

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

ELIZABETH A. HOLMES and RAMESH
“SUNNY” BALWANI,

Defendants.

Case No. 5:18-cr-00258 EJD

ORDER ON RESTITUTION

This matter comes before the Court to determine the amount of mandatory restitution owed to victims by Defendants Elizabeth A. Holmes and Ramesh “Sunny” Balwani as a result of their fraud and conspiracy convictions. Having considered the parties’ written submissions and oral arguments presented at Defendants’ respective hearings, the Court ORDERS restitution in the amount of \$452,047,268. Both Defendants will be jointly and severally liable for this sum.

I. BACKGROUND

A. Facts

On July 28, 2020, the government filed the Third Superseding Indictment (“TSI”), charging Defendants Holmes and Balwani with ten counts of wire fraud (Counts 3–12) and two counts of conspiracy to commit wire fraud (Counts 1–2). ECF No. 469. The TSI charged both Defendants with two schemes: one to defraud Theranos investors (TSI ¶¶ 11–13) and another to defraud Theranos patients (TSI ¶¶ 14–18).

The scheme to defraud investors lasted from 2010 through 2015 and involved misrepresentations made to prospective investors for the purpose of inducing them to invest money in Theranos. TSI ¶¶ 11, 13. Specifically, the TSI charged Defendants with making false statements regarding the capabilities of Theranos’s proprietary analyzer, its financial revenue

1 streams, and device demonstrations, as well as misrepresenting Theranos’s relationships and
 2 interactions with Walgreens, the U.S. Department of Defense, the Food and Drug Administration,
 3 pharmaceutical companies, and research institutions. TSI ¶ 12.

4 Overlapping with the scheme to defraud investors, Defendants’ scheme to defraud doctors
 5 and patients persisted from 2013 to 2016 for the purpose of inducing individuals to purchase and
 6 use Theranos blood tests. The TSI charged Defendants with delivering marketing materials to
 7 doctors and patients regarding Theranos’s blood tests, posting misrepresentations on Theranos’s
 8 websites, and transmitting blood tests results with inaccuracies and modifications. TSI ¶ 17.

9 **B. Procedural History**

10 In March 2020, the Court severed this case as to each individual Defendant. ECF No. 362.
 11 Defendant Holmes was tried in August 2021 and, on January 3, 2022, a jury found her guilty of
 12 conspiracy to commit wire fraud against Theranos investors and three counts of wire fraud against
 13 investors. ECF No. 1235. Defendant Balwani’s trial began in March 2022 and, on July 7, 2022, a
 14 jury convicted him on all twelve counts charged. ECF No. 1507.

15 On November 18, 2022, the Court sentenced Defendant Holmes to 135 months’
 16 imprisonment and a \$400 special assessment fee. In its sentencing, the Court found that the
 17 government had established loss by a preponderance of the evidence as to ten (10) specific
 18 investor victims. 11/18/2022 Hr’g Tr. 78:7–79:17; *see also* ECF No. 1712 (“Holmes Sent’g
 19 Order”), at 12–13. With respect to Defendant Balwani, the Court sentenced him to 155 months’
 20 imprisonment, a \$25,000 fine, and a \$1,200 special assessment fee on December 7, 2022. In
 21 doing so, the Court found that the government had established loss by a preponderance of the
 22 evidence for twelve (12) specific investor victims. 12/07/22 Hr’g Tr. 90:2–23; *see also* ECF No.
 23 1730 (“Balwani Sent’g Order”), at 14–15.

24 For both Defendants, the Court deferred ruling on restitution until a separate hearing for
 25 restitution may be scheduled. On February 17, 2023, the Court heard oral arguments on restitution
 26 from Defendant Balwani and, on March 17, 2023, oral arguments from Defendant Holmes.

27 **II. LEGAL STANDARD**

28 Under the Mandatory Victims Restitution Act (“MVRA”), the Court is required to order

1 full restitution to victims of a convicted offense when the offense is committed by fraud or deceit,
2 without consideration of the defendant’s economic circumstances or ability to pay. 18 U.S.C. §§
3 3663A(c)(1), 3664(f)(1)(A). It is the government’s burden to prove the amount of loss for
4 restitution purposes by a preponderance of the evidence. 18 U.S.C. § 3664(e). The government
5 must also show by a preponderance of the evidence that an individual is a victim of the crime on
6 which the defendants were convicted, and that the victim’s losses were caused by the defendants’
7 offense conduct. *United States v. Gossi*, 608 F.3d 574, 579 (9th Cir. 2010).

8 To establish the amount of loss, “the government must provide the court with enough
9 evidence to allow the court to estimate the ‘full amount of the victim’s losses’ with ‘some
10 reasonable certainty.’” *United States v. Kennedy*, 643 F.3d 1251, 1261 (9th Cir. 2011). Ninth
11 Circuit “precedent grants ‘district courts a degree of flexibility in accounting for a victim’s
12 complete losses.’ [However,] ‘the district court may utilize only evidence that possesses
13 ‘sufficient indicia of reliability to support its probable accuracy.’” *United States v. Waknine*, 543
14 F.3d 546, 557 (9th Cir. 2008) (internal brackets omitted).

