994453 (S.D.N.Y. Oct. 15, 2007) (collecting cases).

would be encompassed by its terms in the future. *See id.* When the defendant appealed, the Second Circuit determined that these acts evidenced the judge's manifest personal bias for a particular outcome: i.e., punishment of that specific defendant for a particular act. *Id.* In contrast, stating what the evidence was in the *Duncan* trial - the asserted involvement of doctors and lawyers in the trip-and-fall conspiracy – and encouraging *investigation* of a *category* of defendants in a complex conspiracy, without any particular goal as to the result of the investigation or suggesting the guilt of any particular doctor or lawyer, as the Court did here, does not represent bias toward a specific defendant or a particular outcome. Indeed, during a pretrial conference in this case, the Court reiterated that despite its familiarity with the alleged fraud from the *Duncan* trial, its role was decidedly *not* to determine the outcome of the case against Dowd or the other defendants, reminding them that, "of course, it will be up to the jury to decide whether or not the government can prove its case beyond a reasonable doubt." (21-cr-530, ECF No. 34 at 5:21-23.)

Other cases Dowd cites are similarly inapposite.[2] In *United States v. Antar*, the Third Circuit held that the trial judge ought to have recused himself when, during sentencing of the defendant, he stated: "My object in

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[2] (*See also* 21-cr-530, ECF No. 86 at 5-6) (citing *Washington v. William Morris Endeavor Entm't, LLC*, 2014 U.S. Dist. LEXIS 41277, at *2 (S.D.N.Y. Mar. 24, 2014) (*denial* of motion for recusal on basis of ruling in another matter against same defendant, and speeches at educational programs); *United States v. Liburd*, No. 17-cr- 296 (PKC), 2019 U.S. Dist. LEXIS 11850, at *24 (E.D.N.Y. Jan. 24, 2019) (*denial* of motion for recusal in which the court properly directed the course of a *Franks* hearing and admonished defense counsel in an appropriate effort to protect defendant's right to unconflicted counsel).

this case from day one has always been to get back to the public that which was taken from it as a result of the fraudulent activities of this defendant and others." 53 F.3d 568, 573 (3d Cir. 1995). The circuit court determined that this constituted "in stark, plain and unambiguous language" a statement that the judge's "goal in the criminal case, from the beginning, was something other than what it should have been and, indeed, was improper." *Id.* at 576. Unlike in *Antar*, this Court's opinion that the role of the doctors and lawyers in this scheme warranted further investigation does not indicate that it had a goal "from the beginning" to convict Dowd.

The Third Circuit distinguished this statement requiring recusal from one that did not. After a U.S. district judge sitting in the District of Colorado refused to accept the defendant's guilty plea for insufficiently admitting criminal wrongdoing, he stated that "[t]he obvious thing that's going to happen to [the defendant] is that she's going to get convicted[.]" *United States v. Young*, 45 F.3d 1405, 1414 (10th Cir. 1995). The district court then denied a motion to disqualify on those grounds, and the Tenth Circuit affirmed, stating that "the comments reflected the judge's belief that [the defendant] was likely to be convicted if she went to trial. Such an opinion of what the jury was likely to find does not show that the judge could not possibly render fair judgment." *Young*, 45 F.3d at 1415-16. Here, the Court's opinion was not nearly as explicit as the judge's admitted opinion in *Young* in which recusal was denied.

Moreover, "judges are frequently, and quite properly, required to make assessments of a defendant's culpability before a jury has returned a verdict." *Wedd*, 993 F.3d at 116. For example, to determine

whether a coconspirator's statement that otherwise would be hearsay should be admitted, the court must determine by a preponderance "that a conspiracy existed, that the defendant and declarant were members, and that the statements were made during the course of and in furtherance of the conspiracy." *United States v. Tracy*, 12 F.3d 1186, 1199 (2d Cir. 1993) (citing Fed. R. Evid. 801(d)(2)(E)). "On occasion, that may also entail a finding by the judge that a yet-to-be-tried co-defendant was, in fact, a member of the charged conspiracy." *Wedd*, 993 F.3d at 117. Indeed, the Court had already had to assess the extent of Dowd's involvement in this matter ahead of his trial; specifically, the Court issued a warrant finding probable cause to search the email accounts of Dowd and others. (*See* 21-cr-530, ECF No. 96 at 2.) But just as these common pretrial assessments of a defendant's involvement do not ordinarily require the court to recuse itself from later proceedings, this Court's acknowledgment of the role of doctors and lawyers, including Dowd, in this conspiracy before Dowd was tried does not create an impression that fair judgment of Dowd by the jury during his trial would be "impossible" such that recusal is required.

Finally, while there is no explicit time limit for filing a motion for recusal, recusal applications are to be made "at the earliest possible moment after obtaining knowledge of facts demonstrating the basis for such a claim," in order to avoid waste of judicial resources and to prevent a movant from "hedging its bets against the eventual outcome." *Apple v. Jewish Hospital and Medical Center*, 829 F.2d 326, 333, 334 (2d Cir. 1987). Dowd filed this motion more than a year after this Court made the core of the comments that Dowd now challenges, and over a year after Dowd was indicted and made aware of the charges against him. The distance of this

motion from the allegedly offending comments as well as the proximity to Dowd' s trial provide a quintessential example of the gamesmanship that a preference for prompt filing of recusal motions is meant to avoid.

Accordingly, Dowd's motion for recusal pursuant to 28 U.S.C. § 455(a) is denied.

Dated: New York, New York
January 31, 2023

/s/ Sidney H. Stein
Sidney H. Stein, U.S.D.J.

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	:	**Order of Restitution**
v.	:	21-CR-530 (SHS)
GEORGE CONSTANTINE, and ANDREW DOWD	:	
Defendants.	:	

Upon the application of the United States of America, by its attorney, Damian Williams, United States Attorney for the Southern District of New York, Alexandra Rothman, Assistant United States Attorney, of counsel; the presentence investigation reports; the defendants' convictions; and all other proceedings in this case, it is hereby ORDERED that:

1. Amount of Restitution

Collectively, the defendants shall pay restitution in the total amount of $14,830,955, subject to the further limitations provided for in this order, see ¶ 1.B, pursuant to 18 U.S.C. § 3663A, to the victims of the offenses charged. Upon advice by the United States Attorney's Office of a change of address of a victim, the Clerk of Court is authorized to send payments to the new address without further order of this Court.

A. Joint and Several Liability

Restitution is joint and several among the defendants in this case, including co-defendants Marc Elefant, Sady Ribiero, and Adrian Alexander, and with the defendants in the following cases: *Peter Kalkanis*, *Kerry Gordon*, *Robert Locust*, *and Ryan Rainford*, 18 Cr. 289 (SHS); and *Reginald Dewitt*, 17 Cr. 633 (VEC). The defendants' liability to pay restitution shall continue unabated until either the defendant has paid the full amount of restitution ordered herein, or every victim set forth in this Order and in Schedule A, attached hereto, has recovered the total amount of its loss.

