FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BLANCA ESTELLA ORELLANA, *Plaintiff-Appellant*, v. ALEJANDRO MAYORKAS, Secretary of Homeland Security; TRACY RENAUD, Acting Director, U.S. Citizenship and Immigration Services; ROBERT LOONEY, San Francisco/San Jose District Director, U.S. Citizenship and Immigration Services, *Defendants-Appellees.*	No. 20-16092 D.C. No. 4:19-cv-05759-DMR OPINION

Appeal from the United States District Court
for the Northern District of California
Donna M. Ryu, Magistrate Judge, Presiding

Argued and Submitted March 8, 2021
San Francisco, California

Filed July 28, 2021

Before: M. Margaret McKeown and Sandra S. Ikuta, Circuit Judges, and Joan N. Ericksen,[*] District Judge.

Opinion by Judge Ikuta

SUMMARY[**]

Immigration

The panel affirmed the district court's dismissal of Blanca Orellana's complaint challenging the United States Citizenship and Immigration Services' denial of her application for naturalization because the complaint did not plausibly plead that Orellana had not been convicted of an offense that involves fraud or deceit in which "the loss to the victim or victims exceeds $10,000," 8 U.S.C. § 1101(a)(43)(M)(i), and therefore had the requisite good moral character. The panel held that: (1) under the "circumstance-specific" approach, the district court is not limited to reviewing the record in the criminal case in determining the loss to the victim; and (2) Orellana's complaint could not survive a motion to dismiss because it did not plausibly allege that the loss to the victim did not exceed $10,000.

[*] The Honorable Joan N. Ericksen, United States District Judge for the District of Minnesota, sitting by designation.

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

After an injury in 2002, Orellana's employer, Ocadian, provided her with disability payments and payments for medical treatment. When later charged with insurance fraud, Orellana pleaded guilty to violating California Penal Code § 550(b)(3) by concealing a material fact relevant to her eligibility for insurance benefits or payments, "to wit: outside employment, sources of income." In 2018, USCIS denied Orellana's naturalization application on the ground that her conviction was an offense under § 1101(a)(43)(M)(i), an "aggravated felony" precluding a finding of the good moral character required for naturalization. Orellana challenged this decision in district court, arguing that, under the applicable "circumstance-specific" approach set out in *Nijhawan v. Holder*, 557 U.S. 29 (2009), the district court could consider a printout of checks Ocadian had sent to Orellana, even though the printout had not been part of the criminal record. The district court rejected that argument and dismissed the complaint.

The panel held that, under the circumstance-specific approach, the district court is not limited to reviewing the record in the applicant's criminal case. The panel observed that *Nijhawan* did not expressly address whether a court could consider evidence beyond sentencing-related materials to determine loss. However, the panel concluded that the logic of *Nijhawan* made clear that the Supreme Court's rules limiting the evidence that can be considered in cases involving the categorical approach (where a court is limited to reviewing the language of the statute of conviction) and the modified categorical approach (where a court is limited to reviewing a narrow category of documents to determine which part of a divisible statute is at issue) do not apply in this circumstance-specific context. Instead, the court must determine whether the actual conduct underlying the state

crime of conviction matches the conduct described in the generic federal offense. The panel observed that courts making this sort of inherently factual finding are generally free to consider any relevant, admissible evidence and explained that it saw no basis for precluding a court from doing so here. The panel observed that this court had previously suggested as much, and that the Board of Immigration Appeals had interpreted *Nijhawan* the same way.

However, the panel concluded that Orellana's complaint did not plausibly allege that the loss to Ocadian did not exceed $10,000. Observing that the loss must be tethered to the offense of conviction, the panel explained that Count 3 of the criminal complaint, Orellana's offense of conviction, charged her with concealing the fact she had engaged in outside employment. Orellana, however, contended the only loss incurred by Ocadian that was tethered to Count 3, as opposed to counts that were dismissed in her criminal case, was at most the $5,010.98 in payments reflected in the printout of checks.

