TRACY L. WILKISON
Acting United States Attorney
SCOTT M. GARRINGER
Assistant United States Attorney
Chief, Criminal Division
KRISTEN A. WILLIAMS (Cal. Bar No. 263594)
Deputy Chief, Major Frauds Section
ALEXANDER C.K. WYMAN (Cal. Bar No. 295339)
ALI MOGHADDAS (Cal. Bar No. 305654)
DAVID H. CHAO (Cal. Bar No. 273953)
DAVID C. LACHMAN (Cal. Bar No. 261711)
Assistant United States Attorneys
Major Frauds/General Crimes Sections
1100 United States Courthouse
312 North Spring Street
Los Angeles, California 90012
Telephone: (213) 894-2400
Facsimile: (213) 894-6269
E-mail: Kristen.Williams@usdoj.gov
Alex.Wyman@usdoj.gov
Ali.Moghaddas@usdoj.gov
David.Chao@usdoj.gov
David.Lachman@usdoj.gov

Attorneys for Plaintiff
UNITED STATES OF AMERICA

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

JULIAN OMIDI,
aka "Combiz Omidi,"
aka "Combiz Julian Omidi,"
aka "Kambiz Omidi,"
aka "Kambiz Beniamia Omidi,"
aka "Ben Omidi,"
SURGERY CENTER MANAGEMENT, LLC, and
MIRALI ZARRABI, M.D.,
aka "Mirali Akba Ghandchi Zarrabi,"
aka "M.A. Ghandchi Zarrabi,"

Defendants.

No. CR 17-661(A)-DMG

GOVERNMENT'S TRIAL MEMORANDUM; EXHIBITS 1-4

Trial Date: September 21, 2021
Time: 9:00AM
Location: Courtroom of the Hon. Dolly M. Gee

Plaintiff United States of America, by and through its counsel of record, the Acting United States Attorney for the Central District of California and Assistant United States Attorneys Kristen A. Williams, Alexander C.K. Wyman, Ali Moghaddas, David H. Chao, and David C. Lachman, hereby files its trial memorandum, as well as exhibits 1-4 thereto.

The government respectfully requests leave to file additional memoranda as may become appropriate during the course of trial.

Dated: September 14, 2021

Respectfully submitted,

TRACY L. WILKISON
Acting United States Attorney

SCOTT M. GARRINGER
Assistant United States Attorney
Chief, Criminal Division

/s/
KRISTEN A. WILLIAMS
ALEXANDER C.K. WYMAN
ALI MOGHADDAS
DAVID H. CHAO
DAVID C. LACHMAN
Assistant United States Attorneys

Attorneys for Plaintiff
UNITED STATES OF AMERICA

TABLE OF CONTENTS

DESCRIPTION PAGE

Contents

TABLE OF AUTHORITIES....1
MEMORANDUM OF POINTS AND AUTHORITIES....4
I. CASE SCHEDULING MATTERS....4
A. Motions....4
B. Government Witnesses....4
C. Defense Witnesses....5
II. FACTUAL SUMMARY OF THE GOVERNMENT'S CASE....5
III. THE INDICTMENT AND ELEMENTS....8
A. Mail Fraud....9
B. Wire Fraud....11
C. Aggravated Identity Theft....12
D. False Statements Relating to Health Care Matters....13
E. Conspiracy to Commit Money Laundering....14
F. Promotional Money Laundering....16
IV. EVIDENTIARY ISSUES....18
A. Hearsay....18
1. Defendants' Statements, Adopted Admissions, and Agent Admissions....18
2. Co-Conspirator Statements....20
3. Patient Files....21
B. Authentication and Foundation....22
1. Federal Rule of Evidence 901....22
2. Audio Recordings....23
C. The Parties' Agreements Regarding Limitations on the Introduction of Certain Evidence....24

TABLE OF CONTENTS (CONTINUED)

DESCRIPTION	PAGE
D. Evidence of Satisfied Patients, Successful Procedures, and Lawful Actions	25
E. Cross-Examination of Defendants	26
F. Defense Witnesses	27
G. Character Evidence	28
H. Reciprocal Discovery and Expert Disclosures	28
I. Jury Nullification	29