B. Apportionment Among Defendants

Pursuant to 18 U.S.C. § 3664(h), the Court has apportioned liability among the defendants to reflect the level of contribution to the victims' losses and the economic circumstances of each defendant. Each defendant's apportioned liability for restitution is as follows:

(1) George Constantine: $7,320,657

(2) Andrew Dowd: $8,117,011

2. Defendants' Joint and Individual Liability and Apportionment Among Victims

Restitution shall be paid to the victims identified in below, and as set forth in Schedule A, on a percentage basis. Defendants are jointly and severally liable for restitution, in apportioned shares of liability, to each victim as set forth in Schedule A.

3. Schedule of Payments

Pursuant to 18 U.S.C. § 3664(f)(2), in consideration of the financial resources and other assets of the defendants, including whether any of these assets are jointly controlled; projected earnings and other income

of the defendants; and any financial obligations of the defendants; including obligations to dependents, the defendants shall pay restitution in the manner and according to the schedule that follows:

A. In the interest of justice, restitution will be payable in installments pursuant to 18 U.S.C. § 3572(d)(1) and (2). The defendants will commence monthly installment payments of at least twenty percent (20%) of the defendant's gross income, payable on the 15th of each month, immediately upon entry of this judgment.

B. While serving the term of imprisonment, the defendants shall make installment payments toward restitution and may do so through the Bureau of Prisons' (BOP) Inmate Financial Responsibility Plan (IFRP). Any unpaid amount remaining upon release from prison will be paid in installments of at least twenty percent (20%) percent of the defendant's gross income on the 15th of each month.

This schedule is without prejudice to the Government taking enforcement actions, pursuant to 18 U.S.C. § 3613, to the extent warranted.

C. Pursuant to 28 U.S.C. § 2044 and 18 U.S.C. § 3611, the Court shall order any money belonging to and deposited by a defendant with the Clerk of Court for the purposes of a criminal appearance bail bond to be applied to the payment of restitution.

3. Payment Instructions

The defendants shall make restitution payments by certified check, money order, or online. Instructions for online criminal debt payments are available on the Clerk of Court's website at https://nysd.uscourts.gov/payment-information#PaymentofCriminalDebt. Checks and money orders shall

be made payable to the "SDNY Clerk of Court" and mailed or delivered to: United States Courthouse, 500 Pearl Street, New York, New York 10007 - Attention: Cashier, as required by 18 U.S.C. § 3611. The defendant shall write his name and the docket number of this case on each check or money order.

4. Change in Circumstances

Each defendant shall notify, within 30 days, the Clerk of Court, the United States Probation Office (during any period of probation or supervised release), and the United States Attorney's Office, 86 Chambers Street, 3rd Floor, New York, New York 10007 (Attn: Financial Litigation Program) of (1) any change of the defendant's name, residence, or mailing address or (2) any material change in the defendant's financial resources that affects the defendant's ability to pay restitution in accordance with 18 U.S.C. § 3664(k).

5. Term of Liability

A defendant's liability to pay restitution shall terminate on the date that is the later of 20 years from the entry of judgment or 20 years after the defendant's release from imprisonment, as provided in 18 U.S.C. § 3613(b). Subject to the time limitations in the preceding sentence, in the event of death of the defendant, the defendant's estate will be held responsible for any unpaid balance of the restitution amount, and any lien filed pursuant to 18 U.S.C. § 3613(c) shall continue until the estate receives a written release of that liability.

SO ORDERED:

/s/ Sidney H. Stein July 20, 2023
HONORABLE SIDNEY H. STEIN DATE
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
Southern District of New York

UNITED STATES OF AMERICA	**AMENDED JUDGMENT IN A CRIMINAL CASE**
	Case Number:
v.	01:(S1) 21-Cr-00530-3 (SHS)
ANDREW DOWD	USM Number: 61642-509
Date of Original Judgment:	
4/25/2023	Kevin J. Keating
(Or Date of Last Amended Judgment)	Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s)

☐ pleaded nolo contendere to count(s)_ which was accepted by the court.

☒ was found guilty on count(s) One through six after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	**Nature of Offense**	**Offense Ended**	**Count**
18 U.S.C. § 1349	Conspiracy to Commit Mail and Wire Fraud	4/30/2018	
18 U.S.C. § 1341	Mail Fraud	4/30/2018	
18 U.S.C. § 1343	Wire Fraud	4/30/2018	

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) —

☒ Count(s) underlying indictment ☒ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material change in the defendant's economic circumstances.

7/20/2023
Date of Imposition of Judgment

/s/ Sidney H. Stein
Signature of Judge

Sidney H. Stein, U.S.D.J.
Name and Title of Judge

July 20, 2023
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

102 months on each count to run concurrently.

☒ The court makes the following recommendations to the Bureau of Prisons:

1. That defendant be housed in a facility in the tristate area to facilitate visits with his family.

2. That defendant be admitted into the RDAP Program if he otherwise meets the requirements; the PSR reflects that he has not had a drink in 20 years.

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☒ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☒ before 2 p.m. on 6/30/2023.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By: _____
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:

three years on each count to run concurrently.

MANDATORY CONDITIONS

1. You must not commit another federal, state, or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

   ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*

4. ☒ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*

5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*

6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the

probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*

7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside

without first getting permission from the court or the probation officer.

4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation

officer within 72 hours of becoming aware of a change or expected change.

8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____

Date _____

SPECIAL CONDITIONS OF SUPERVISION

1. You must provide the probation officer with access to any requested financial information.
2. You must not incur new credit charges or open additional lines of credit without the approval of the probation officer unless you are in compliance with the installment payment schedule.
3. You shall be supervised by the district of residence.

*4. You shall make monthly installment payments of 20% of your gross income, payable on the 15th of each month, immediately upon entry of this judgment.

CRIMINAL MONETARY PENALTIES

The defendant must pay the following criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Restitution	Fine
Totals	$600.00	$8,117,011.00	$0.00

	AVAA Assessment*	JVTA Assessment**
Totals	$0.00	$0.00

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.

** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (A0 245C)* will be entered after such determination.

☐ The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 1 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	**Total Loss**[***]	**Restitution Ordered**	**Priority or Percentage**
*SDNY Clerk of Court ATTN: Cashier United States Courthouse 500 Pearl Street New York, NY 10007		$8,117,011.00	
TOTALS	$0.00	$8,117,011.00	

☐ Restitution amount ordered pursuant to plea agreement $_____.

[***] Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13 , 1994, but before April 23, 1996.