15 The MVRA defines “victim” as “any person directly harmed by the defendant’s criminal
16 conduct in the course of the scheme, conspiracy, or pattern.” 18 U.S.C. § 3663A(a)(2); *see also*
17 *United States v. Lo*, 839 F.3d 777, 788 (9th Cir. 2016). For crimes that require proof of a
18 “scheme, conspiracy, or pattern of criminal activity,” 18 U.S.C. § 3663A(a)(2), restitution may be
19 ordered for “all persons directly harmed by the entire scheme,” which includes not only “harm
20 caused by the particular counts of conviction” but also “related but uncharged conduct that is part
21 of a fraud scheme.” *In re Her Majesty the Queen in Right of Canada*, 785 F.3d 1273, 1276 (9th
22 Cir. 2015). In all cases, the harm to the victim must be “closely related to the scheme, rather than
23 tangentially linked.” *Id.*

24 **III. DISCUSSION**

25 The government submits the same arguments and evidence for restitution as to both
26 Defendants Holmes and Balwani. *See* ECF Nos. 1726, 1727. It primarily argues that the Court
27 should order restitution for \$807,465,307 to all Theranos C-1 and C-2 investors; \$40 million to the
28 Walgreens subsidiary that invested via a convertible promissory note; \$30 million to Safeway

1 based on two convertible promissory notes; and \$100,000 to individual investor Eileen Lepera.
 2 Gov't Suppl. Br. Restitution ("Gov't Rest. Br.") 4–5, ECF No. 1726. In the alternative, the
 3 government seeks full restitution as to the investors the Court specifically identified in its
 4 sentencing of both Defendants. Gov't Rest. Br. 6.

5 Defendants Holmes and Balwani object to several points in the government's restitution
 6 argument and instead argue that the Court should invoke the MVRA's "complexity exception" to
 7 decline ordering any restitution. Holmes's Suppl. Sent'g Mem. Restitution ("Holmes Rest. Br.")
 8 13–14, ECF No. 1741; Balwani's Suppl. Sent'g Mem. Restitution ("Balwani Rest. Br.") 2–3, 9,
 9 ECF No. 1728.

10 **A. Victims Identified at Sentencing**

11 The Court begins by acknowledging and reaffirming certain findings relating to victims
 12 and loss calculation it had made in sentencing both Defendants.

13 **1. Victims**

14 For the reasons outlined at length in its prior sentencing orders, the Court finds that the
 15 government has established by a preponderance of the evidence that the following individuals and
 16 entities were victims of Defendants' scheme to defraud Theranos investors:

- 17 1. Partner Investments L.P., PFM Healthcare Master Fund, L.P., and PFM Healthcare
 18 Principals Fund, L.P. (collectively, "PFM");
- 19 2. Mosley Family Holdings LLC;
- 20 3. RDV Corporation (Dynasty Financial II, LLC);
- 21 4. Keith Rupert Murdoch;
- 22 5. Richard Kovacevich;
- 23 6. Peer Venture Partners (Peer Ventures Group IV, L.P., or "PVP");
- 24 7. Lucas Venture Group (Lucas Venture Group IV LP and Lucas Venture Group XI);
- 25 8. Mendenhall TF Partners;
- 26 9. Hall Group (Hall Black Diamond II, LLC);
- 27 10. Black Diamond Venture (Black Diamond Ventures XII-B, LLC);
- 28 11. Alan Eisenman; and

1 12. Sherrie Eisenman.

2 Holmes Sent’g Order 13; Balwani Sent’g Order 14. For each of these investors, the Court
 3 identified specific reliable evidence indicating that they were induced to invest in Theranos by
 4 Defendants’ misrepresentations as part of the fraud conspiracy. Holmes Sent’g Order 13–17;
 5 Balwani Sent’g Order 14–20. Therefore, the harm these investors suffered (*i.e.*, their investments
 6 in Theranos) is sufficiently and closely related to the conduct underlying the convictions (*i.e.*,
 7 Defendants’ fraudulent representations and conspiracy) to qualify them all as victims of the
 8 conspiracy to defraud investors.¹

9 Defendants acknowledge the Court’s prior victim findings but argue that the government
 10 has nonetheless failed to present evidence as to each victim’s individual motivations for investing
 11 in Theranos. Balwani Rest. Br. 4; Holmes Rest. Br. 4–7. However, Defendants’ “conduct need
 12 not be the sole cause of the loss.” *United States v. Gamma Tech Indus., Inc.*, 265 F.3d 917, 928
 13 (9th Cir. 2001). The fact that there may have been other motivations for a particular investor
 14 victim to invest, therefore, does not nullify the role Defendants’ misrepresentations and fraud
 15 conspiracy played in inducing that investment. *See United States v. Sarad*, 227 F. Supp. 3d 1153,
 16 1159 (E.D. Cal. 2016) (“The court need not embark on a fact-finding mission to determine how
 17 much weight these investors attributed to [defendant’s] misrepresentations.”). Furthermore, the
 18 inference the Court previously drew at sentencing and now adopts on restitution—that “investors
 19 who were told or received information containing misrepresentations before investing . . . had
 20 relied on such information in assessing their investment risk” (Balwani Sent’g Order 20; Holmes
 21 Sent’g Order 16)—is one that the Ninth Circuit has recognized as “reasonable.” *See United States*
 22 *v. Laurienti*, 611 F.3d 530, 557 (9th Cir. 2010) (“Defendants were convicted of criminal