TABLE OF AUTHORITIES

DESCRIPTION — PAGE

CASES

Anderson v. United States,
417 U.S. 211 (1974) 18

Bourjaily v. United States,
483 U.S. 171 (1987) 17

Bryan v. United States,
524 U.S. 184, (1998) 7, 11

Gallego v. United States,
276 F.2d 914 (9th Cir. 1960) 19

Michelson v. United States,
335 U.S. 469 (1948) 24

United States v. Akintobi,
159 F.3d 401 (9th Cir. 1998) 15

United States v. Aramula-Ruiz,
987 F.2d 599 (9th Cir. 1993) 18

United States v. Awad,
551 F.3d 930 (9th Cir. 2009) 7, 11

United States v. Black,
767 F.2d 1334 (9th Cir. 1985) 19

United States v. Chu Kong Yin,
925 F.2d 990 (9th Cir. 1991) 19

United States v. Dearing,
504 F.3d 897 (9th Cir. 2007) 7

United States v. Fagan,
996 F.2d 1009 (9th Cir. 1993) 23

United States v. Gay,
967 F.2d 322 (9th Cir. 1992) 23

United States v. King,
587 F.2d 956 (9th Cir. 1978) 20

United States v. Knigge,
832 F.2d 1100 (9th Cir. 1987) 17, 19

United States v. Kreimer,
609 F.2d 126 (5th Cir. 1980) 22

United States v. Lloyd,
807 F.3d 1128, (9th Cir. 2015).....7

United States v. McCollom,
664 F.2d 56 (5th Cir. 1981).....25

United States v. Miranda-Uriarte,
649 F.2d 1345 (9th Cir. 1981).....22

United States v. Moreira,
605 Fed. App'x 852 (11th Cir. 2015).....22

United States v. Orellana-Blanco,
294 F.3d 1143 (9th Cir. 2002).....16

United States v. Ortega,
203 F.3d 675 (9th Cir. 2000).....17

United States v. Osuna-Alvarez,
788 F.3d 1183 (9th Cir. 2015).....9

United States v. Powell,
955 F.2d 1206 (9th Cir. 1992).....25

United States v. Reese,
666 F.3d 1007 (7th Cir. 2012).....21

United States v. Santos,
553 U.S. 507 (2008).....15

United States v. Scarpa,
897 F.2d 63 (2d Cir. 1990).....21

United States v. Schmit,
881 F.2d 608 (9th Cir. 1989).....17

United States v. Smith,
893 F.2d 1573 (9th Cir. 1990).....17, 20

United States v. Taylor,
716 F.2d 701 (9th Cir. 1983).....19

United States v. Turner,
528 F.2d 143 (9th Cir. 1975).....20

United States v. Yarborough,
852 F.2d 1522 (9th Cir. 1988).....18

Zal v. Steppe,
968 F.2d 924 (9th Cir. 1992).....26

STATUTES

18 U.S.C. § 1028.....9, 10

18 U.S.C. § 1341.....6
18 U.S.C. § 1343.....8
18 U.S.C. § 1956.....11, 14
18 U.S.C. §§ 1035.....11
U.S.C. § 1347.....7

RULES

Fed. R. Evid. 1003.....20
Fed. R. Evid. 405.....24
Fed. R. Evid. 801.....15, 16, 17
Fed. R. Evid. 901.....19, 20
Fed. R. Evid. 401.....26
Fed. R. Evid 608.....23

CRIMINAL JURY INSTRUCTION

Ninth Circuit Model Criminal Jury Instruction No. 8.147.....14
Ninth Circuit Model Criminal Jury Instruction No. 5.6 (2010 ed.)....7
Ninth Circuit Model Criminal Jury Instruction No. 8.121 (2010 ed.; approved 6/2021).....7
Ninth Circuit Model Criminal Jury Instruction No. 8.122 (2010 ed.; approved 6/2021).....8
Ninth Circuit Model Criminal Jury Instruction No. 8.124 (2010 ed.; approved 6/2021).....9
Ninth Circuit Model Criminal Jury Instruction No. 8.83 (2010 ed.; approved 3/2021).....9
Ninth Circuit Model Instruction Nos. 8.146.....14
Ninth Circuit Model Jury Instruction No. 8.23 (2010 ed.; approved 4/2019).....13

MEMORANDUM OF POINTS AND AUTHORITIES

I. CASE SCHEDULING MATTERS

Jury trial is set for September 21, 2021, at 9:00AM. The estimated time for the government's case-in-chief is approximately nine to ten weeks. Defendants JULIAN OMIDI ("OMIDI"), SURGERY CENTER MANAGEMENT, LLC ("SCM"), and MIRALI ZARRABI, MD ("ZARRABI") (collectively, "defendants") are proceeding to trial.[1] Trial by jury has not been waived. Defendants have been released on bond.

A. Motions

On August 30, 2016, the government filed five motions in limine. (Dkt. 1192, 1194, 1199, 1220, 1226.) Defendants OMIDI and ZARRABI filed 13 motions in limine, six jointly (Dkt. 1189, 1196, 1200, 1207, 1215, 1235), six by OMIDI along (Dkt. 1203, 1188, 1193, 1209, 1223, and 1218), and one by ZARRABI alone (Dkt. 1191). SCM joined in all of these. (Dkt. 1225.) All of the motions are contested, set for hearing on September 14, 2021, and remain pending as of this filing.

As of this filing, OMIDI's Motion for Relief Based on Interference with Fifth and Sixth Amendment Privilege (Dkt. 1162), also remains pending.

B. Government Witnesses

The government anticipates calling approximately 45 witnesses in its case-in-chief. Those witnesses are listed on the chart attached hereto as Exhibit 1, with the government's anticipated time on direct examination and the anticipated defense cross-examination as provided by defendants OMIDI and ZARRABI. SCM did not provide anticipated cross-examination times.

---

[1] The case against defendant INDEPENDENT MEDICAL SERVICES, INC. remains severed and stayed. (Dkt. 519.)

There are two cooperating defendants testifying; neither is in custody.

At this time, the government does not anticipate that any government witness will require the assistance of an interpreter.

C. Defense Witnesses

Per the Court's order, on September 7, 2021, defendants were required to provide their witness lists. OMIDI provided a witness list, attached hereto as Exhibit 2, with 96 witnesses on it. Of those, more than 80 appear to have been drawn from earlier, longer versions of the government's witness list, including the vast majority of the witnesses on the government's current witness list, some of whom OMIDI has elsewhere moved to exclude. (See, e.g., Dkt. 1169 (Michael Petron); Dkt. 1223 (Tommy Iorio, Tom Johnson, and Barbara Balcom).) The list also includes a deceased GET THIN patient (Paula Rojeski).

ZARRABI provided a witness list, attached hereto as Exhibit 3, with four witnesses, two of whom were ZARRABI's noticed experts.

SCM has provided no witness list.

II. FACTUAL SUMMARY OF THE GOVERNMENT'S CASE

The government intends to prove at trial the following facts, among others. Defendants have not provided a position with respect to this summary.

From approximately May 2010 to approximately March 2016, OMIDI, ZARRABI, SCM, Charles Klasky, Sherwin Hong, and others, participated in a scheme to defraud Tricare and private insurance companies in connection with GET THIN's billings for sleep studies and Lap-Band surgeries.