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

☐ the interest is waived for ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A ☒ Lump sum payment of $600.00 due immediately, balance due

☐ not later than _____, or

☐ in accordance with ☒C, ☐D, ☐E, or ☐F below, or

B ☐ Payment to begin immediately (may be combined with ☐C, ☐D, or ☐F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $_____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $_____ over a period of _____ (e.g., months or years), to commence _____

(e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties:

While serving the term of imprisonment, you shall make installment payments toward your restitution obligation and may do so through the Bureau of Prisons' (BOP) Inmate Financial Responsibility Plan (IFRP). Pursuant to BOP policy, the BOP may establish a payment plan by evaluating your six-month deposit history and subtracting an amount determined by the BOP to be used to maintain contact with family and friends. The remaining balance may be used to determine a repayment schedule. BOP staff shall help you develop a financial plan and shall monitor the inmate's progress in meeting your restitution obligation.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons'

Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☒ Joint and Several

Case Number	Total Amount
Defendant and Co-Defendant Names *(including defendant number)*	
18-Cr-289-1 (SHS) Peter Kalkanis 18-Cr-289-3 (SHS) Kerry Gordon 18-Cr-289-4 (SHS) Robert Locust	
Joint and Several Amount	Corresponding Payee, if appropriate
$14,830,955.00	

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☒ The defendant shall forfeit the defendant's interest in the following property to the United States: $2,900,905 in U.S. currency.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

ADDITIONAL DEFENDANTS AND CO-DEFENDANTS HELD JOINT AND SEVERAL

Case Number Defendant and Co-Defendant Names (including defendant numbers)	**Total Amount**	**Joint and Several Amount**	**Corresponding Payee, if appropriate**
18-Cr-289-1 (SHS) Peter Kalkanis 18-Cr-289-3 (SHS) Kerry Gordon 18-Cr-289-4 (SHS) Robert Locust 18-Cr-289-5 (SHS) Ryan Rainford 17-Cr-633-1 (SHS) Reginald Dewitt			

APPENDIX F

UNITED STATES DISTRICT COURT
Southern District of New York

UNITED STATES OF AMERICA	**JUDGMENT IN A CRIMINAL CASE**
	Case Number:
v.	01:(S1) 21-Cr-00530-3 (SHS)
ANDREW DOWD	USM Number: 61642-509
	Kevin J. Keating
	Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s)

☐ pleaded nolo contendere to count(s)_ which was accepted by the court.

☒ was found guilty on count(s) One through six after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	**Nature of Offense**	**Offense Ended**	**Count**
18 U.S.C. § 1349	Conspiracy to Commit Mail and Wire Fraud	4/30/2018	1, 4
18 U.S.C. § 1341	Mail Fraud	4/30/2018	2, 5
18 U.S.C. § 1343	Wire Fraud	4/30/2018	3, 6

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

—

☒ Count(s) underlying Indictment ☒ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material change in the defendant's economic circumstances.

4/25/2023
Date of Imposition of Judgment

/s/ Sidney H. Stein
Signature of Judge

Sidney H. Stein, U.S.D.J.
Name and Title of Judge

April 26, 2023
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

102 months on each count to run concurrently.

☒ The court makes the following recommendations to the Bureau of Prisons:

1. That defendant be housed in a facility in the tristate area to facilitate visits with his family.

2. That defendant be admitted into the ARDAP Program if he otherwise meets the requirements; the PSR reflects that he has not had a drink in 20 years.

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☒ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☒ before 2 p.m. on 6/30/2023.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By: _____
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:

three years on each count to run concurrently.

MANDATORY CONDITIONS

1. You must not commit another federal, state, or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

   ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*

4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*

5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*

6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any

state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*

7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside

without first getting permission from the court or the probation officer.

4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation

officer within 72 hours of becoming aware of a change or expected change.

8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at www.uscourts.gov.

Defendant's Signature _____

Date _____

SPECIAL CONDITIONS OF SUPERVISION

1. You must provide the probation officer with access to any requested financial information.
2. You must not incur new credit charges or open additional lines of credit without the approval of the probation officer unless you are in compliance with the installment payment schedule.
3. You shall be supervised by the district of residence.

CRIMINAL MONETARY PENALTIES

The defendant must pay the following criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Restitution	Fine
Totals	$600.00		$0.00

	AVAA Assessment*	JVTA Assessment**
Totals	$0.00	$0.00

☒ The determination of restitution is deferred until 7/24/2023. An *Amended Judgment in a Criminal Case (A0 245C)* will be entered after such determination.

☐ The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or

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* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.

** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

percentage payment column below. However, pursuant to 1 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss***	Restitution Ordered	Priority or Percentage
TOTALS	$0.00	$0.00	

☐ Restitution amount ordered pursuant to plea agreement $_____.

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

☐ the interest is waived for ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☒ Lump sum payment of $600.00 due immediately, balance due

☐ not later than _____, or

*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13 , 1994, but before April 23, 1996.

☐ in accordance with ☒C, ☐D, ☐E, or ☐F below, or

B ☐ Payment to begin immediately (may be combined with ☐C, ☐D, or ☐F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $_____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $_____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties:

While serving the term of imprisonment, you shall make installment payments toward your restitution obligation and may do so through the Bureau of Prisons' (BOP) Inmate Financial Responsibility Plan (IFRP). Pursuant to BOP policy, the BOP may establish a payment plan by evaluating your six-month deposit history and subtracting an amount determined by the BOP to be used to maintain contact with family and friends. The remaining balance may be used to determine a repayment schedule. BOP

staff shall help you develop a financial plan and shall monitor the inmate's progress in meeting your restitution obligation.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Case Number — Total Amount

Defendant and Co-Defendant Names *(including defendant number)*

Joint and Several Amount — Corresponding Payee, if appropriate

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☒ The defendant shall forfeit the defendant's interest in the following property to the United States: $2,900,905 in U.S. currency.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

APPENDIX G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	21-CR-530 (SHS)
v.	
GEORGE CONSTANTINE, et al.	Conference
Defendants.	New York, NY November 17, 2022 10:00am

Before:

HON. SIDNEY H. STEIN,

U.S. District Judge.

APPEARANCES

DAMIAN WILLIAMS
United States Attorney for the
Southern District of New York
BY: ALEXANDRA ROTHMAN
NICHOLAS S. FOLLY
DANIELLE M. KUDLA
Assistant United States Attorneys

COLLINS GANN McCLOSKEY & BARRY
Attorneys for Defendant Constantine
BY: MARC C. GANN
AMANDA A. VITALE

KEVIN J. KEATING
Attorney for Defendant Dowd

STEPHEN P. SCARING, PC
Attorney for Defendant Dowd
BY: MATTHEW W. BRISSENDEN

SCHWARTZ CONROY & HACK, PC
Attorney for Defendant Dowd
BY: MATTHEW J. CONROY

[2] (Case called)

* * *

[36] THE COURT: Okay. I have the arguments. And I'm taking that one under advisement as well.