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¹ Although the jury did not convict Defendant Holmes of wire fraud with respect to the Eisenman, Black Diamond Ventures, and Hall Group investments, the MVRA permits restitution to be ordered “for all persons directly harmed by the entire scheme . . . [and] not limited to harm caused by the particular counts of conviction,” *In re Her Majesty the Queen*, 785 F.3d at 1276. Here, a jury found Defendant Balwani guilty of all counts (ECF Nos. 1235, 1507), and the Court found in sentencing Defendant Balwani that the Eisenmans, Black Diamond Ventures, and Hall Group investors were victims of the overall conspiracy to defraud investors. *See* Holmes Sent’g Order 13–17; Balwani Sent’g Order 14–20. Accordingly, these investors are also victims of Defendant Holmes’ conviction for investor fraud conspiracy. *See also infra* Section III(F).

1 impossible, impracticable, or inadequate”). To the contrary, the MVRA requires defendants, in
 2 the first instance, to “return the property to the owner of the property.” 18 U.S.C.
 3 § 3663A(b)(1)(A). Here, the “property” lost refers to the money that Defendants received from
 4 investors in exchange for ownership shares in Theranos. *See Robers v. United States*, 572 U.S.
 5 639, 642 (2014) (interpreting “property” in a loan fraud case to be “the property the banks lost,
 6 namely the money they lent to [defendant]”). Accordingly, plainly read, the MVRA requires the
 7 Defendants to return the property (*i.e.*, the full amount of investment funds) that the investor
 8 victims gave up as a result of Defendants’ fraud conspiracy and misrepresentations.

9 Both Defendants nonetheless argue that their restitution obligations should be reduced by
 10 the inherent value of Theranos shares absent their fraudulent conduct, akin to the analysis the
 11 Court undertook at sentencing. Balwani Rest. Br. 4–7; Holmes Rest. Br. 7–10. Although the
 12 MVRA does permit in certain circumstances for a deduction of “the value (as of the date the
 13 property is returned) of any part of the property that is returned,” this section simply does not
 14 apply here. Specifically, this section only applies if returning the property would be “impossible,
 15 impracticable, or inadequate,” § 3663A(b)(1)(B), and there is no basis for the Court to conclude
 16 that Defendants’ return of lost fungible money would meet that standard. *See Robers*, 572 U.S. at
 17 643 (“Money being fungible, however, ‘the property . . . returned’ need not be the very same bills
 18 or checks.”) (internal citations omitted).

19 Additionally, the MVRA’s “property that is returned” language only accounts for the
 20 specific property lost by a victim that was subsequently returned. *Id.* at 640–41. Accordingly,
 21 where the specific property lost was the investors’ money, Defendants are only entitled to
 22 deductions for any *money returned* to Theranos investors,² not the fair market value of Theranos
 23 *shares* that the investors were fraudulently induced into accepting for their money. This
 24 application of the MVRA was clarified in 2014 by the Supreme Court in *Robers v. United States*,
 25 where the Supreme Court considered whether the value of collateral property securing a
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 28 ² The government does not oppose deducting amounts for money that Theranos *did* return to
 certain investors, specifically \$3,000,000 to Hall Black Diamond; \$43,500,000 to Partner
 Investments; and \$15,500,000 to Safeway. *See Gov’t Rest. Br. 6; 02/17/23 Hr’g Tr. 6:17–21.*

1 fraudulently obtained loan should be deducted from the defendant’s restitution obligation. 572
2 U.S. 639. The Supreme Court concluded that no deduction was warranted, finding that (1) “the
3 statutory phrase ‘any part of the property’ refers only to the specific property lost by a victim,
4 which, in the case of a fraudulently obtained loan, is the money lent,” and, therefore, (2) “no ‘part
5 of the property’ is ‘returned’ to the victim until the collateral is sold and the victim receives money
6 from the sale.” *Id.* at 640–41.