OMIDI, together with his brother and mother, controlled GET THIN, including SCM, setting and implementing policies to induce patients to seek Lap-Band surgery through out-of-network provider GET THIN and then ensure those patients received numerous services such as sleep studies, irrespective of medical necessity, which services could both be billed to insurance at exorbitant rates and used in an effort to hunt for a co-morbidity that would support the lucrative Lap-Band surgery, even when, as OMIDI knew, the patient's insurance would sometimes never cover the surgery. OMIDI further directed employees in the information to be gathered and provided to insurance companies in connection with seeking approval and billing for those services, including false and fabricated information, as described below.

OMIDI directed the conduct of GET THIN's sleep study program, hiring Klasky to manage it, with the assistance of Sherwin Hong and Daniel Carriedo, among others; ZARRABI's brother, Michael Zarrabi ("M. Zarrabi"), to score the sleep studies; and ZARRABI to interpret those scored studies. M. Zarrabi would score the sleep studies, and input those scores into a template sleep study report complete with diagnoses and treatment recommendations that were not individualized to the patients, as well as ZARRABI's electronic signature, purportedly for ZARRABI's review. ZARRABI allowed his e-signature to be used on the SSRs, providing GET THIN's sleep study program with a veneer of legitimacy and making it appear that ZARRABI had reviewed and interpreted the SSRs and was approving the boilerplate diagnosis and treatment recommendations set forth therein, including routine recommendations for second sleep studies purportedly premised on the findings of the first. In fact, ZARRABI often had not reviewed or

interpreted the SSRs, even though ZARRABI was aware of those reports and their use in seeking Lap-Band approval and CPAP provision, and repeatedly demanded payment for his purported interpretations and, for a period, for allegedly writing CPAP prescriptions for patients based on those reports. GET THIN continued to use ZARRABI's signature on sleep study reports even after it stopped paying him in late 2013, although ZARRABI accepted payment in late 2015 for GET THIN sleep study reports from 2014.

Moreover, OMIDI regularly directed co-schemer Klasky to alter the data in the sleep study reports to make it appear that the patients had sleep apnea when they did not, or more severe sleep apnea than they in fact had in order to support insurance approval for Lap-Band surgeries. As OMIDI knew, Klasky sought help in this task from others, including Sherwin Hong. In order to make it more likely that patients would receive insurance pre-approval for Lap-Band surgery, OMIDI also (1) instructed Klasky to provide Epworth Sleepiness Scale scores that falsely indicated that the patients had extreme daytime sleepiness, a task Klasky gave to Daniel Carriedo; (2) instructed Klasky and Hong, among others, to inflate patients' weights in order to increase the body mass index ("BMI") scores that insurers used in determining their approval of Lap-Band surgery; and (3) instructed GET THIN employees to falsify other information used in connection with the pre-approval requests, provide falsified supporting documentation to the bariatric surgeons who would purportedly approve these letters of medical necessity, and sometimes send the letters out without the authorization of those surgeons.

In an effort to conceal the alteration of sleep study reports, OMIDI directed Klasky to create new GET THIN policies that purported

to adjust the sleep study scoring parameters, allegedly at ZARRABI's direction, and induced ZARRABI to sign these memoranda through payments for ZARRABI's purported services. OMIDI also directed Klasky to obtain and destroy the raw data from the sleep studies, which Klasky proceeded to do.

GET THIN then used the fraudulent sleep study reports and other falsified information to seek approval from Tricare and the insurance companies for Lap-Band surgeries and ultimately submit tens, if not hundreds, of millions of dollars in claims for Lap-Band surgeries and sleep studies under the provider number of IMS and other GET THIN entities. Those claims often contained false and misleading information, including regarding the services performed and their location, and were often accompanied by the fraudulent sleep study reports. GET THIN also provided the falsified GET THIN sleep study reports and prescriptions purportedly written by ZARRABI and other GET THIN doctors to durable medical equipment companies, which then used those to support claims to insurance for the provision of CPAP devices.

Finally, OMIDI approved the hiring of and payments to GET THIN employees and contractors, including ZARRABI, Klasky, and others associated with GET THIN's sleep study program, to promote the scheme, including payments to Hong and Carriedo for their roles in falsifying sleep study and Epworth information and to ZARRABI for purportedly interpreting studies.

III. THE INDICTMENT AND ELEMENTS

Defendants OMIDI, SCM, and ZARRABI are charged in a First Superseding Indictment as follows: OMIDI, SCM, and ZARRABI with wire fraud (counts 1—28) and mail fraud (counts 29-31), OMIDI and ZARRABI

with false statements relating to health care matters (counts 33-34), OMIDI and SCM with conspiracy to commit money laundering (count 35), and OMIDI with aggravated identity theft (count 32) and promotional money laundering (count 36). (Dkt. 12.) Defendants have not provided their position regarding the above statement of the charges.

Defendants OMIDI and ZARRABI were arraigned on the FSI and pleaded not guilty to all of the charges in which they were named on February 28, 2018. SCM was arraigned and pleaded not guilty to all of the charges in which it was named on March 20, 2018. A copy of the FSI is attached to this memorandum as Exhibit 4.

The elements of the charges are set forth below, and further detailed in the parties' proposed joint and disputed jury instructions, to be filed September 14, 2021. All of the below elements are disputed at least in part by defendants, and their positions with respect to the proposed jury instructions addressing these issues can be found in the parties' proposed disputed jury instruction filing.