Let's move on to Arce, because I don't understand that one.

The government claims it's a lay opinion. What opinion is the government going to reduce from Arce? I understand she's an investigator. I understand I guess some computer said there were -- I don't know, claims were filed in terms of Constantine late and other indicia of fraud, so she investigated 41 cases and she found this was true, that was true, and that was true.

What opinion do you want her to draw from that?

MS. ROTHMAN: So I think most of her --

THE COURT: Because I think what you're trying to do, although you don't say it in your papers, is have her say these were fraudulent.

MS. ROTHMAN: Not entirely, your Honor. Although I think she can say -- let me back up.

Ms. Arce is a fact witness and a victim of the defendants' scheme, because she works for Traveler's, one of the insurance companies that paid settlements in connection

[37] with fraudulent cases. She will testify to her background in the insurance industry, which is relevant for the jury to hear because the government has to prove, among other things, materiality for the false statements in the complaints, in the medical reports. So she will say that she works for an insurance company. They get claims filed against them. They investigate those claims, and they look for evidence of fraud where appropriate. She'll say that insurance companies pay hundreds of thousands of dollars per claim sometimes when there are fraudulent claims. And she'll speak to the importance of the allegations in fact complaint, and particularly the importance of the medical records to the insurance company's determination as to how to value a settlement. All of that is fair game.

THE COURT: I have no problem with that.

MS. ROTHMAN: She will also say that in 2015 she was alerted to a colleague to a pending investigation into two cases that have been filed by defendant Constantine. What she did then as a more senior investigator is she gathered all of the Constantine cases. That was 41. Forty-one is not the total number of Constantine lawsuits filed, but that's the number where Traveler's was the insurance company. She looked at those 41 cases and she's going to speak to her observations that she made in investigating and analyzing those cases.

So, for instance, in nearly all of those cases, they [38] were unwitnessed accidents. There were no incident reports filed, meaning even though the person claimed to have fallen at a 7-Eleven, they didn't tell 7-Eleven; 7-Eleven only found out three months later when the complaint was filed against them. She'll notice the similarities in medical providers, Dr. Ribeiro, Dr. Dowd, AMI, an MRI facility, All County, another MRI facility. Those are the things she'll speak to. She'll talk about the involvement in funding companies, things that in her experience

have been indicias of fraud. And then she will explain that she referred to investigation to NICB, a national organization that looks at insurance fraud, and the FBI. That's the scope of her testimony. She's not going to sit up here and say I think the defendant's guilty, I think the defendant knew that these cases were staged, but she is going to explain what she did, her investigation, why she did certain things, and the indicia of fraud that she saw.

I'll also note two other things, your Honor.

There's going to be evidence at trial that the defendant learned about this Traveler's investigation and doesn't cease his involvement in the scheme. So her testimony is particularly relevant. And there's also going to be evidence that the defendant doesn't want to engage with Traveler's at a certain point in large part because they're pushing back on his cases. So for those reasons, her testimony is lay witness testimony, it's probative, it's relevant, and [39] she is allowed to explain why she did certain things, and that's based upon her experience looking at all of these red flags of fraud.

THE COURT: All right.

Response.

MR. KEATING: Yes, your Honor.

The testimony of Ms. Arce would never be permitted as an expert, never. The standard for expert testimony, as we all know, one, is the subject matter beyond the ken of the ordinary jury.

THE COURT: They're not presenting her as a --

MR. KEATING: I understand. But this is relevant to my argument. I'll be brief.

The issue at hand at this trial is straightforward. Were these staged accidents? They're going to have witnesses that will say these are staged accidents. They're going to have a witness who will say that they told that to Dowd, and then they're going to claim that Dowd engaged

in unnecessary surgeries. You don't need expert testimony——and that's what this really is, expert testimony——for the jury to decipher the evidence at this trial. I remind the Court there was no expert in the first trial and the jury returned a swift verdict.

Number two, your Honor --

THE COURT: Well, in the first trial was there an insurance investigator?

[40] MS. ROTHMAN: Your Honor, we called an attorney who was staff counsel for an insurance company Jim Aldag. He was staff counsel for AmTrust, one of the victims, and he testified to his involvement in the case, things they looked for with respect to fraudulent cases, the settlements that they did. So it's similar testimony, although a little different.

THE COURT: Did he talk about indicia of fraud?

MR. KEATING: He did not. He did not. James Aldag testified as a victim——legitimate testimony——at the first trial. Here's what we do in a claim. Had we known that these were staged accidents we never would have settled the case. Victim appropriate testimony. This is miles different, your Honor.

The other issue is this does -- and two points, please. This does go to the ultimate issue of fact. The government can stand up and say -- she's not going to say that Dowd engaged in fraud, what they're going to say is that these bore the red flags, the whole marks of fraud.

THE COURT: Right.

MR. KEATING: That goes right to subjective intent. The government attempts to end run the fact that she is an expert witness by saying she's a lay witness. She is not.

Here's what 701 says. 701 says you are not a lay witness if you have specialized knowledge or technical information. She's A fraud investigator for 25 years. They [41]

have algorithms and patterns which create these patterns of material that they looked at, your Honor.

The government then cites a series of cases to say certain industry information doesn't disqualify one from being a lay witness. So is it specialized knowledge or certain industry information? They cite *Yannotti*. In the *Yannotti* case, the government called a coconspirator to decipher the meaning of one word on a wiretap. They cite the *Rubin* case. Same exact thing. They cite the *Rigas* case, your Honor. This is a case we've probably all heard of, four-month long, document-intensive, white-collar case. In *Rigas*, an accountant who was part of the case was called by the government to talk about what certain entries in accounting spreadsheets were, not to opine upon the appropriateness of these entries.

So this woman is an expert. She's not a lay witness because of her specialized knowledge. They want her to testify to something which is not beyond the ken of the typical jury. This jury doesn't need it. They don't need this information. The government simply wants to indicate to produce evidence of fraud.

THE COURT: I got it.

MS. ROTHMAN: Your Honor, so two things.

This is no different than a bank investigator speaking to the investigation that that person conducted in connection with a financial fraud case. She is a fact witness who [42] conducted an investigation and needs to explain the reason she took certain steps.

Let me give the Court an example. She did surveillance. So she went to homeless shelters as part of her investigation to see if she could figure out how patients were being recruited from the homeless shelters. She's going to say that she did that. And she's allowed to, as part of that, explain the reason that she went to that homeless shelter. One other thing she did, she looked at the lack of incident

reports being filed and the time period between the alleged accident and when the victim, the insured, got the first notice.