In light of its holding that a district court is not per se precluded from considering documents beyond criminal records, and the principle that a district court may consider materials outside the pleadings where, as here, they have been incorporated by reference into the complaint, the panel concluded that it could consider the printout. However, the panel concluded that the complaint itself undermined Orellana's theory because the complaint alleged that, in addition to the payments of $5,010.98, Ocadian also incurred $5,146 in legal and investigation costs. The panel concluded these costs, which together exceeded $10,000, were tethered to Count 3 because Ocadian incurred these costs due to Orellana's concealment of her employment. The panel also

concluded that, even assuming some part of the $30,000 Orellana owed Ocadian in restitution was attributable to criminal counts that were dismissed, the complaint did not raise a plausible inference that the loss attributable to Count 3 was less than or equal to $10,000.

COUNSEL

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OPINION

IKUTA, Circuit Judge:

The United States Citizenship and Immigration Services (USCIS) denied an application for naturalization because the applicant had been convicted of "an offense that . . . involves fraud or deceit in which the loss to the victim or victims exceeds $10,000," 8 U.S.C. § 1101(a)(43)(M)(i), and therefore lacked the "good moral character" required under 8 U.S.C. § 1427(a). This appeal requires us to consider whether a district court reviewing documents in the applicant's challenge to such a denial can consider documents outside of the record in the applicant's prior criminal case. We conclude that under the "circumstance-specific" approach

to the monetary threshold in § 1101(a)(43)(M)(i), the district court is not limited to reviewing the record in the applicant's criminal case in determining the "loss to the victim." *See Nijhawan v. Holder*, 557 U.S. 29, 40 (2009). Nevertheless, we conclude that the complaint here cannot survive a motion to dismiss, because it does not plausibly allege that "the loss to the victim" of the applicant's criminal offense did not "exceed[] $10,000." 8 U.S.C. § 1101(a)(43)(M)(i).

I

According to her complaint, Blanca Orellana is a citizen of El Salvador. She has resided in the United States since 1990 and has been a lawful permanent resident since February 2003.

In February 2002, while working for Ocadian Care Center, Orellana injured her neck, right hand, left hand, right foot, and back. Orellana received emergency room treatment in February 2002, and was subsequently treated by several different physicians. Orellana filed a disability claim with Ocadian, claiming that the injuries she sustained from this incident left her unable to work. Ocadian accepted the claim, and Orellana began receiving temporary disability payments from Ocadian in February 2002. Ocadian also paid for Orellana's ongoing medical treatment, which included therapy for her upper extremities, treatment for her right foot and ankle, and assistive devices (splints for both wrists and an elbow sleeve). As of December 2, 2002, Ocadian had paid $37,957.64. In connection with these injuries, Orellana also filed an application with the Workers' Compensation Appeal Board (WCAB).

Ocadian's private investigator subsequently discovered that Orellana's claimed disabilities were contradicted by her activities. Surveillance during the period from April 2002 to August 2002 showed that Orellana was continuing to work while receiving disability and workers' compensation payments, and that she showed no signs of limited movements. In December 2002, Ocadian's insurance company filed a mandatory report of suspected fraud with the local district attorney. In 2003, the district attorney filed a criminal complaint against Orellana. Counts 1 and 2 (which were subsequently dismissed) charged Orellana with making a false statement in support of an insurance claim, Cal. Penal Code § 550(b)(2), and a false statement in support of a claim for workers' compensation, Cal. Ins. Code § 1871.4(a)(1), respectively. Count 3 charged her with the crime of concealing a material fact "on or about February 20, 2002 and through August 14, 2002," namely, that Orellana "did conceal and knowingly fail to disclose the occurrence of an event and series of events that affected [her] initial and continued right or entitlement to insurance benefits or payments, and the amount of any benefits or payments to which [she] was entitled, to wit: outside employment, sources of income."[1]

[1] Count 3 states, in full:

> Count: 003, for a further and separate cause of complaint, being a different offense from but connected in its commission with the charge set forth in Count 002, complainant further complains and says: on or about February 20, 2002 and through August 14, 2002, the crime of concealment of material fact affecting insurance benefit, in violation of section 550(b)(3) of the penal code, a misdemeanor was committed by Blanca Estela Orellana, in that said defendant(s) did conceal and knowingly fail to disclose the occurrence of an event and series of events that affected

This nondisclosure violated section 550(b)(3) of the California Penal Code, which makes it "unlawful to do, or to knowingly assist or conspire with any person to . . . [c]onceal, or knowingly fail to disclose the occurrence of, an event that affects any person's initial or continued right or entitlement to any insurance benefit or payment, or the amount of any benefit or payment to which the person is entitled."