A. Mail Fraud

Counts 1 through 28 charge defendants OMIDI, SCM, and ZARRABI with mail fraud, in violation of 18 U.S.C. § 1341, which has the following elements: (1) the defendant knowingly participated in or devised a scheme or plan to defraud, or a scheme or plan for obtaining money or property by means of false or fraudulent pretenses, representations, or promises. Deceitful statements of half-truths may constitute false or fraudulent representations; (2) the statements made as part of the scheme were material; that is, they had a natural tendency to influence, or were capable of influencing, a person to part with money or property; (3) the

defendant acted with the intent to defraud; that is, the intent to deceive and cheat; and (4) the defendant used, or caused to be used, the mails to carry out or attempt to carry out an essential part of the scheme.

In determining whether a scheme to defraud exists, you may consider not only the defendant's words and statements, but also the circumstances in which they are used as a whole.

A mailing is caused when one knows that the mails will be used in the ordinary course of business or when one can reasonably foresee such use. It does not matter whether the material mailed was itself false or deceptive so long as the mail was used as a part of the scheme, nor does it matter whether the scheme or plan was successful or that any money or property was obtained. See Ninth Circuit Model Criminal Jury Instruction No. 8.121 (2010 ed.; approved 6/2021).

The intent to defraud may be proved through reckless indifference to the truth or falsity of statements. See United States v. Lloyd, 807 F.3d 1128, 1163 (9th Cir. 2015); United States v. Dearing, 504 F.3d 897, 901-03 (9th Cir. 2007).

A defendant acts knowingly if the defendant is aware of the act and does not act or does not fail to act through ignorance, mistake, or accident. See Ninth Circuit Model Criminal Jury Instruction No. 5.6 (2010 ed.). A defendant acts willfully if the defendant committed the act voluntarily and purposely, and with knowledge that his conduct was, in a general sense, unlawful. See 18 U.S.C. § 1347(b); Ninth Circuit Model Criminal Jury Instruction No. 5.5 (2010 ed.); Bryan v. United States, 524 U.S. 184, 189-91, 193-96, 198-99 (1998); United States v. Awad, 551 F.3d 930, 937-41 (9th Cir. 2009).

If the defendant was a member of a scheme to defraud and had the intent to defraud, the defendant may be responsible for other co-schemers' actions during the course of and in furtherance of the scheme, even if the defendant did not know what they said or did. For the defendant to be guilty of an offense committed by a co-schemer in furtherance of the scheme, the offense must be one that the defendant could reasonably foresee as a necessary and natural consequence of the scheme to defraud. See Ninth Circuit Model Criminal Jury Instruction No. 8.122 (2010 ed.; approved 6/2021)

B. Wire Fraud

Counts 29 through 31 charge defendants OMIDI, SCM, and ZARRABI with wire fraud, in violation of 18 U.S.C. § 1343, which has the following elements: (1) the defendant knowingly participated in or devised a scheme or plan to defraud, or a scheme or plan for obtaining money or property by means of false or fraudulent pretenses, representations, or promises. Deceitful statements of half-truths may constitute false or fraudulent representations; (2) the statements made as part of the scheme were material; that is, they had a natural tendency to influence, or were capable of influencing, a person to part with money or property; (3) the defendant acted with the intent to defraud, that is, the intent to deceive and cheat; and (4) the defendant used, or caused to be used, an interstate wire communication to carry out or attempt to carry out an essential part of the scheme.

In determining whether a scheme to defraud exists, you may consider not only the defendant's words and statements, but also the circumstances in which they are used as a whole.

A wiring is caused when one knows that a wire will be used in the ordinary course of business or when one can reasonably foresee such use.

It need not have been reasonably foreseeable to the defendant that the wire communication would be interstate in nature. Rather, it must have been reasonably foreseeable to the defendant that some wire communication would occur in furtherance of the scheme, and an interstate wire communication must have actually occurred in furtherance of the scheme. See Ninth Circuit Model Criminal Jury Instruction No. 8.124 (2010 ed.; approved 6/2021).

C. Aggravated Identity Theft

OMIDI is charged in count 32 with aggravated identity theft, in violation of 18 U.S.C. § 1028A, which has the following elements: (1) the defendant knowingly transferred, possessed, or used without legal authority a means of identification of another person, namely the name of defendant Mirali Zarrabi; (2) the defendant knew that the means of identification belonged to a real person; and (3) the defendant did so during and in relation to the crime of mail fraud, in violation of Section 1341 of Title 18 of the United States Code, as charged in Count Twenty-One of the First Superseding Indictment.

The term "means of identification" means any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual, including any name, date of birth, or government issued identification number.

"Use" requires that the use of the means of identification was central to the specified felony and facilitated its commission.

The government need not establish that the means of identification of another person was stolen. See Ninth Circuit Model

Criminal Jury Instruction No. 8.83 (2010 ed.; approved 3/2021); United States v. Osuna-Alvarez, 788 F.3d 1183, 1185 (9th Cir. 2015) (permission of another to use his or her identity in an unlawful scheme is not "lawful authority" within the meaning of 18 U.S.C. § 1028A).

D. False Statements Relating to Health Care Matters

OMIDI and ZARRABI are charged in counts 33-34 with false statements relating to health care matters, in violation of 18 U.S.C. ¶ 1028A, which has the following elements: (1) the defendant made a false, fictitious, or fraudulent statement or representation involving a healthcare benefit program; (2) the statement or representation was in connection with the delivery of or payment for health care benefits, items, or services; (3) defendant acted with knowledge that the statement or representation was untrue; (4) the defendant acted willfully; and (5) the statement or representation was material to the activities or decisions of a healthcare benefit program, that is, it had a natural tendency to influence, or was capable of influencing, the healthcare benefit program's decisions or activities.

"Willfully" means to act with knowledge that one's conduct is unlawful and with the specific intent to do something the law forbids, that is to say with the bad purpose to disobey or disregard the law. The person need not be aware of the specific law or rule that his conduct may be violating. A defendant's conduct was not "willful" if it was due to negligence, inadvertence or mistake.