7 The Court finds the Supreme Court’s interpretation in *Robers* to be instructive. An
8 investor victim’s loss is the full amount of the property given (*i.e.*, money) at the time of the
9 fraudulently induced investments, irrespective of any shares the victims received or the value of
10 those shares. Per § 3663A(b)(1)(B) and *Robers*, Defendants would only be entitled to a restitution
11 deduction if the investor victims had hypothetically sold their Theranos shares and received
12 money in return; the proceeds from that sale may be deducted from the restitution amount. Here,
13 neither Defendant has presented evidence to support such a deduction, *cf. Gagarin*, 950 F.3d at
14 607 (placing the burden on defendants to establish a right to a statutory restitution offset), nor have
15 they presented a meaningful basis for distinguishing *Robers* other than the fact that *Robers*
16 involved loan fraud instead of investor fraud. Holmes Rest. Br. 10. The Court, accordingly, finds
17 that Defendants are not entitled to the § 3663A(b)(1)(B) offset because they have not returned
18 “any part of the property” the investor victims had lost.

19 **b. Intervening Causes**

20 In addition to the statutory offset for the value of Theranos shares, Defendants also argue
21 that Theranos’s ultimate collapse was an intervening cause that breaks the chain of proximate
22 causation between their fraudulent conduct and the loss in value of the victims’ investments.
23 Balwani Rest. Br. 5–7; Holmes Rest. Br. 9. The Court finds this argument unpersuasive.

24 Contrary to Defendants’ assertions, the investor victims’ losses are properly measured by
25 the amount of their investment, not by the diminution in value of Theranos shares they received.
26 As discussed above, for restitution purposes, the victims’ losses occurred at the moment they
27 exchanged their money for Theranos shares. Subsequent events do not change the fact that those
28 victims gave up money for those fraudulently induced investments, nor do they change the amount

1 given. The causal nexus, therefore, need only be between Defendants' misconduct and the
2 victims' decisions to invest, which the Court has already found. *See supra* Section III(A)(1).

3 Courts in this circuit have rejected similar causation objections by loan fraud and investor
4 fraud defendants, who argued that financial crises, changes in company leadership, or borrowers'
5 inability to repay loans had severed the causal link between their own fraudulent representations
6 and the victims' investment losses or loan defaults. *See, e.g., Peterson*, 538 F.3d at 1077
7 (affirming restitution order for full amount of defaulted fraudulently obtained loans even where
8 defendants argued the defaults were caused by "home-buyers' inability to repay the loans due to
9 increased interest rates, inability to maintain employment, and decreased paychecks"); *Sarad*, 227
10 F. Supp. 3d at 1159 (rejecting investor fraud defendant's argument that "the 2008 financial crisis
11 and the subsequent [company] leadership may be partially to blame for devaluing the victims'
12 investments" and holding "the district court does not have to apportion restitution, where, as here,
13 the defendant has been found culpable and the causal chain 'is not extended so far as to become
14 unreasonable'"); *cf. United States v. Hackett*, 311 F.3d 989, 993 (9th Cir. 2002) (finding causation
15 where defendant's conduct "created the circumstances under which the harm or loss occurred.").

16 Accordingly, other events that occurred after the victims' investments, such as Defendant
17 Balwani's May 2016 departure from Theranos and the company's eventual dissolution, do not
18 interrupt the necessary causal relationship between Defendants' misconduct and the loss suffered
19 by the investor victims.

20 **c. Additional Investment Sums**

21 In addition to the loss amount the Court had calculated for these investor victims at
22 sentencing, the government has proffered evidence that one investor (Peer Ventures Group) had
23 also invested an additional \$45 million in July 2010 and \$17.7 million in June 2013. Gov't Rest.
24 Br. 6; 1/30/23 Decl. Robert S. Leach ("Leach Decl."), Ex. A, ECF No. 1726-2.

25 The Court finds that these amounts are supported by sufficiently reliable evidence. These
26 figures were included in a spreadsheet that Theranos's corporate controller had provided to the
27 SEC on July 19, 2016. Neither Defendant has objected to the amounts reflected in this
28 spreadsheet, though they object to using the spreadsheet to infer investors' reliance on Defendants'

1 representations. *See* Balwani Rest. Br. 3–4; Holmes Rest. Br. 2. As in its sentencing orders, the
 2 Court here does not rely on this spreadsheet to draw an inference of investors’ reliance on
 3 Defendants’ misrepresentations. *See supra* Section III(A)(1); Holmes Sent’g Order 14–15;
 4 Balwani Sent’g Order 18–19. However, because the Court has already found that Peer Ventures
 5 Group was a victim of the fraud conspiracy and receiving no objections, the Court finds the
 6 spreadsheet introduced by the government to be sufficiently reliable for the limited purpose of
 7 determining investment amounts.

8 Accordingly, the Court finds that Peer Ventures Group’s total loss amount is comprised of
 9 the \$30,799,912 the Court previously found at sentencing, plus an additional \$62,700,000 amount
 10 invested prior to 2014, for a total amount of **\$93,499,912**.

11 * * *

12 In sum, the Court finds that the MVRA requires Defendants to “return the property [lost]
 13 to the owner of the property,” which is the full amount of the investor victims’ investments in
 14 Theranos less any funds they have already received. *See supra* n.3. The Court also finds that
 15 Defendants are not entitled to any deductions for the residual value of Theranos shares at the time
 16 of investment because, other than certain undisputed amounts returned, none of the investor
 17 victims’ lost property were returned nor were any of the victims able to liquidate their shares.
 18 Finally, the Court finds that there is proximate cause between Defendants’ fraud conspiracy and
 19 the victims’ investments in Theranos to warrant restitution of their investments in full.