THE COURT: I saw that.

MS. ROTHMAN: All of that is not expert testimony. It's what she did as part of her investigation.

THE COURT: No. She is then going to say these are indicia of fraud, that's the problem.

MS. ROTHMAN: She's going to explain the reason that she did it. She's not going to say definitively, I concluded that the defendant committed fraud. No one is asking her to reach that conclusion. And, really, the ultimate–

THE COURT: It's pretty close.

MR. GANN: Yes.

MS. ROTHMAN: I don't think so, your Honor.

THE COURT: There were indicia of fraud here, that's what she's going to say.

[43] MS. ROTHMAN: She is explaining why she took certain steps.

So, for instance, she's going to explain why she looked at who the doctors were that were involved in this. Just explain why she considered that. She has to explain -- and she's not going to say that if you use the same doctor that means that you committed fraud, but she's allowed to speak to her experience in this space, having conducted thousands of investigations and things that she's seen.

THE COURT: All right. I understand.

Sir.

MR. GANN: Two quick points, Judge, just to piggyback on Mr. Keating's arguments.

Number one, with regard to the 41 cases they're referring to, I do not believe that Ms. Arce is going to be able to say that those 41 cases are Kalkanis, Gordon/Duncan cases. She's taken the universe of cases during this

period of time, 2013 to 2018, from George Constantine's practice and said these are 41 cases that I believe are fraudulent. That's what she's essentially going to testify to without being able to say that these are cases that involve the alleged coconspirators here. I think that's highly relevant to the question of whether she should be allowed to testify at all, because now she is broadening the scope of, or her investigation into, the alleged fraudulent practices of George Constantine and now [44] getting involved in the rest of his practice, and whether the rest of his practice is also fraudulent.

THE COURT: I understand.

MR. GANN: One other thing, Judge, very quickly.

I don't mean to speak for Mr. Keating on this, but we would be prepared to stipulate that there was a Traveler's investigation into fraud that began in 2015 and resulted in the FBI getting involved in this case and coming forward with the indictments that they did. So I don't mean to speak for you, Mr. Keating, but I'm certainly prepared.-

THE COURT: I assume -- well, what's the position of the government? I assume it's not sufficient.

MS. ROTHMAN: No, your Honor.

THE COURT: All right.

As you can see the courtroom, I have a couple of matters here.

This is what I'm going to do. I've taken under advisement the income allegedly being withheld from the IRS. I've taken under advisement the prior good acts, and Arce as well, and the consent agreement. I've rendered my decision on the recusal.

What we'll do on the 28th is we'll pick a jury, and then we'll handle these, and we'll have the openings then on Tuesday, the 29th. All right?

* * *

APPENDIX H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	21-CR-530 (SHS)
v.	
GEORGE CONSTANTINE ANDREW DOWD,	Trial
Defendants.	New York, NY December 1, 2022 10:45am

Before:

HON. SIDNEY H. STEIN,

District Judge
–and a jury–

APPEARANCES

DAMIAN WILLIAMS
United States Attorney for the
Southern District of New York
ALEXANDRA ROTHMAN
NICHOLAS FOLLY
DANIELLE KUDLA
Assistant United States Attorneys

MARC C. GANN
AMANDA VITALE
Attorneys for Defendant Constantine

KEVIN J. KEATING
MATTHEW W. BRISSENDEN
MATTHEW J. CONROY
Attorneys for Defendant Dowd

Also Present: Joseph Carbone, Paralegal Specialist
Matthew Bailey, Paralegal Specialist

* * *

[725] (In open court)

THE COURT: You've called your next witness. I'm sorry.

THE DEPUTY CLERK: Please raise your right hand.

TARA ARCE,

called as a witness by the Government, having been duly sworn, testified as follows:

Please state your full name and spell your last name for the record.

THE WITNESS: Tara Arce.

THE COURT: You may be seated. Talk into that microphone.

THE WITNESS: OK. Very good.

THE COURT: Where is that microphone?

There it is.

THE WITNESS: My name is Tara Arce. Last name is spelled A-r-c-e.

THE COURT: Welcome. Good afternoon.

THE WITNESS: Thank you. Good afternoon.

MS. ROTHMAN: May I proceed?

THE COURT: Yes.

MS. ROTHMAN: Thank you, your Honor.

DIRECT EXAMINATION
BY MS. ROTHMAN:

* * *

[735] MS. ROTHMAN: We'll come back to Mr. Julbe later in your testimony. We can take that down.

Q. Now, Ms. Arce, you explained that when a complaint gets filed, that's one way that Travelers can start looking at a claim. But does sometimes Travelers sometimes learn of claims before a complaint is filed?

A. Yes, absolutely.

Q. How does that happen?

A. We'll get claims -- claims can be filed by a phone call from an insured or a claimant, an agent, another carrier, an injured party. We may receive a letter of rep, which is not a summons and complaints, just a notice of a representation of an injured party.

Q. So what is the first thing that Travelers would do when it gets either a complaint or just a claim filed against one of its insured?

A. It will be find to a claim handler.

Q. What does a claim handler do?

A. A claim handler will -- first they will determine coverage, so they will review policy insurance, then they will make the appropriate contacts, and then they would begin to gather the pertinent documents related to the claim in question.

Q. What type of records will the claims handler or adjustor gather?

A. Medical records, incident reports, accidents reports, um, [736] anything -- anything related in that matter.

Q. Why does the claims handler gather accident reports?

A. To get an account of the loss.

Q. Why does the claims handler gather medical information?

A. We want to know the claim handler wants to know what type of treatment the claimant had and with that it puts a value on the case.

Q. So can you explain the correlation or connection between the medical treatment provided and the value of a case from an insurance perspective?

A. From an insurance perspective, if an individual goes for a surgery, the value of the case is going to increase. Because if a surgery is involved, then the allegations that there is an appearance of a more severe injury.

Q. Let me ask you a few more questions about medical procedures.

If Travelers had a claim related to a trip-and-fall where surgery was performed but there was no record of physical therapy prior to surgery, how if at all would Travelers think about that claim?

A. Travelers would question why there was no conservative treatment and why the individual was -- went right into surgery without first trying to do PT or chiro or acupuncture.

Q. Let me ask you another question.

If Travelers had a claim related to trip-and-fall [737] where surgery was performed but no record of an MRI before that surgery, how if at all would Travelers think about that claim?

A. Well, that would be the same thing. We would question that. If there is no MRI report, then there is no justification for the surgery.

Q. Focusing on cases where a lawsuit has been filed, what happens in the litigation process, at a high level?

A. In litigation, they will begin their, um, assignments and, um, excuse me, schedule depositions of the plaintiff.

Um, they will do -- they will get additional records, maybe schedule experts, IMEs, do film reviews, stuff like that.