An act is done "knowingly" if the defendant is aware of the act and does not act through ignorance, mistake, or accident. The government is not required to prove that the defendant knew that his

acts or omissions were unlawful. You may consider evidence of the defendant's words, acts, or omissions, along with all the other evidence, in deciding whether the defendant acted knowingly.

A "health care benefit program" means any public or private plan or contract, affecting commerce, under which any medical benefit, item, or service is provided to any individual, and includes any individual or entity who is providing a medical benefit, item, or service for which payment may be made under the plan or contract. 18 U.S.C. §§ 1035(a)(2), 24; Ninth Circuit Model Criminal Jury Instruction Nos. 5.5 [Willfully] and 8.73 [False Statement to Government Agency] (modified); United States v. Awad, 551 F.3d 930, 939-41 (9th Cir. 2009); see also Bryan v. United States, 524 U.S. 184, 191 (1998).

E. Conspiracy to Commit Money Laundering

OMIDI and SCM are charged in count 35 with conspiring to commit money laundering, in violation of 18 U.S.C. § 1956(h), which has the following elements: (1) beginning in or about January 2011, and continuing to at least in or about December 2015, there was an agreement between two or more person to commit money laundering by conducting a financial transaction to promote an unlawful activity, that is, the making of false statements regarding health care matters, in violation of 18, United States Code, Section 1035; and (2) the defendant became a member of the conspiracy knowing of its object and intending to help accomplish it.

A conspiracy is a kind of criminal partnership—an agreement of two or more persons to commit one or more crimes, here, promotional money laundering. The crime of conspiracy is the agreement to do

something unlawful; it does not matter whether the crime agreed upon was committed.

For a conspiracy to have existed, it is not necessary that the conspirators made a formal agreement or that they agreed on every detail of the conspiracy. It is not enough, however, that they simply met, discussed matters of common interest, acted in similar ways, or perhaps helped one another. You must find that there was a plan to commit money laundering as alleged in the First Superseding Indictment as an object of the conspiracy.

One becomes a member of a conspiracy by willfully participating in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy, even though the person does not have full knowledge of all the details of the conspiracy. Furthermore, one who willfully joins an existing conspiracy is as responsible for it as the originators. On the other hand, one who has no knowledge of a conspiracy, but happens to act in a way which furthers some object or purpose of the conspiracy, does not thereby become a conspirator. Similarly, a person does not become a conspirator merely by associating with one or more persons who are conspirators, nor merely by knowing that a conspiracy exists. See Ninth Circuit Model Instruction No. 8.20 (2010 ed.; approved 1/2019) (modified for money laundering and single object); id. cmt. (stating that overt act element should be omitted in money laundering conspiracy cases).

A conspiracy may continue for a long period of time and may include the performance of many transactions. It is not necessary that all members of the conspiracy join it at the same time, and one may become a member of a conspiracy without full knowledge of all the

details of the unlawful scheme or the names, identities, or locations of all of the other members.

Even though a defendant did not directly conspire with the other conspirators in the overall scheme, the defendant has, in effect, agreed to participate in the conspiracy if the government proves each of the following beyond a reasonable doubt: (1) that the defendant directly conspired with one or more conspirators to carry out at least one of the objects of the conspiracy; (2) that the defendant knew or had reason to know that other conspirators were involved with those with whom the defendant directly conspired; and (3) that the defendant had reason to believe that whatever benefits the defendant might get from the conspiracy were probably dependent upon the success of the entire venture.

It is not a defense that a person's participation in a conspiracy was minor or for a short period of time. See Ninth Circuit Model Jury Instruction No. 8.23 (2010 ed.; approved 4/2019).

F. Promotional Money Laundering

OMIDI is charged in Count 36 with conducting a financial transaction to promote an unlawful activity, namely false statements regarding health care matters, in violation of 18 U.S.C. ¶ 1956(a)(1)(A), which has the following elements: (1) the defendant conducted a financial transaction involving property that represented the proceeds of mail fraud or wire fraud; (2) the defendant knew that the property represented the proceeds of some form of unlawful activity; and (3) the defendant acted with the intent to promote the carrying on of false statements regarding health care matters.

A financial transaction is a transaction involving the use of a financial institution that is engaged in, or the activities of which

affect interstate or foreign commerce in any way. The issuance of a check qualifies as a "financial transaction."

The phrase "knew that the property represented the proceeds of some form of unlawful activity" means that the defendant knew that the property involved in the transaction represented proceeds from some form, though not necessarily which form, of activity that constitutes a felony. I instruct you that false statements regarding health care matters is a felony.

"Interstate commerce" means commerce between a state, territory or possession of the United States, including the District of Columbia, and another state, territory, or possession, or the District of Colombia. It is not necessary that the defendant have intended or anticipated an effect on interstate commerce.

"Proceeds" means any property derived from or obtained or retained, directly or indirectly, through some form of unlawful activity, including gross receipts of such activity. The government is not required to prove that all of the funds involved in the charged transactions were the proceeds of the specified unlawful activity. A financial transaction involves "proceeds" of a specified unlawful activity even when proceeds of a specified unlawful activity are commingled in an account with funds obtained from legitimate sources. It is sufficient if the government proves beyond a reasonable doubt that at least part of the funds involved in a transaction represents such proceeds of specified unlawful activity.

The government must prove that the defendant knew that the property represented the proceeds of a separate criminal activity but need not prove that the defendant knew that the act of laundering the proceeds was unlawful. See Ninth Circuit Model Instruction Nos.

