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12 NORTHERN DISTRICT OF CALIFORNIA  
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14

15 UNITED STATES OF AMERICA,	)	CASE NO. 18-CR-00258 EJD
	)	
16 Plaintiff,	)	UNITED STATES' OPPOSITION TO
	)	DEFENDANT'S MOTION FOR NEW TRIAL
17 v.	)	BASED ON ALLEGED STATEMENTS
	)	BY DR. ADAM ROSENDORFF (ECF NO. 1574)
18 ELIZABETH HOLMES,	)	
	)	Date: October 3, 2022
19 Defendant.	)	Time: 1:30 p.m.
	)	Court: Hon. Edward J. Davila
20	)	

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## INTRODUCTION

1  
2 The defense in this case has always had trouble making up its mind about Dr. Adam Rosendorff.  
3 At various times throughout the trial, they have portrayed him as (1) one of several scientists whose  
4 feedback gave Defendant reason to be confident in Theranos technology, (2) a rogue employee who  
5 misappropriated sensitive information, (3) the true culprit responsible for the problems with Theranos's  
6 testing, and (4) the single most crucial witness in the government's case against Defendant. Now,  
7 months after Defendant's conviction, the defense has assigned Dr. Rosendorff a new role: Defendant's  
8 ticket to a new trial.

9 Really, though, Dr. Rosendorff is none of these things. Defendant's new-trial motion is based on  
10 a conversation that took place earlier this summer between Dr. Rosendorff and William Evans,  
11 Defendant's partner. Defendant argues that Dr. Rosendorff's purported statements to Mr. Evans raise  
12 concerns about the veracity of his testimony as well as the government's conduct. Dr. Rosendorff has  
13 submitted a sworn declaration, filed herewith, that addresses those concerns. In that declaration, Dr.  
14 Rosendorff avers that he testified truthfully at trial, that he stands by his testimony in every respect, that  
15 he received instructions from the government only to testify honestly, and that he does not believe the  
16 government made misrepresentations about Defendants' conduct. These unequivocal, sworn assertions  
17 directly from the witness obviate the need to parse the drawn-from-memory collection of ambiguous,  
18 unsworn statements submitted by Defendant's partner.

19 On these facts, it is impossible for Defendant to carry her burden to show that newly discovered  
20 evidence merits a new trial or an evidentiary hearing. If Dr. Rosendorff's alleged statements to Mr.  
21 Evans could be interpreted to call into question the truth of his testimony or the accuracy of the  
22 government's presentation, his declaration repudiates any such interpretation. Even if Dr. Rosendorff  
23 had actually recanted his testimony—which he did not—Defendant's motion for a new trial would still  
24 fail under Ninth Circuit law holding that repudiated recantations do not warrant new trials. *See Lindsey*  
25 *v. United States*, 368 F.2d 633, 635-36 (9th Cir. 1966). The so-called "new evidence" underlying  
26 Defendant's motion is cumulative of testimony the jury already heard. Because it does not qualify as  
27 new substantive evidence, its only use at a retrial would be for impeachment, which is an insufficient  
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1 basis for a new trial. Most important, Defendant’s proffered evidence is not material to the investor-  
2 related charges on which she was convicted, and would not result in an acquittal if presented on retrial.  
3 Finally, because the case law encourages the Court to rely on its deep knowledge of the evidence in this  
4 case as well as Dr. Rosendorff’s declaration, there is no need to depart from the typical practice of  
5 deciding new-trial motions without an evidentiary hearing. *See United States v. Connolly*, 504 F.3d 206,  
6 219-20 (1st Cir. 2007) (New trial motions “ordinarily are decided on the basis of affidavits” except  
7 where the defendant makes “a threshold showing sufficient to warrant such a hearing.”).

8 For these reasons, as discussed in more detail below, the Court should deny Defendant’s motion  
9 in its entirety.<sup>1</sup>

## 10 BACKGROUND

11 The factual and procedural background of this case are well-known to the Court. The  
12 government offers the following summary of facts relevant to this motion.

### 13 **I. Dr. Rosendorff’s Actions and Sworn Testimony Show His Recognition 14 of Serious Problems at Theranos.**

15 Dr. Rosendorff was clinical lab director at Theranos from mid-2013 through late 2014. In that  
16 capacity, he witnessed Theranos’s blood testing operation firsthand and saw a picture that was very  
17 different from the one Defendants painted for investors and patients. His actions throughout his time at  
18 Theranos, like his trial testimony, make clear that he has always understood the seriousness of the  
19 problems he saw at Defendant’s company.