20 Accordingly, the Court finds that, with respect to the twelve investor victims named at
 21 sentencing, restitution is warranted, as follows:

Investor (Testifying Individual)	Restitution Amount
Alan Eisenman (Self)	\$99,990
Sherrie Eisenman (Alan Eisenman)	\$49,995
Hall Group (Bryan Tolbert)	\$1,875,000
Richard Kovacevich (Self)	\$4,149,990
Lucas Venture Group (Donald A. Lucas)	\$7,570,005
Mendenhall TF Partners (Pat Mendenhall)	\$1,312,500
Black Diamond Ventures (Chris Lucas)	\$5,349,900

Peer Ventures Group (Mark Campbell)	\$93,499,912
PFM Funds (Brian Grossman)	\$52,639,998
Mosley Family Holdings (Daniel Mosley)	\$5,999,997
RDV Corporation (Lisa Peterson)	\$99,999,984
Keith Rupert Murdoch (Natalie Ravitz)	\$124,999,997
TOTAL AMOUNT	\$397,547,268

B. Walgreens and Safeway

The government also asserts that Safeway and Walgreens were victims of the conspiracy to defraud Theranos investors by virtue of the convertible notes they had received from Theranos. 02/20/23 Hr’g Tr. 6:1–7:9. These notes functioned as loans to Theranos that could later be converted to Theranos shares at Safeway’s or Walgreens’s election. *See, e.g.*, TX 495, 496; 10/06/21 Trial Tr. 2967:18–21.

1. Victim Identification

Although Walgreens and Safeway were not victims that the Court had considered at sentencing, the government has nonetheless established by a preponderance of the evidence that these two companies are victims of the fraud conspiracy for purposes of restitution.³ First, to the extent Defendants attempt to distinguish these companies from other investors by characterizing them as Theranos’s business partners, their argument is undermined by the TSI’s definition of “Theranos’s investors,” which expressly included “individuals, entities, *certain business partners*, members of its board of directors.” TSI ¶ 3 (emphasis added).

More practically, Walgreens and Safeway—like other Theranos investors—were also induced to convey millions of dollars to Theranos by the same misrepresentations the other investor victims had received. For example, Safeway’s former CEO Steven Burd testified at trial that, in entering into the contractual relationship that led to a \$30 million wire transfer, he had relied on Defendant Holmes’s representations regarding the speed of Theranos’s test results, the

³ Defendants argue that the Court cannot determine from the general verdict whether the jury found Safeway or Walgreens to be a victim, but this point is inapposite. 02/17/21 Hr’g Tr. 16:19–17:8. The government need only prove that Safeway or Walgreens are victims by a preponderance of the evidence, and the Court may rely on any evidence that “possesses sufficient indicia of reliability to support its probable accuracy,” including trial testimony. *Waknine*, 543 F.3d at 557.

1 company's cash flow, and its pharmaceutical clientele. 10/06/21 Trial Tr. 2952:12–20, 2954:20–
 2 2955:12, 2977:20–2978:10. Walgreens's former CFO similarly testified that he had received
 3 many of the same representations in presentations from Defendants before deciding to partner with
 4 and invest in Theranos. 10/12/21 Trial Tr. 3173:7–3174:1, 3179:3–3180:9; 3181:19–3182:4; *see*
 5 *also* 10/13/21 Trial Tr. 3398:19–24 (testimony that Walgreens was “an investor in Theranos in
 6 addition to being a business partner”). Furthermore, when Walgreens requested due diligence
 7 documents from Theranos prior to their business relationship, Defendant Holmes had sent
 8 validation reports that were doctored to include Pfizer's logo alongside Theranos's, leading
 9 Walgreens to believe that the reports had been drafted or approved by Pfizer. 10/12/21 Trial Tr.
 10 3189:8–3190:6; 11/23/21 Trial Tr. 7478:15–23; *see also* TX 291.

11 Accordingly, given the existing evidence on the record, the Court finds that both
 12 Walgreens and Safeway were victims of the conspiracy to defraud investors.

13 2. Loss Calculation

14 With respect to calculating Safeway's loss amount, the Court finds that—although
 15 Safeway did not submit a victim impact statement—there is nonetheless sufficient and reliable
 16 evidence in the record to document the precise amount of its loss. The Court heard trial testimony
 17 from Mr. Burd that Safeway had wired \$30 million to Theranos in August 2011 under Safeway's
 18 Master Purchase Agreement with Theranos. 10/06/21 Trial Tr. 2986:6–15. This testimony is
 19 supported by the agreements themselves and the bank payment information for the \$30 million
 20 wire transfer. *See* TX 387, 495, 496, 5426. In July 2016, Safeway agreed to receive \$15.5 million
 21 from Theranos to terminate the Master Purchase Agreement and all parties' liabilities under that
 22 contract. Coopersmith Decl., Ex. C, ECF No. 1728–2, at 205. The government does not dispute
 23 that the \$15.5 million Safeway received constitutes “property returned” under the MVRA and
 24 should be deducted from the total restitution amount. 02/17/23 Hr'g Tr. 6:17–21. Accordingly,
 25 the final amount of restitution for Safeway is **\$14,500,000**, which reflects the \$30 million Safeway
 26 wired to Theranos less the \$15.5 million Safeway already received from Theranos.