8.146 [Financial Transaction or Attempted Transaction to Promote Unlawful Activity] and 8.147 Laundering or Attempting to Launder Monetary Instruments] (second element) (2010 ed.; approved 6/2021); 18 U.S.C. § 1956(a)(1) ("Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity . . ."); United States v. Akintobi, 159 F.3d 401, 405 (9th Cir. 1998) (issuance of a check qualifies as a "financial transaction"), abrogated on other grounds by United States v. Santos, 553 U.S. 507 (2008).

IV. EVIDENTIARY ISSUES

The government will not repeat here issues already briefed at length in connection with the parties' motions in limine, and instead addresses other issues that may arise during trial. Defendants have not provided their position regarding the below issues.

A. Hearsay

Federal Rule of Evidence 801 defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed. R. Evid. 801(c).

1. Defendants' Statements, Adopted Admissions, and Agent Admissions

The government intends to admit statements made by defendants. Statements by a party opponent when offered against that party are excluded from the hearsay definition. Fed. R. Evid. 801(d)(2)(A). Thus, defendants' statements may be admitted against the defendant who made the statements. Where these statements are not in furtherance of the charged scheme, as in the case of ZARRABI's statements during interviews with law enforcement, the government

asks that the Court give a limiting instruction so that the jury understands that it is not to consider the statement as evidence against the other defendants.

Statements that defendants adopted or that were made by a person authorized to speak on behalf of the defendants or by an agent of defendants on a matter within the scope of that agency relationship are similarly admissible. Fed. R. Evid. 801(d)(2)(B), (C), (D).

As discussed above, the government anticipates the evidence will show that OMIDI controlled GET THIN and directed its employees and that SCM was a GET THIN company controlled by OMIDI managing numerous other GET THIN entities, including IMS, through which GET THIN's sleep study program was ostensibly run. Co-schemers and other former employees are anticipated to testify that they acted pursuant to directions they understood to be coming from OMIDI, even if through an intermediary and even if they were ostensibly employed by another GET THIN entity. Out-of-court statements from such individuals, often contained in emails and instant messages, concern the work they were hired to do for GET THIN, including regarding patient intake, sleep studies, nutrition, processing, insurance authorizations, and billing.

In particular, GET THIN's sleep study scoring technician, M. Zarrabi, scored sleep studies and inputted them into template reports as a part of his job. While also business records and statements related to medical history and treatment, as discussed below, these reports are agent statements of OMIDI and SCM. Those reports are also adoptive admissions of ZARRABI, who permitted his electronic signature to be used on them at the outset of his employment with GET THIN. See United States v. Orellana-Blanco, 294 F.3d 1143 (9th Cir.

2002) (noting that "a signature would ordinarily make adoption plain").

When the government offers some of a defendant's prior statements, the door is not thereby opened to the defendant to introduce all of his or her out-of-court statements because, when offered by the defendant, the statements are hearsay. See Fed. R. Evid. 801(d)(2. Accordingly, exculpatory statements made by a defendant are hearsay and are not admissible at trial, when offered by the defendant. See Fed. R. Evid. 801(d), 802; United States v. Ortega, 203 F.3d 675, 682 (9th Cir. 2000).

2. Co-Conspirator Statements

The government intends to admit statements made by co-schemers made in furtherance of the scheme. A statement made by one co-conspirator or co-schemer during the course and in furtherance of the conspiracy or scheme may be used against another conspirator or co-schemer because such statements are not hearsay. Fed. R. Evid. 801(d)(2)(E); Bourjaily v. United States, 483 U.S. 171, 183 (1987). A statement admitted under Rule 801(d)(2)(E) does not violate the Confrontation Clause, and no independent inquiry into reliability is needed. Bourjaily, 483 U.S. at 183-84; United States v. Knigge, 832 F.2d 1100, 1107 (9th Cir. 1987), amended, 846 F.2d 591 (9th Cir. 1988). Rule 801 (d)(2)(E) requires a foundation that: (1) the declaration was made during the life of the conspiracy; (2) the declaration was made in furtherance of the conspiracy; and (3) there is sufficient proof of the existence of the conspiracy and defendant's connection to it. Bourjaily, 483 U.S. at 173, 181; United States v. Smith, 893 F.2d 1573, 1578 (9th Cir. 1990). These foundational requirements must be established by a preponderance of

the evidence. Bourjaily, 483 U.S. at 175; United States v. Schmit, 881 F.2d 608, 610 (9th Cir. 1989). To be admissible under Rule 801(d)(2)(E), the statement must "further the common objectives of the conspiracy," or "set in motion transactions that [are] an integral part of the [conspiracy]." United States v. Aramula-Ruiz, 987 F.2d 599, 607-08 (9th Cir. 1993); United States v. Yarborough, 852 F.2d 1522, 1535 (9th Cir. 1988).

Here, as the government has advised defendants, these consist primarily of statements made by OMIDI, ZARRABI, Klasky, Hong, and Carriedo, whose roles in the scheme (described in brief in the factual summary above) are well known to defendants and set forth in the FSI. Klasky, Hong, and Carriedo are all also anticipated to testify regarding their roles in the scheme. The government has further identified for defendants those exhibits on its exhibit list that it intends to admit as co-conspirator statements and offered to meet-and-confer with defendants regarding those exhibits.

3. Patient Files

The government intends to introduce into evidence patient files and medical records produced by and obtained from GET THIN, whether in hard copy patient files, from its electronic medical records system NexTech, sent as attachments to emails, or otherwise. These are admissible under a number of theories. First, many of the records are business records created during GET THIN's business of providing medical services. Second, many of the statements therein, such as prior medical histories provided by patients and examinations, orders, and tests, were statements made for medical diagnosis or treatment under Federal Rule of Evidence 803(4). These patient files and records also contain fraudulent medical records,

including fraudulent sleep study reports, which are not offered for their truth but to show that the documents contained within the files and records are fraudulent. See Anderson v. United States, 417 U.S. 211, 219-20 (1974) ("The election contest testimony of Tomblin and Browning, however, was not admitted into evidence in the [§] 241 trial to prove the truth of anything asserted therein. Quite the contrary, the point of the prosecutor's introducing those statements was simply to prove that the statements were made so as to establish a foundation for later showing, through other admissible evidence, that they were false."); Knigge, 832 F.2d at 1108.