In May 2003, Orellana pleaded guilty to Count 3, and Counts 1 and 2 were dismissed subject to a *Harvey* waiver.[2] She was ordered "to make restitution for damages as to Count(s) 3 in an amount and manner to be determined by the probation officer and ordered by the court," as well as "to make restitution on counts, cases, and uncharged matters dismissed with *Harvey* waiver."

In connection with the restitution proceedings, Ocadian provided a letter stating that as of August 4, 2003, Ocadian had paid $56,000 for Orellana's claim and had "paid

> defendant's initial and continued right or entitlement to insurance benefits or payments, and the amount of any benefits or payments to which defendant(s) was entitled, to wit: outside employment, sources of income.

[2] A *Harvey* waiver allows a court to consider the facts underlying a dismissed count for purposes of calculating the amount of restitution. *See* Cal. Penal Code § 1192.3(b) ("If restitution is imposed which is attributable to a count dismissed pursuant to a plea bargain, as described in this section, the court shall obtain a waiver pursuant to *People v. Harvey* (1979) 25 Cal. 3d 754 from the defendant as to the dismissed count."). In *Harvey*, the California Supreme Court held that a sentencing court could not consider any of the facts underlying a dismissed count for purposes of enhancing a defendant's sentence "in the absence of any contrary agreement." 25 Cal. 3d at 758.

$5,146.00 in legal and investigation fees and $11,609 in temporary disability fees." Orellana was ultimately ordered to pay Ocadian $30,000 in restitution.

In December 2004, the WCAB approved a separate agreement settling Orellana's workers' compensation claim against Ocadian. Under the agreement, the parties agreed that Orellana's claim against Ocadian would be settled for $42,700. The $30,000 restitution payment to Ocadian would be deducted from this amount.

Years later, Orellana applied for naturalization. In January 2018, the USCIS denied her application based on its determination that Orellana's state conviction for insurance fraud was an offense that "involves fraud or deceit in which the loss to the victim or victims exceeds $10,000," 8 U.S.C. § 1101(a)(43)(M)(i), which is an "aggravated felony" precluding naturalization, 8 C.F.R. § 316.10(b)(1)(ii).

In September 2019, Orellana filed suit in the district court, seeking to compel the USCIS to adjudicate her then-pending administrative appeal of the denial of her naturalization application. After the USCIS reaffirmed its decision to deny her application for naturalization, Orellana amended her complaint to challenge the USCIS's determination. In the operative complaint, Orellana referenced documents that had not been part of the record in her criminal case. In particular, the complaint relied on a printout that it claimed listed the checks Ocadian sent to Orellana for the period between February 4, 2002 and February 2, 2003. According to the complaint, the printout showed that for the period between February 20, 2002 and August 14, 2002, Ocadian paid Orellana $5,010.98.

Orellana argued that under *Nijhawan*, the district court could consider any admissible evidence to calculate the loss caused to the victim by the specific conduct underlying the count of conviction. Therefore, she argued that the court should consider the printout setting forth the check payments, even though it had not been part of the criminal record.

The district court dismissed the complaint without prejudice on the ground that Orellana failed to plead facts sufficient to show that she had not been convicted of an offense involving "fraud or deceit in which the loss to the victim or victims exceeds $10,000," 8 U.S.C. § 1101(a)(43)(M)(i), and therefore failed to make a plausible claim that she was eligible for naturalization. In reaching this conclusion, the court rejected Orellana's argument that, under *Nijhawan*, it could consider the printout purportedly setting forth Ocadian's check payments. The district court reasoned that *Nijhawan* permitted courts to consider sentencing-related material, but did not allow a court to consider any other admissible evidence, which (in the court's view) would allow a party to relitigate the underlying conviction.

After Orellana informed the court that she did not intend to file an amended complaint, the court entered final judgment, and Orellana brought this appeal.

II

We have jurisdiction to review the district court's judgment under 28 U.S.C. § 1291. *See Alocozy v. U.S. Citizenship & Immigr. Servs.*, 704 F.3d 795, 796 (9th Cir. 2012). We review de novo the grant of a motion to dismiss. *Elmakhzoumi v. Sessions*, 883 F.3d 1170, 1172 (9th Cir. 2018).