Q. Let's break that down.

What is a deposition?

A. A deposition is an interview where the claimant will be asked about the loss details, their injuries, their treatment, prior losses, personal information.

Q. Are you aware --

THE COURT: Is the claimant under oath during a deposition?

THE WITNESS: Yes.

THE COURT: Are the claimants answers to questions recorded by a reporter?

THE WITNESS: Yes.

Q. Why is the deposition important to Travelers' assessment of a claim?

[738] A. Well, we want to gather the facts. We want to make sure that the loss that was reported to us occurred in the manner which we were told, and we also want to delve into the injuries and treatment and see what they're going through.

Q. Are you aware there was a deposition in the Jose Julbe case?

A. There was.

Q. Now, you also mentioned independent medical exams.

What is that?

A. Independent medical exam is when a Travelers contracted doctor will examine the patient.

Q. Why does Travelers do that?

A. They will get a complete medical history from the individual, talk about their injuries, their treatment, and make a determination if the injuries and the treatment are causally related to the loss in question.

Q. So when that pretrial litigation process is complete, what then happens with these complaints that are filed?

A. Um, settlements will begin to be discussed.

Q. Do all cases -- withdrawn.

What are the factors Travelers considers in deciding whether to settle a case or to take it to trial?

A. Monetary value. They will look into the cost it would be to go to trial and compare it to the potential settlement amount. So Travelers, people speaking from Travelers would [739] make a business decision maybe not to go to trial and settle a claim.

Q. What percentage of personal injury cases go to trial?

A. I don't have the exact percentage. I will say it's small. It's very low.

Q. Does the fact that Travelers settles a case mean that it believes the case is legitimate?

MR. GANN: Objection.

THE COURT: Just a moment.

What was that, sir?

MR. GANN: I'll withdraw the objection, Judge.

Q. Why not?

A. Because, again, what I said. Sometimes Travelers or an insurance company will make a business decision to settle a claim.

Q. So now I want to ask you about some of your work as a claims investigator and the things that you look at when you're investigating claims particularly in the personal injury context.

A. Um-hmm.

Q. What are some of the factors you will consider in assessing the legitimacy of a potential claim?

A. When investigating a claim, we are going to do a background on the plaintiff, a background on their providers,

the statements that are taken. We'll assess what was said, we'll [740] conduct a review of the medical treatment, and see where we need to go with that.

Q. And in your experience, are there certain things you have identified that could raise concerns about personal injury cases?

A. Yes. Yes.

Q. What are some of those things?

A. We call them red flags in the insurance industry. So some involving slip-and-falls are unwitnessed accidents, late reporting, no medical treatment at the loss scene, no incident report to the insured, questionable medical records or incomplete medical records.

We looked at funding company involvement with high interest rates, and we looked at provider -- possible provider attorney relationships.

(Continued on next page)

[741] BY MS. ROTHMAN:

Q. All right. So let's break that down and go one-by-one.

You mentioned unwitnessed accidents. Why is that a problem in slip-and-falls?

A. There's no proof that the loss occurred.

Q. You also mentioned late reporting of incidents. What do you mean by that?

A. The late reporting can affect our investigation. So if a claimant or plaintiff allegedly fell in a pothole in a parking lot in 2015, yet we didn't receive the claim until a year, year and a half later, that parking lot may have changed; that pothole may not be there anymore or, you know, it could have been paved and repaired. So we lose that ability to assess the alleged defect that may have caused the injury.

Q. You also mentioned that no incident reports would be filed on scene. What do you mean by that?

A. Well, if an individual falls, you would think that they would go to the insured premise.

MR. GANN: Objection.

THE COURT: May I hear that read back.

(Record read)

THE COURT: I'll overrule the objection.

You may want to ask a follow up.

Q. Yes. Ms. Arce, let me ask you again, in talking about some of the things you look for when investigating potential issues [742] with trip-and-fall cases, you mentioned that there's often a lack of an incident report being filed. I wanted to break that down and ask you to explain why that is something that you look for when you're assessing trip-and-fall accidents?

A. We look for that -- it's an accounting of the loss on that day that it happened. So it's like having a police report if you're in a car accident and you call the police and you want the report. So it would be similar to that. You have a loss and we're looking for a report, which gives us an account of what happened that day.

Q. And if you don't see an incident report, what, if anything, do you think may happen?

A. Well, we wonder --

MR. GANN: Objection.

THE COURT: Sustained. Absolutely.

I'm sorry. The jury will disregard what I said.

Sustained.

Q. You also mentioned that one thing you consider is a lack of medical attention on scene. What do you mean by that?

A. In some of the claims, the injuries are severe to the point where they are going for surgery. So at the loss scene, they were injured, allegedly injured, and you would

expect that they would go to an emergency room or call an ambulance or let somebody know that they were hurt.

Q. You also, I think, mentioned questionable medical [743] treatment. What did you mean by that, Ms. Arce?

A. In reviewing the medicals, we'll see that what we had talked about before, that maybe there was, like, one or two instances where they went to physical therapy, and a week later they already had a surgery. So we'll look at things like that.

Q. And why is that concerning?

A. We look at the fact that those injuries aren't as severe as it would need surgery if there was only two treatments of physical therapy.

Q. You also mentioned the idea of funding companies being involved as one thing you consider when you're evaluating the legitimacy of claims. What's a funding company?

A. A funding company. They fund litigation, lawsuits.

Q. And why is that one thing you look at when you're assessing the claims you investigate?

A. In this case in particular, it was the --

MR. GANN: Objection.

THE COURT: Sustained.

The question was different. The question is why is that something you look at when you are assessing the claims you investigate? Not about the Julbe case, the question wasn't addressed to the Julbe case.

Q. Proceed.

THE COURT: Do you understand what I'm saying, ma'am, what I'm asking?

[744] THE WITNESS: Yes, I understand. Yup.

THE COURT: Okay. Can you answer?

A. So the interest rate on these funding company loans are high. So they'll be, in some instances, compounded daily

or monthly. So a $12,000 litigation loan, in three years, the payoff could be $65,000. So that's what we're looking at as far as the litigation loans.

Q. And why is that a potential concern to you, the insurance company?

A. Well, I can give you an example.

Just say an insurance company settles a case for $100,000. The first entity that's going to get paid back is that funding company. So there goes $65,000. Then possibly the attorney is going to take a third. So just say that they take a third. That's $33,000. In that situation, it's going to leave $2,000, maybe, left for the plaintiff at the end of the day, the plaintiff that went for the surgeries.

Q. You also mentioned that repeat medical providers was one thing that you looked at in evaluating -- investigating claims. What do you mean by that and why is that something that you look at?