B. Authentication and Foundation

1. Federal Rule of Evidence 901

Federal Rule of Evidence 901 (a) provides that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Under Rule 901(a), evidence should be admitted, despite any challenge, once the government makes a *prima facie* showing of authenticity or identification so "that a reasonable juror could find in favor of authenticity or identification . . . [because] the probative force of the evidence offered is, ultimately, an issue for the jury." United States v. Chu Kong Yin, 925 F.2d 990, 996 (9th Cir. 1991) (citations and internal quotation marks omitted); see also United States v. Black, 767 F.2d 1334, 1342 (9th Cir. 1985). The government need not establish all links in the chain of custody of an item or call all persons who were in a position to come into contact with it. See Gallego v. United States, 276 F.2d 914, 917 (9th Cir. 1960). Alleged gaps in the chain of custody go to the weight of the

evidence rather than to its admissibility. See United States v. Taylor, 716 F.2d 701, 711 (9th Cir. 1983). A duplicate is admissible to the same extent as the original, unless there is a genuine question as to the authenticity of the original or it would be unfair under the circumstances to admit the duplicate in lieu of the original. See Fed. R. Evid. 1003; Smith, 893 F.2d at 1579.

2. Audio Recordings

The government intends to introduce audio recordings captured during interviews with ZARRABI in this case. A recording is admissible upon a showing that it is "accurate, authentic, and generally trustworthy." United States v. King, 587 F.2d 956, 961 (9th Cir. 1978). For example, testimony that a recording depicts evidence that the witness observed is sufficient to authenticate the recording. Fed. R. Evid. 901(b); United States v. Smith, 591 F.3d 974, 979-80 (8th Cir. 2010). These recordings were in English. As the Court is aware from the government's motion in limine to admit these excerpts (Dkt. 1192), the government has prepared written transcripts of the excerpts of those recordings that it intends to introduce as an aid to the jury in listening to the audio recordings. See United States v. Turner, 528 F.2d 143, 167 (9th Cir. 1975) (cautionary instruction given that only the recordings were evidence of the conversation). Following the Court's ruling on the admissibility of those excerpts, the government will meet and confer with defendants regarding that transcription. The transcript will be displayed on a screen simultaneous with the playing of the audio, but the transcripts will not be admitted into evidence.

C. The Parties' Agreements Regarding Limitations on the Introduction of Certain Evidence

During the course of preparing for trial, the parties have met and conferred regarding the introduction of certain types of evidence, some of which have resulted in agreements. In particular, the government has agreed it will not introduce during its case-in-chief evidence of (1) patient deaths following their receipt of a Lap-Band from GET THIN; (2) patient complications from and need to seek corrective surgery for Lap-Band surgeries and procedures not discussed in the FSI (e.g., unnecessary procedures including biopsies, gallbladder removals, and hysterectomies); (3) OMIDI's overall wealth, lifestyle, and spending[2]; (4) the recordings of OMIDI conducted by Klasky between March and June 2016; and (5) Brian Oxman's threats against Klasky's appointed counsel during a May 2016 meeting at that attorney's office. The government has also agreed it will not refer to GET THIN's patients as "victims." OMIDI has agreed he will not present evidence of insurer negligence (that is, evidence that it is the insurers' fault they did not catch the charged conduct at the outset and evidence that the insurers should have had other procedures in place. The government and OMIDI have agreed that they will advise the jury that OMIDI has a medical degree but, at the time of the events, was not maintaining an active medical license. The government has reserved its right to address issues related to OMIDI's license revocation as appropriate in cross-examination, should OMIDI take the stand.

---

[2] This agreement does not apply to the government's introduction of evidence of OMIDI's financial interest in GET THIN and that he benefitted financially from GET THIN's success.

The government reserves the right to admit the above-described evidence at any time to rebut claims made by the defense or if the defense otherwise opens the door to this evidence, including by asking questions on cross-examination that cannot be truthfully answered without reference to the above-described evidence, as well as for impeachment purposes.

D. Evidence of Satisfied Patients, Successful Procedures, and Lawful Actions

OMIDI has contended elsewhere that the government's admission of certain testimony regarding the patients' experiences related to the charges in the FSI will prompt him to call "numerous patients" to testify "about the positive impact Lap-Band surgery had on their lives." (Dkt. 1203 at 9.) Admitting such evidence, or evidence that some GET THIN services were medically necessary or billed appropriately, would be improper. "[T]hat a defendant acted lawfully on other occasions is generally inadmissible to prove he acted lawfully on the occasion[s] alleged in the indictment." United States v. Reese, 666 F.3d 1007, 1020 (7th Cir. 2012); see also United States v. Scarpa, 897 F.2d 63, 70 (2d Cir. 1990) ("A defendant may not seek to establish his innocence . . . through proof of the absence of criminal acts on specific occasions."); United States v. Kreimer, 609 F.2d 126, 130 (5th Cir. 1980) ("The question is not how many times they obeyed the law but whether or not on the occasions charged they violated it.").

Prior legitimate acts are routinely excluded. See United States v. Moreira, 605 Fed. App'x 852, 855 (11th Cir. 2015). In Moreira, the defendants were accused of billing for home health services never rendered and paying kickbacks for referrals. Id. The trial court

excluded evidence that some patients received services and got no kickbacks. Id. Upholding exclusion, the Eleventh Circuit observed that "[t]he Government did not charge and did not argue that there was no legitimate business conducted at Anna Nursing. Thus, evidence that some of the claims filed by Anna Nursing may have been for services legitimately provided to eligible patients without the payment of kickbacks was irrelevant." Id. at 859.