A

On appeal, Orellana's central argument is that the district court erred in declining to consider the printout, which provided evidence of the payments she received from Ocadian between February 20, 2002 and August 14, 2002. Because Orellana's eligibility for naturalization turns on a showing that her prior conviction is not "an offense that . . . involves fraud or deceit in which the loss to the victim or victims exceeds $10,000," 8 U.S.C. § 1101(a)(43)(M)(i), Orellana claims that her additional evidence is crucial to show that the loss to Ocadian did not exceed the statutory amount. Therefore, we first turn to the question whether the district court erred in concluding that even under the "circumstance-specific" approach outlined in *Nijhawan*, it could review only documents in Orellana's state criminal case records.

We consider this issue in the context of the Supreme Court's evidentiary rules for determining whether a person's prior state conviction qualifies as a generic federal offense described in the relevant federal statute. Section 1101(a)(43)(M)(i) lists such a generic fraud offense. Over the past three decades, the Supreme Court has developed and refined a methodology called the "categorical approach" for making this determination. *See Taylor v. United States*, 495 U.S. 575, 588–90 (1990) (considering generic federal offenses for purposes of the Armed Career Criminal Act); *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 186–87 (2007) (considering generic federal offenses for purposes of immigration law). In addition to the categorical approach, the Supreme Court has delineated two other approaches—the modified categorical approach and the circumstance-specific approach—to determine whether a person's state conviction

qualifies as a generic offense specified in a federal statute. *See Nijhawan*, 557 U.S. at 40–41. Each of these approaches has its own evidentiary rules.

First, under the categorical approach, a court must determine only whether the defendant was convicted under a criminal statute that categorically matches the generic federal offense, without considering the particular facts underlying the defendant's conviction. *Taylor*, 495 U.S. at 600. When engaging in this analysis, a court considers only the statutory language of the criminal statute of conviction and the generic federal offense, and may not consider any evidence relating to the defendant's conduct. *Id.* at 600–01; *see also Descamps v. United States*, 570 U.S. 254, 261 (2013).

Second, if the criminal statute of conviction is divisible, meaning it "sets out one or more elements of the offense in the alternative," a court must address a single factual question: "which of the [alternative] statutory offenses (generic or non-generic) formed the basis of the defendant's conviction." *Descamps*, 570 U.S. at 257, 265. To make this determination, a court may review only a narrow category of documents, such as "the indictment or information and jury instructions or, if a guilty plea is at issue, by examining the plea agreement, plea colloquy or some comparable judicial record of the factual basis for the plea." *Nijhawan*, 557 U.S. at 35 (cleaned up). The court may not look at other evidence to determine what crime the person actually committed, because that would amount to a collateral trial. *Shepard v. United States*, 544 U.S. 13, 23 (2005).

Nijhawan established a third approach, which it referred to as a "circumstance-specific" approach. 557 U.S. at 34. In considering § 1101(a)(43)(M), it concluded that Congress did

not intend for the "loss to the victim" element to be applied categorically. *Id.* at 40. Instead, *Nijhawan* concluded that the words "loss to the . . . victims exceeds $10,000" referred to "the specific way in which an offender committed the crime on a specific occasion" rather than "to a generic crime." *Id.* at 34. The Court based this conclusion on the text and context of § 1101(a)(43)(M). It also considered that applying a categorical approach to the monetary threshold in § 1101(a)(43)(M)(i) would leave the "loss to the victim" element "with little, if any, meaningful application" because at the time Congress added the $10,000 threshold, there was "no widely applicable federal fraud statute that contain[ed] a relevant monetary loss threshold," and "only 8 States [had] statutes in respect to which subparagraph (M)(i)'s $10,000 threshold, as categorically interpreted, would have full effect." *Id.* at 39–40. In light of this conclusion, *Nijhawan* held that a court was not limited by the evidentiary restrictions applied under the categorical or modified categorical approach. *Id.* at 40–41. *Nijhawan* explained that there is "nothing in prior law that so limits the . . . court" as to what it may consider as evidence. *Id*. at 41. Moreover, such a limitation would be "impractical insofar as it requires obtaining from a jury a special verdict on a fact that . . . is not an element of the offense." *Id.* at 42.