27 As for Walgreens, it filed a victim impact statement describing a similar \$40 million
 28 convertible loan it had extended to Theranos in June 2012, as well as \$5 million that Theranos

1 failed to pay Walgreens under a settlement agreement between them. Leach Decl., Ex. B
 2 (“Walgreens Impact Statement”). With respect to the \$40 million convertible note, the Court finds
 3 by a preponderance of the evidence that this amount was the result of Defendants’ fraudulent
 4 representations. *See* Walgreens Impact Statement, Ex. A; *see also* 10/13/21 Trial Tr. 3401:9–16
 5 (testifying that Walgreens’ investment was a \$40 million note); *supra* Section III(B)(1).
 6 Defendant Holmes argues that this \$40 million figure improperly reflects Walgreens’s expectation
 7 damages had both parties fully performed their contractual obligations, instead of restitution
 8 damages that puts Walgreens back in the position it would have been but for Defendants’ conduct.
 9 Holmes Rest. Br. 12–13. This argument misconstrues the function of the convertible note, which
 10 operates as a loan accruing 0.79% interest annually until Walgreens elects to convert part of the
 11 loan principal into Theranos shares. Walgreens Impact Statement, Ex. A. Because Walgreens
 12 never elected to convert its shares, its *expectation* damages would be the \$40 million loan plus the
 13 0.79% interest it would have expected to accrue; Walgreens’ total *restitution* damages, however, is
 14 **\$40,000,000**, which is the amount needed to return Walgreens to its position before it acquired the
 15 convertible note (*i.e.*, when it was \$40 million richer).

16 The Court, however, does not find that the remaining requested \$5 million amount is
 17 sufficiently supported by reliable evidence. First, the Court does not find that the civil judgment
 18 from the District of Delaware (“Delaware Judgment”)—which is the only supporting document
 19 appended to the Walgreens Impact Statement for this amount—is sufficient for restitution.
 20 Walgreens Impact Statement, Ex. B. The Court has not received evidence, for example, on how
 21 the Delaware court arrived at its final figure or whether the civil judgment was reached using a
 22 causation analysis analogous to the one this Court must undertake in determining criminal
 23 restitution, *i.e.*, whether this loss was caused by Defendants’ fraud conspiracy. *See United States*
 24 *v. Havens*, 424 F.3d 535, 538 (7th Cir. 2005) (vacating restitution order where district court
 25 adopted a state civil judgment in its entirety, reasoning that “[a] civil judgment award by itself,
 26 however, is insufficient to support an order of restitution because some damages and costs
 27 recoverable in a civil action . . . do not qualify as ‘losses’ under the MVRA”). Second, even if the
 28 Court can infer from the Walgreens Impact Statement that this \$5 million is the precise amount of

1 the final unpaid payment owed under Walgreens’s settlement agreement with Theranos, there is a
 2 general lack of evidence regarding the purpose of the original \$100 million “innovation fee”
 3 payment, the subsequent settlement agreement between Walgreens and Theranos, or the payments
 4 that Theranos *had* made under the settlement agreement. *Cf.* 10/13/21 Trial Tr. 3398:13–18
 5 (confirming that “the innovation fee didn’t give Walgreens equity, any ownership of Theranos”).
 6 At bottom, the Court is asked to rely solely on an unsubstantiated representation from the
 7 Walgreens Impact Statement that Theranos had precisely \$5 million left unpaid under its
 8 settlement agreement. On the face of Walgreens’ Statement alone, however, the Court cannot
 9 make that determination. *See Waknine*, 543 F.3d at 557–58 (vacating restitution order that relied
 10 on affidavits that “were too summary and too conclusory to be sufficiently reliable”).

11 * * *

12 Based on the extensive evidence in the record and the submissions filed alongside the
 13 government’s restitution briefing, the Court finds by a preponderance of evidence that Walgreens
 14 and Safeway are victims of Defendants’ conspiracy to defraud Theranos investors. Trial
 15 testimony from Walgreens and Safeway representatives indicated that these companies elected to
 16 provide substantial sums to Theranos based on misrepresentations they had received from
 17 Defendants. Furthermore, the evidence supports a finding that these representations are closely
 18 related to—and indeed were intended to result in—the investments that Walgreens and Safeway
 19 made in Theranos via convertible notes, *i.e.*, the losses sustained by these victims.