E. Cross-Examination of Defendants

A defendant who testifies at trial may be cross-examined as to all matters reasonably related to the issues he or she puts in dispute during direct examination. "A defendant has no right to avoid cross-examination on matters which call into question his claim of innocence." United States v. Miranda-Uriarte, 649 F.2d 1345, 1353-54 (9th Cir. 1981).

Defendants' credibility will be crucial if they choose to testify in order to refute the government's showing of knowledge and intent. Indeed, because defendants are the only witnesses with "direct" evidence of their own knowledge and intent, if they take the stand to deny any knowledge of the fraud, their credibility becomes a key issue. Accordingly, cross-examination of defendants about other fraudulent conduct in which they have engaged is necessary for the jury to weigh whether defendant's denial of knowledge and intent is credible given his other actions. As the Ninth Circuit has held, Rule 608(b):

> specifically contemplates inquiries into prior behavior in order to challenge a witness's credibility. Evidence of prior frauds is considered probative of the witness's character for truthfulness or untruthfulness.

United States v. Gay, 967 F.2d 322, 328 (9th Cir. 1992).

The prejudicial effect of such evidence, if any, can be addressed by a limiting instruction. The admission of evidence harmful to the defendant's case does not necessarily constitute unfair prejudice. United States v. Fagan, 996 F.2d 1009, 1015 (9th Cir. 1993). Unfair prejudice results from evidence that "provokes an emotional response in the jury or otherwise tends to affect adversely the jury's attitude toward the defendant wholly apart from its judgment as to his guilt or innocence of the crime charged." Id. (internal quotation marks omitted).

Finally, the government is not required to provide notice of matters about which it may seek to cross-examine defense witnesses, including defendants, should they testify.

F. Defense Witnesses

As noted above, OMIDI has provided a witness list containing 96 witnesses, the vast majority of whom appear to have just been copied from prior iterations of the government's witness list. To the extent those witnesses are called by the government, defendants will have an opportunity to cross examine them at that time. To the extent defendants elect to call other witnesses at trial, aside from experts they have noticed, the government requests that the Court order defendants to provide an offer of proof with respect to the anticipated testimony of those witnesses so that the government may assess whether their testimony would be relevant and otherwise admissible, and whether their testimony would implicate any Fifth Amendment rights those witnesses might have, before the witnesses take the stand.

G. Character Evidence

The Supreme Court has recognized that character evidence – particularly cumulative character evidence – has weak probative value and great potential to confuse the issues and prejudice the jury. See Michelson v. United States, 335 U.S. 469, 480, 486 (1948). The Court has thus given trial courts wide discretion to limit the presentation of character evidence. Id.

In addition, the form of the proffered evidence must be proper. Federal Rule of Evidence 405(a) sets forth the sole methods for which character evidence may be introduced. It specifically states that, where evidence of a character trait is admissible, proof may be made in two ways: (1) by testimony as to reputation and (2) by testimony as to opinion. Thus, a defendant may not introduce specific instances of his or her good conduct through the testimony of others. See Michelson, 335 U.S. at 477. On cross-examination of a defendant's character witness, however, the government may inquire into specific instances of a defendant's past conduct relevant to the character trait at issue. See Fed. R. Evid. 405(a). In particular, a defendant's character witnesses may be cross-examined about their knowledge of the defendant's past crimes, wrongful acts, and arrests. See Michelson, 335 U.S. at 481. The only prerequisite is that there must be a good faith basis that the incidents inquired about are relevant to the character trait at issue. See United States v. McCollom, 664 F.2d 56, 58 (5th Cir. 1981).

H. Reciprocal Discovery and Expert Disclosures

The United States has requested and the Court ordered production of expert disclosures and reciprocal discovery from defendants on July 28, 2021, and September 7, 2021, respectively. ZARRABI provided

timely notice of two expert witnesses, and OMIDI of five expert witnesses. On August 31, 2021, OMIDI provided untimely notice regarding another expert witness. The government has attempted to meet-and-confer regarding the inadequacies of that untimely disclosure, and reserves its right to move to exclude that expert if the disclosure is not supplemented in a timely manner.

To date, ZARRABI has only provided a handful of documents in reciprocal discovery and OMIDI only a single video of a sleep apnea patient. To the extent defendants may attempt to introduce or use any documents at trial that they have not previously produced, the United States reserves the right to object and to seek to have such documents precluded.

I. Jury Nullification

The Court should exclude any evidence and/or argument relating to or concerning any possible jury nullification defense. This includes any evidence and/or argument meant to play on the jury's sympathy for defendants.

It is well-established that a defendant does not have a right to a jury nullification instruction. United States v. Powell, 955 F.2d 1206, 1213 (9th Cir. 1992). Having no right to seek jury nullification, defendant has no right to present evidence relevant only to such a defense. Zal v. Steppe, 968 F.2d 924, 930 (9th Cir. 1992) (Trott, J., concurring) ("[N]either a defendant nor his attorney has a right to present to a jury evidence that is irrelevant to a legal defense to, or an element of, the crime charged. Verdicts must be based on the law and the evidence, not on jury nullification as urged by either litigant.").

Since they do not make any fact in issue more or less probable, evidence and arguments meant to play on the jury's sympathy are not relevant under Federal Rule of Evidence 401 and must be excluded on that basis. In addition, appeals to sympathy are unduly prejudicial and confusing to the jury and misleading under Rule 403 and, therefore, properly excluded on that basis even if they had some arguable relevance.