The Court rejected the alien's argument that "fairness requires the evidentiary limitations" of the modified categorical approach. *Id.* at 41. The Court noted that aliens were already protected by procedural safeguards, including the Third Circuit's rule that "loss to the victim" for purposes of § 1101(a)(43)(M)(i) must "be tied to the specific counts covered by the conviction" and "cannot be based on acquitted or dismissed counts or general conduct." *Id.* at 42 (citing *Alaka v. Attorney General of United States*, 456 F.3d 88, 107

(3rd Cir. 2006)). In addition, a "petitioner and those in similar circumstances have at least one and possibly two opportunities to contest the amount of loss, the first at the earlier sentencing and the second at the deportation hearing itself." *Id.* Therefore, the Court held there was "nothing unfair" about an immigration judge relying on "earlier sentencing-related material," including the defendant's stipulation "produced for sentencing purposes," to establish the amount of loss. *Id.*

Although *Nijhawan* did not expressly address the question whether a court could consider evidence beyond sentencing-related materials introduced in immigration or judicial proceedings to determine the "loss to the victim," the logic of *Nijhawan* makes clear that the Supreme Court's rules limiting the evidence that can be considered in categorical cases do not apply in this circumstance-specific context. Because the "loss to the victim" inquiry in § 1101(a)(43)(M)(i) requires an examination of the offender's actual conduct, a court is not limited to reviewing the language of the statute of conviction, as would be the case under the categorical approach. For the same reason, the court is not limited to reviewing a specified set of documents to determine which part of a divisible statute was at issue, as would be the case under the modified categorical approach. Instead, the court must determine whether the offender's actual conduct underlying the state crime of conviction matches the conduct described in the generic federal offense. Courts making this sort of inherently factual finding (the "specific way in which an offender committed the crime" of conviction, *id.* at 34) are generally free to consider any admissible evidence relevant to making such a determination. We see no basis for precluding a court from doing so here.

We have previously suggested as much. *See Kawashima v. Holder*, 615 F.3d 1043, 1056 (9th Cir. 2010) (holding in a similar context that "the BIA is not limited to only those documents which a court applying the modified categorical approach may review" in order to determine the loss amount under § 1101(a)(43)(M)(i)), *aff'd*, 565 U.S. 478 (2012). And the BIA has interpreted *Nijhawan* the same way, holding that it may consider any evidence that is admissible in removal proceedings to determine the loss amount under the circumstance-specific approach. *See, e.g.*, *Matter of Garza-Olivares*, 26 I. & N. Dec. 736, 742 & n.4 (BIA 2016); *Matter of Introcaso*, 26 I. & N. Dec. 304, 308–09 (BIA 2014) ("[C]ourts may look at the documents in the record of conviction and, if they are inconclusive, to other reliable documents or evidence.").

The government argues that because *Nijhawan* relied solely on sentencing-related materials, a court may not consider documents beyond the record of the underlying criminal case. We disagree. Here, "nothing in prior law" limits the evidence that may be considered by the district court in its review of the denial of an application for naturalization, including its determination of the amount of the victim's loss under "the specific circumstances surrounding an offender's commission of a fraud and deceit crime on a specific occasion." *Nijhawan*, 557 U.S. at 40–41. Although the materials at issue in *Nijhawan* included only sentencing-related materials, the Supreme Court did not limit its holding to that category of materials, or otherwise suggest that the nature of the materials was significant. Accordingly, a district court may consider any materials, subject only to the

applicable evidentiary rules, to determine whether the offense of conviction caused more than $10,000 in loss to the victim.[3]

B

Having determined that the district court was not precluded from considering evidence beyond the records underlying Orellana's state criminal case, we now turn to the question whether the district court erred in dismissing Orellana's complaint for failure to state a claim. We may affirm the dismissal upon any basis fairly supported by the record. *See Burgert v. Lokelani Bernice Pauahi Bishop Tr.*, 200 F.3d 661, 663 (9th Cir. 2000).