20 Accordingly, the Court finds that, with respect to Walgreens and Safeway, restitution is
 21 warranted, as follows:

Investor	Investment Amount
Walgreens	\$40,000,000
Safeway	\$14,500,000
TOTAL INVESTMENT AMOUNT	\$54,500,000

26 **C. Other Potential Victims**

27 In addition to the investor victims listed above, the government has argued that restitution
 28 should be ordered for all Theranos C-1 and C-2 investments made between 2010 to 2015, as well

1 as for \$100,000 invested by one Eileen Lepera. Gov't Rest. Br. 4–5. The Court finds that there is
2 insufficient evidence to order restitution for these investments.

3 For the C-1 and C-2 investors, the government relies entirely on a spreadsheet of Theranos
4 investors, arguing that the Court should infer that all of these investors had relied on Defendants'
5 representations. Gov't Rest. Br. 5. However, as indicated *supra* at Section III(A)(2)(c) and in its
6 sentencing orders, the Court does not find the mere fact that an individual or entity had invested in
7 Theranos to be sufficient to prove by a preponderance of the evidence that the investment was the
8 direct result of Defendants' misrepresentations. *See Waknine*, 543 F.3d at 557–58.

9 Similarly, with respect to Ms. Lepera, her submitted victim impact statement does not
10 contain any information that she had invested in Theranos because of Defendants' conduct in their
11 fraud conspiracy. Leach Decl., Ex. C. To the contrary, Ms. Lepera stated that she had purchased
12 Theranos shares through her boss, the late Don Lucas; she did not state that she ever
13 communicated with either Defendant or that she read any publications containing Defendants'
14 misrepresentations. *Id.* While the Court is sympathetic to Ms. Lepera's circumstances, seeing as
15 her \$100,000 investment was the largest investment she made, the evidence indicates that Ms.
16 Lepera's investment is too attenuated from Defendants' fraudulent representations for restitution.

17 Accordingly, the Court will decline to order restitution for the losses and investments made
18 by Ms. Lepera and investors other than those identified at Sections III(A)(1) and III(B)(1).

19 **D. Prejudgment Interest and Investigative Costs**

20 The government also seeks prejudgment interest under the MVRA and a \$500,000
21 reimbursement to RDV for its legal fees. Gov't Rest. Br. 7.

22 Although the MVRA does not expressly provide for prejudgment interest, district courts
23 have discretion to award interest for victims' actual losses as “foregone interest.” *See, e.g., United*
24 *States v. Gordon*, 393 F.3d 1044, 1058 (9th Cir. 2004), *abrogated on other grounds by Lagos v.*
25 *United States*, 201 L. Ed. 2d 1 (May 29, 2018). Here, balancing the equities and considering the
26 substantial restitution amounts at issue, the Court will exercise its discretion under 18 U.S.C. §
27 3612(f)(3) to waive interest on the final restitution award.

28 With respect to RDV's legal and investigation fees, the government and RDV has

1 approximated the fees to be over \$500,000 in connection with “document collections and
 2 productions, law enforcement interviews, depositions, grand jury, and trial testimony.” Gov’t
 3 Rest. Br. 7. However, “the MVRA requires more precision. A ‘back-of-the-envelope’ approach
 4 simply will not do.” *United States v. Anderson*, 741 F.3d 938, 953 (9th Cir. 2013). In the absence
 5 of any billing records or other supporting documents, RDV’s generalized request for half a million
 6 dollars in legal fees is too imprecise for restitution under the MVRA.

7 **E. Complexity Exception**

8 Both Defendants ask the Court to invoke the so-called “complexity exception” in the
 9 MVRA, by which a defendant can avoid mandatory restitution if the district court finds that
 10 “determining complex issues of fact related to the cause or amount of the victim’s losses would
 11 complicate or prolong the sentencing process to a degree that the need to provide restitution to any
 12 victim is outweighed by the burden on the sentencing process.” 18 U.S.C. § 3663A(c)(3)(B).
 13 However, as evidenced by the analysis and loss calculation above, the Court does not find that the
 14 calculation here involved such unwieldy issues of fact to preclude restitution. Indeed, given the
 15 Supreme Court’s guidance in *Roberts*, 572 U.S.C 639, calculating restitution is relatively
 16 straightforward. Simply put, the amount of money necessary to return the victims to their
 17 positions prior to Defendants’ fraudulent conduct is the amount of their investments.