A. When we review claims and we find the same attorneys and providers multiple times, we wonder what the relationship is between them.

Q. You also mentioned a link between funders and facilities.

[745] What did you mean by that?

A. Again --

Q. I'm sorry.

A. Oh, I thought somebody said something. Okay.

Q. I don't think so.

A. The same situation. If we're seeing the same attorneys with the same funding companies, what is the relationship?

Q. I want to direct your attention to Travelers' investigation into George Constantine.

When did you first learn about attorney George Constantine?

A. June 2015.

Q. How was he brought to your attention?

A. The claim handler began seeing multiple claims.

MR. GANN: Objection.

MS. ROTHMAN: Explaining how she got started.

THE COURT: Just a moment.

I will allow that.

How was this issue brought to your -- brought to your attention? You may answer.

MR. GANN: Judge, the answer she's going to give, the question she was asked calls for a hearsay response.

THE COURT: Not yet. Go ahead. You may answer. Or actually, the answer was given. Next question.

MS. ROTHMAN: I think Ms. Arce needed to finish her [746] answer.

THE WITNESS: I did.

THE COURT: Finish your answer.

THE WITNESS: So the claim handler began receiving multiple slip-and-fall claims --

MR. GANN: Objection, Judge. This is hearsay.

MS. ROTHMAN: Not for the truth.

THE COURT: I will allow it. Go ahead.

A. So the claim handler began seeing multiple slip-and-fall claims with George Constantine, where there were red flags on the claims. And that claim handler referred some claims over to field investigators.

Q. And at that point, what did you do?

A. At that point the field investigators had brought it to my attention, as a major case investigator, and I opened up a major case matter on this.

Q. And when you say you opened a major case matter, what did you do?

A. So at this point, because I look at multiple claim associated with an entity, I don't do single case investigations, the first thing I do is I look for the exposure. So I identified all of the claims that are related to Mr. Constantine. And I began my review of those claims.

Q. How many cases did you gather in amassing Travelers' potential exposure to Mr. Constantine's cases?

[747] A. We had 41; 38 Travelers and three --

MR. GANN: Objection.

THE COURT: Just a moment.

I will allow that. But, ladies and gentlemen, earlier in the answer, part of the answer was that "there were red flags on the claims." I'm directing the jury to disregard that part of the answer. The testimony is that a claims handler referred it to somebody who referred it to her.

Go ahead. Next question.

BY MS. ROTHMAN:

Q. So you said there were 41 cases involving George Constantine at Travelers. And I think you were explaining that some of them related to Northland?

A. Yeah, three are Northland, which is a subsidiary of Travelers.

Q. Now, Ms. Arce, that 41 number, is that all of the personal injury cases that Mr. Constantine has filed or just the ones where Travelers or Northland are the insured?

MR. GANN: Objection.

THE COURT: I will allow that.

A. Just Travelers and Northland.

Q. So your testimony today is focused on -- withdrawn.

So I want to ask you some things that you observed from your review of those files, and focusing on the things that you did in conducting an investigation into [748] Mr. Constantine.

So first, did you look at medical reports that had been submitted to Travelers in connection with Mr. Constantine's cases?

MR. KEATING: Your Honor, did she look at medical reports?

THE COURT: That's the question, did she, and the answer is either yes or no.

A. Yes, I did look at the medical --

THE COURT: Next question.

Q. What, if anything, did you notice about the providers' names on those medical reports for the 41 cases that you considered?

MR. KEATING: Your Honor, note my objection. She's reviewing reports --

THE COURT: I understand.

MR. KEATING: -- prepared by another entity.

THE COURT: I understand. By?

MR. KEATING: By I don't know whom.

THE COURT: I understand.

MS. ROTHMAN: She's not going to speak to anything in content within those reports; she's speaking to the providers listed.

THE COURT: Go ahead. I have the objection. I'll allow the answer.

[749] MR. KEATING: But --

BY MS. ROTHMAN:

Q. What did you notice, Ms. Arce?

A. We were seeing the same providers in multiple claims.

Q. What are some of the names you recall?

A. We were seeing Sady Ribeiro, Astoria Medical Imaging, Andrew Dowd, All County, Aron Rovner, Forest Hills Orthopedic, Dr. Donadt.

Q. I want to ask you about the timing in which Travelers were notified about these Constantine claims. In conducting your review, did you see any instance in which incident reports had been filed at the time of the purported accident?

MR. GANN: Objection.

THE COURT: Let's have a sidebar.

(Continued on next page)

[750] (At sidebar)

MS. ROTHMAN: Ms. Arce is a victim and a fact witness. She is talking about what she did in conducting her investigation into Mr. Constantine. She will not elicit hearsay statements.

THE COURT: Well, their point is she's looking at hearsay documents and telling this jury what she found in those hearsay documents; is that correct?

MR. GANN: That's 100 percent.

THE COURT: Only two at a time.

MS. ROTHMAN: Whether or not there is an incident report is not a hearsay document. There is a report or there is not.

THE COURT: That I agree with. But their point is you're looking at the contents of the incident report. I think that's your point.

MR. GANN: It's not just -- it's not just the contents of the potential incident report, Judge. Because she's presumably going to say there are no incident reports. I think that's what she's going to testify to. My point is she's giving testimony --

THE COURT: What is she looking at?

MS. ROTHMAN: She's looking at the case files for all 41 of the Constantine cases. She is not going to talk about the findings within medical reports; Mr. Keating should not [751] have an objection here. She is not going

to talk about the criminal history of the individuals. She's going to talk about the names of the providers; she's going to talk about the lack of incident reports; she's going to talk about the timing between when the purported accident happened which is put in the complaints that Mr. Constantine, the defendant, filed; and when Travelers was notified. That's a date.

She's going to talk about the addresses of certain individuals that were listed as the claimants; and specifically, that she went to one address, 599 Ralph Avenue, a homeless shelter, because there were several claimants who listed that as their address, and that's what she's going to talk about.

And then she's going to explain what she did after reviewing these claims. I'm not trying to get into hearsay. I get the objection, Mr. Keating.

THE COURT: But their point is everything she's testifying to is from a hearsay document, not the absence of incident reports. Maybe even that. But certainly the addresses, the close timing, the so forth.

MS. ROTHMAN: The addresses are being provided by co-conspirators. They are at least a co-conspirator statement, if anything, or by Mr. Constantine as a party admission.

The doctor reports are also co-conspirator statements with respect to Mr. Ribeiro and AMI. I Think those statements, [752] if there are even statements there, are inadmissible on that basis.

What she is saying is what she did. What she looked at, and then what she did when she got the information.

MR. KEATING: Judge, can I be heard?

THE COURT: Yes.