The relevant framework for establishing eligibility for naturalization is set forth in 8 U.S.C. § 1427(a) and the implementing regulations, 8 C.F.R. part 316. Under these provisions, a person may apply to the Attorney General (through the USCIS) for naturalization. *See* 8 U.S.C. § 1421(a); 8 C.F.R. § 316.4. "The applicant shall bear the burden of establishing by a preponderance of the evidence that he or she meets all of the requirements for naturalization." 8 C.F.R. § 316.2(b); *see also Berenyi v. Dist. Dir., Immigr. & Naturalization Serv.*, 385 U.S. 630, 637 (1967). One eligibility requirement is that the applicant "has been and still is a person of good moral character" during the relevant time periods referred to in the statute. 8 U.S.C.

[3] Orellana's argument that the Federal Rules of Evidence do not apply to a district court's review of the denial of a naturalization application, lacks merit. The rules "apply to proceedings in United States courts." Fed. R. Evid. 101, 1101. A judicial review of a denial of a naturalization application is one such proceeding. *See* 8 U.S.C. § 1421(c). Orellana points to no contrary authority and we have not found one.

§ 1427(a); 8 C.F.R. § 316.10. An applicant for naturalization "shall be found to lack good moral character, if the applicant has been . . . [c]onvicted of an aggravated felony as defined in [8 U.S.C. § 1101(a)(43)]." 8 C.F.R. § 316.10(b)(1)(ii). The statutory definition of an "aggravated felony" includes "an offense that . . . involves fraud or deceit in which the loss to the victim or victims exceeds $10,000." 8 U.S.C. § 1101(a)(43)(M)(i). In reviewing an application for naturalization, the USCIS conducts an investigation of the applicant, and may take testimony, subpoena witnesses, and require "the production of relevant books, papers, and documents." *Id.* § 1446(b). If the application for naturalization is denied, the applicant may request a hearing before an immigration officer, where additional evidence may be produced. *Id.* § 1447(a).

If the application is again denied, the applicant "may seek review of such denial" before a district court. *Id.* § 1421(c). "Such review shall be de novo, and the court shall make its own findings of fact and conclusions of law and shall, at the request of the petitioner, conduct a hearing de novo on the application." *Id.* An applicant for naturalization may present testimony and documents to the district court to establish eligibility. *See Gonzalez v. Sec'y of Dep't of Homeland Sec.*, 678 F.3d 254, 262 (3d Cir. 2012) (applying the Federal Rules of Evidence in reviewing the USCIS's denial of a naturalization application).

To survive a motion to dismiss a complaint in district court, a person challenging the denial of an application for naturalization must file a complaint that alleges "enough facts to state a claim to relief that is plausible on its face." *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Said otherwise, the allegations in the complaint must "plausibly

give rise to an entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). If an applicant is held to lack good moral character because of a conviction under 8 U.S.C. § 1101(a)(43), the applicant's complaint must set forth plausible allegations that, if true, would carry the burden of proving that the state conviction was not disqualifying. "The plausibility standard . . . asks for more than a sheer possibility that" plaintiffs are entitled to relief. *Id.* at 678. "Where a complaint pleads facts that are merely consistent with [plaintiffs' theories], it stops short of the line between possibility and plausibility of entitlement to relief." *Id.* (cleaned up).

Where, as here, a plaintiff's prior state conviction is at issue, a district court is not per se precluded from considering documents beyond the criminal case records relating to that conviction. *See supra* Section II.A. Nevertheless, the district court generally may not consider material outside the pleadings at the motion to dismiss stage, *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001), unless the documents have been incorporated into the complaint by reference, or are matters of which a court may take judicial notice, *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). "Although mere mention of the existence of a document is insufficient to incorporate the contents of a document, the document is incorporated when its contents are described and the document is integral to the complaint." *Tunac v. United States*, 897 F.3d 1197, 1207 n.8 (9th Cir. 2018) (quoting *Coto Settlement v. Eisenberg*, 593 F.3d 1031, 1038 (9th Cir. 2010)) (internal quotation marks omitted).