18 The Ninth Circuit has never affirmed a district court’s decision to apply the MVRA
 19 complexity exception, a reality that Defendants recognize. 03/17/23 Hr’g Tr. 27:1–11; *see also*
 20 *Sarad*, 227 F. Supp. 3d at 1158 (“The Ninth Circuit has analyzed the MVRA complexity
 21 exception only twice, and both times found it inapplicable.”). Defendant Holmes, however, relies
 22 on *United States v. Reifler*, a Second Circuit case that remarked that the complexity exception
 23 would be *likely* to apply to loss calculation in a public securities fraud case. 446 F.3d 65 (2d Cir.
 24 2006). In its closing paragraphs, the *Reifler* opinion had remarked in dicta that—because the
 25 government had arbitrarily selected certain valuation dates, hypothetical prices, and other
 26 assumptions to calculate the restitution amount— “[p]erhaps it was unduly difficult . . . to attempt
 27 to determine a victim’s actual loss [and] that difficulty clearly implicates § 3663A(c)(3)(B)’s
 28 exclusion from the reach of the MVRA.” *Id.* at 138–39. Notwithstanding this commentary’s

1 qualified and limited impact on the applicable law this Court must apply, the facts here are easily
 2 distinguishable from those in *Reifler*. Whereas *Reifler* involved publicly traded securities and
 3 rough approximations of loss amounts across investors, *id.* at 123–135, the fraud here involved
 4 discernible transactions of private securities where the Court individually assessed the impact of
 5 Defendants’ misconduct on each identified investor victim’s loss. *See supra* Sections III(A)(1);
 6 III(B)(1). Moreover, the complexities at issue in *Reifler* related to the valuation of share prices the
 7 defendants had intentionally manipulated. 446 F.3d at 135–39. Meanwhile, in the instant case,
 8 the Court has found that the value of Theranos shares is irrelevant, because the investor victims’
 9 lost property was the money they were fraudulently induced by Defendants to invest. *See also supra*
 10 Section III(A)(2)(a) (citing *Roberts*, 572 U.S. 639). In short, the Court is unpersuaded by
 11 Defendants’ reliance on dicta from an out-of-circuit decision that predated the Supreme Court’s
 12 updated MVRA interpretation in *Roberts*.⁴

13 Accordingly, the Court does not find that restitution calls for such complex issues of fact
 14 that “would complicate or prolong the sentencing process” and will decline to invoke the MVRA’s
 15 complexity exception described at 18 U.S.C. § 3663A(c)(3)(B).

16 **F. Apportionment of Liability**

17 Neither the government nor Defendants directly argue how the Court should apportion any
 18 restitution liability between the Defendants. That said, the MVRA “expressly permits the
 19 imposition of joint and several liability.” *United States v. Gagarin*, 950 F.3d 596, 609 (9th Cir.
 20 2020) (citing 18 U.S.C. § 3664(h); *see also United States v. Booth*, 309 F.3d 566, 576 (9th Cir.
 21 2002) (same)).

22 The Court finds that joint and several liability is warranted as to the victims’ losses arising
 23 from the TSI’s conspiracy to commit wire fraud against Theranos investors. Here, two separate
 24 juries found both Defendants to be guilty of the same count—conspiring to defraud Theranos

25
 26 ⁴Other cases cited by Defendants are even more inapposite, involving restitution for the purported
 27 victims of bribery schemes. *See Holmes Rest. Br.* (citing *United States v. Adorno*, 950 F. Supp.
 28 2d 426, 431 (E.D.N.Y. 2013) (declining restitution where it required calculating a municipality’s
 loss resulting from an official’s bribery conduct); *United States v. Schlifstein*, 2020 WL 2539123,
 at *1 (S.D.N.Y. May 19, 2020) (declining restitution that involved bribes and kickbacks for
 prescribing highly addictive fentanyl products)).

investors—which indicates that both Defendants contributed to the losses arising from that conspiracy. 18 U.S.C. § 3664(h). To the extent Defendant Holmes may object that restitution is improper as to her on the individual investor fraud counts for which she was not convicted (*see* Holmes Rest. Br. 7), restitution may nonetheless be ordered “based on related but uncharged conduct that is part of a fraud scheme.” *In re Her Majesty the Queen*, 785 F.3d at 1276; *see also United States v. Lievanos*, 422 F. App’x 603, 606 (9th Cir. 2011) (“The jury’s acquittal of [defendant] on one wire fraud charge doesn’t render the restitution order an abuse of discretion.”).

Accordingly, both Defendants Holmes and Balwani will each be jointly and severally liable for the total amount of restitution.

IV. FINAL RESTITUTION AWARD

For the foregoing reasons, both Defendants Elizabeth Holmes and Ramesh “Sunny” Balwani shall be jointly and severally liable to the victims of their fraud conspiracy, as follows:

Investor	Amount
Alan Eisenman	\$99,990
Sherrie Eisenman	\$49,995
Hall Group	\$1,875,000
Richard Kovacevich	\$4,149,990
Lucas Venture Group	\$7,570,005
Mendenhall TF Partners	\$1,312,500
Black Diamond Ventures	\$5,349,900
Peer Ventures Group	\$93,499,912
PFM Funds	\$52,639,998
Mosley Family Holdings	\$5,999,997
RDV Corporation	\$99,999,984
Keith Rupert Murdoch	\$124,999,997
Walgreens	\$40,000,000
Safeway	\$14,500,000
TOTAL RESTITUTION	\$452,047,268

United States District Court
Northern District of California

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IT IS SO ORDERED.

Dated: May 16, 2023



EDWARD J. DAVILA
United States District Judge