MR. KEATING: Judge, no matter how you slice it, this witness is referring to documents which are not in evidence. That's the bottom line. If this was an agent or

anybody else, none of this would be permissible. I got an address from this site. What?

They are referring to hearsay documents they didn't prepare which are not in evidence. All of it. The government could say, Well, if they won't give the content of an IME, I appreciate that; you can't give the content of an IME, nor can you say, I learned that Dr. Dowd was on -- was involved because I reviewed this document. What document? I don't have that document. It's hearsay. She didn't prepare them. It's rank hearsay.

THE COURT: Sir.

MR. GANN: That's the exact point I was trying to make, Judge, articulated by Mr. Keating.

MS. ROTHMAN: We're not offering this for its truth; just saying what she did.

MR. GANN: Of course they are.

* * *

APPENDIX I

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	21-CR-530 (SHS)
v.	
GEORGE CONSTANTINE ANDREW DOWD,	Trial
Defendants.	New York, NY December 14, 2022 9:30am

Before:

HON. SIDNEY H. STEIN,

District Judge
–and a jury–

APPEARANCES

DAMIAN WILLIAMS
United States Attorney for the
Southern District of New York
ALEXANDRA ROTHMAN
NICHOLAS FOLLY
DANIELLE KUDLA
Assistant United States Attorneys

MARC C. GANN
Attorneys for Defendant Constantine

KEVIN J. KEATING

MATTHEW W. BRISSENDEN
MATTHEW J. CONROY
Attorneys for Defendant Dowd

Also Present: Joseph Carbone, Paralegal Specialist
Matthew Bailey, Paralegal Specialist

* * *

[2311] (Jury present)

THE COURT: Please be seated in the courtroom.

Ladies and gentlemen, you've heard all of the evidence — you know that — there's no more evidence. You know you're now going to hear the lawyers tell you what they think the evidence showed and you know that you decide what the evidence showed. So some of you take notes, some of you don't — it makes no difference to me — but those who take notes remember that they're telling you what they think the evidence showed, you decide what it showed, and you know what the lawyers say is not evidence.

I think you also know that the order of summations is set by law. The parties have no role to play in that.

The government and then the defense and then the government gets to sum up last because it has the burden of proof. You know all of that by now.

So, let's begin. We're going to hear the opening summation by the government.

Ms. Rothman, please.

MS. ROTHMAN: Thank you, your Honor.

* * *

Here is one more, an April 2016 email between Bryan [2317] Duncan and Jason Krantz. You'll remember Kerry Gordon told you that Krantz worked at Fast Trak. So, Duncan is emailing Krantz in New Jersey, copying

Constantine, with patient information. Another interstate wire for the wire fraud charge.

So, again, this element, interstate wires, is not meaningfully in dispute.

What else isn't in dispute? Materiality.

Now, I expect Judge Stein will instruct you that the lies in this case need to relate to a material fact. A material fact is one which would reasonably be expected to be of concern to a reasonable and prudent person in relying upon the representation or statement in making a decision.

So, what does that mean? It just means that that's what this is about. And the lies in this case, they matter a lot. They matter to the insurance companies that paid out settlements for the fraudulent lawsuits that were filed and the value of those cases that was inflated based upon the unnecessary medical procedures.

Tara Arce from Travelers Insurance explained to you how insurance companies rely on the allegations in complaints and the medical treatment provided to evaluate and settle claims. She said if a person intentionally fell, that fact would be material to Travelers. If a person was not actually injured, that fact would be material.

And here's what else she said: From an insurance [2318] perspective, if an individual goes for a surgery, the value of the case is going to increase because if a surgery is involved, then the allegation is that there is an appearance of a more severe injury.

Ladies and gentlemen, that is this fraud, those words in a nutshell. Beef up the value of the case and cause the insurance companies to settle for more money. So, the surgeries, the unnecessary surgeries, matter to the insurance companies because they think the cases are worth more, and they agree to pay more to settle them, so that's why these lies are material.

So, as I mentioned, what this case boils down to is the defendants' knowledge and intent.

Now, defense counsel has argued throughout this trial — and I expect you'll hear this argument from counsel today — that the defendants were lied to by the patients, and, therefore, they didn't know this was a fraud. I think Mr. Constantine's attorney went so far as to call him a victim of those fraudsters in his opening statement.

Ladies and gentlemen, that is preposterous. These men, an experienced lawyer and an experienced surgeon, weren't fooled by anyone. They knew about the fraud for all the reasons I'm about to go through.

So, the first reason that you know the defendants knowingly participated in this fraud scheme with the intent to

* * *

[2351] Reginald Dewitt, the runner who referred him.

Now, you Tara Arce testified about some of the red flags that she looks for when she's looking at trip-and-fall cases — unwitnessed accidents, late reporting, no incident reports to the insurer, questionable medical reports, provider-attorney relationships, and funding company involvement — all of which you saw in George Constantine's cases and the cases that Dowd treated as well.

This is a chart from Compass Lexecon. It shows you, of all the Constantine cases, the number of patients that are seeing either Ribeiro, the back doctor, Dowd, the knee and shoulder surgeon, or both. Again, another pattern of fraud obvious to anyone, including Constantine.

You know everyone had the same injuries — knees, shoulders, backs — you know surgeries prescribed in all of these cases. More patterns of fraud.

You saw overlap in the addresses of the patients. 15 percent with the same address as another patient. Nine

people coming from 599 Ralph Avenue. That's a shelter, a shelter that people were recruited from and brought to Constantine's office.

There's the map that Compass put together. Look at all of those patients and photographs of where Tara Arce went to investigate. More signs of fraud, obvious signs of fraud, that George Constantine was presented with.

* * *

[2362] consequences of criminal law. If the defendant you are considering was aware of a high probability a crime was being committed, and the defendant took deliberate actions to avoid confirming this fact, such as by purposefully closing his eyes to it or intentionally failing to investigate it, then you may treat this deliberate avoidance as the equivalent of knowledge.

Ladies and gentlemen, the defendants knew, they absolutely knew, but if you have any doubt, you can convict them on this theory. They can't bury their head in the sand to avoid confirming this is a big fraud.

And think about all of the red flags, those sirens they are seeing — patients asking for money, patients coming from shelters, patients disappearing, patients being in jail, everyone getting surgery from these trip-and-falls, MRI scans that don't match the surgeries — bright red flags that Dowd and Constantine cannot ignore, cannot bury their head in the sand, to avoid learning.

So, ladies and gentlemen, the defendants knew. If they didn't, they are guilty on a theory of conscious avoidance.

So, that's it. We've gone through all nine reasons why the defendants knowingly participated in this fraud scheme and had the intent to defraud. We've talked about the elements for the six counts, the many things that are not in dispute — the mailings, the wires, the materiality — and all of the proof

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