III

We now apply these principles to Orellana's case. To survive a motion to dismiss, Orellana's complaint and the documents incorporated by reference must allege facts that, taken in the light most favorable to Orellana, show that her conviction under section 550(b)(3) of the California Penal Code did not result in loss to the victims that exceeded $10,000. For purposes of 8 U.S.C. § 1101(a)(43)(M)(i), the loss to the victim must be "tethered to [the] offense of conviction" and "cannot be based on acquitted or dismissed counts." *Nijhawan*, 557 U.S. at 42 (citation omitted). Count 3, the offense of conviction, charged Orellana with the crime of concealing, "on or about February 20, 2002 and through August 14, 2002," the fact that she engaged in "outside employment," which affected her "initial and continued right or entitlement to insurance benefits or payments."

According to Orellana, her complaint plausibly alleges that "the actual loss amount caused by her conduct was at most $5,010.98, based on the sum total of the checks paid to her by Ocadian during the time period she was alleged to have failed to report outside income in the criminal complaint." This argument is based on the financial details printout described in the complaint. We may consider the printout because the document is incorporated by reference in the complaint, despite the fact that it is not part of the records in Orellana's criminal case. *See supra* Section II.A. The printout lists payments made to Orellana on a biweekly basis from February 4, 2002 to February 2, 2003. The complaint reprints a subset of the entries in the printout for the payments made during the period from February 20, 2002 through August 14, 2002 (the time period referenced in Count 3), and states that the "total of the above payments made during this

time period was $5,010.98 . . . not includ[ing] checks that appear to have been later adjusted with a negative amount and are marked 'ESCROWFUN.'" While it is not clear how the complaint added up the checks paid to Orellana during the relevant time period to arrive at the $5,010.98 figure, we take this allegation in the light most favorable to Orellana, *see Nguyen v. Endologix, Inc.*, 962 F.3d 405, 408 (9th Cir. 2020). Orellana claims that this amount represents the only loss incurred by Ocadian that is tethered to Count 3.

We disagree, because the complaint itself undermines Orellana's theory of the case and renders it implausible. *See Eclectic Props. E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 999 & n.8 (9th Cir. 2014) (holding that where allegations in the complaint were internally inconsistent, the allegations supported "at best—a 'possible' basis to believe [plaintiffs' theory], not a 'plausible' one"). The complaint alleges that in addition to Ocadian's payments of $5,010.98 to Orellana, Ocadian incurred $5,146 in legal and investigation costs leading to the discovery of Orellana's fraud. Specifically, the complaint alleged that the investigator surveilled Orellana, which resulted in a report to the local district attorney that Orellana was employed during the period she claimed she was not working. Because Ocadian incurred these costs due to Orellana's concealment of the fact that she was engaged in outside employment during the period from February 20, 2002 through August 14, 2002, these costs are tethered to Count 3. Accordingly, the complaint indicates that the losses to Ocadian, including its

legal and investigation costs and its direct payments to Orellana, exceed $10,000.[4]

Furthermore, as set out in the complaint, Ocadian was owed $30,000 from Orellana for restitution. Orellana argues that this $30,000 loss is not necessarily related to Count 3, the count of conviction, because the *Harvey* waiver in her criminal case supports the inference that the $30,000 in restitution was attributable to the dismissed counts. But even assuming that some part of the $30,000 is attributable to losses caused by Counts 1 and 2, the complaint does not raise a plausible inference that the loss attributable to Count 3 was less than or equal to $10,000. Orellana has not "explained what losses resulted from the dismissed counts or how those losses were calculated into the $30,000 restitution agreement."

Taking all the allegations in the complaint together, the complaint fails to plausibly allege that the loss to Ocadian did not exceed $10,000. *Iqbal*, 556 U.S. at 678. At best, the complaint raises a "sheer possibility" that the losses did not exceed this amount, but when a complaint's allegations are merely consistent with the plaintiff's theory of relief, the complaint cannot survive a motion to dismiss. *Id.*

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Accordingly, we hold that Orellana failed to state a plausible claim that the total loss to the victim of her violation of section 550(b)(3) of California Penal Code did not exceed

[4] In light of this conclusion, we need not consider whether other specific costs, including the payment for Orellana's medical treatment, are "tethered to [the] offense of conviction." *See Nijhawan*, 557 U.S. at 42.

$10,000. Therefore, she has failed to plausibly allege that she was not convicted of an "aggravated felony" under § 1101(a)(43)(M)(i), and the USCIS did not err in ruling that she failed to meet the good moral character requirement for naturalization.

AFFIRMED.