20 Relatively early in Dr. Rosendorff’s tenure as lab director, as Theranos was heading toward the  
21 commercial launch of its blood testing services, Dr. Rosendorff saw that the pace of assay development  
22 work at the company was “extremely rushed and hurried” and he felt that more time was needed to  
23 thoroughly investigate the company’s technology. Holmes 9/24/21 Transcript at 1722-1725. Just before  
24 the launch, Dr. Rosendorff reached out to Defendant herself to “raise alarm bells” about assays that he  
25 “didn’t feel were ready for launch.” *Id.* at 1725-1729; TX 1049. At trial, he testified that even before  
26

27 <sup>1</sup> The government incorporates by reference the introduction, procedural background, and legal standard  
28 sections of its contemporaneously filed Opposition to Defendant Elizabeth Holmes’ Rule 33 Motion re:  
Government Argument in Balwani Trial, filed at ECF No. 1585.

1 the launch, Theranos’s technology was producing questionable results for certain tests, which “raised  
2 alarms” for him as lab director and required more investigation. *Id.*

3         Once Theranos started offering tests to patients, Dr. Rosendorff continued to observe accuracy  
4 problems with one Theranos assay after another. In mid-2014, Theranos’s HCG assay—used to monitor  
5 pregnancy status—was performing so poorly in patient testing that Dr. Rosendorff ordered it moved to  
6 standard commercial analyzers, forbidding the lab from running it on the Edison device. Holmes  
7 9/24/21 Tr. at 1785-1792.

8         Dr. Rosendorff’s concerns at that time were not limited to the performance of the technology but  
9 apparently included the integrity of Theranos management. Dr. Rosendorff felt compelled to take steps  
10 to preserve evidence of misconduct at Theranos and protect himself in the event of a future government  
11 investigation. *Id.* at 1834-1835. Thus, in 2014, he began regularly forwarding internal Theranos emails  
12 he viewed as incriminating to his personal email account. *Id.* At trial, the government introduced  
13 exhibits proving that Dr. Rosendorff engaged in this practice. *See, e.g.*, TX 5397. Dr. Rosendorff  
14 testified that he did this in violation of his employment agreement because he wanted to get the word out  
15 about the problems at Theranos and because he was not confident the company would preserve these  
16 records in the event of a government investigation. Holmes 9/24/21 Tr. at 1834-1835.

17         In late 2014, Dr. Rosendorff had a tense email exchange with Christian Holmes, in which Dr.  
18 Rosendorff refused to speak with a doctor to defend Theranos test results he knew to be inaccurate.  
19 Holmes 9/28/21 Tr. at 1940-1946; TX 4323, 4314. Dr. Rosendorff told Defendant’s brother during that  
20 conversation that he wanted “to offer reliable and robust assays, not to spin,” and admonished that  
21 “honesty and transparency to the patient is essential.” *Id.*

22         Dr. Rosendorff decided to leave Theranos due to the troubling things he witnessed there. At  
23 trial, he testified that he “felt that it was a question of [his] integrity as a physician not to remain there  
24 and to continue [] endorsing results that [he] essentially didn’t have faith in.” Holmes 10/5/21 Tr. at  
25 2733. This matches what he told Defendant Holmes in writing at the time: that he was feeling “really  
26 uncomfortable with what [was] happening” in the company and that he felt “pressured to vouch for  
27 results” in which he was not confident. Holmes 9/28/21 Tr. at 1948-1949; TX 4330. Around the time of  
28



1 his departure, Dr. Rosendorff was exploring the possibility of bringing a qui tam whistleblower lawsuit  
2 against Theranos, in order to “right the wrongs, basically, to alert the public of what was going on at  
3 Theranos.” Holmes 10/6/21 Tr. at 2851-2852.

4 In April 2020, more than six months after finishing his testimony in the Holmes trial, Dr.  
5 Rosendorff took the stand to testify in the case against her codefendant Ramesh Balwani. The Court  
6 will recall that Dr. Rosendorff’s testimony in that second trial was substantially the same as his  
7 testimony in the Holmes matter.<sup>2</sup>

## 8 **II. Dr. Rosendorff Stands by His Trial Testimony and the Government’s** 9 **Presentation of Evidence.**

10 In response to Defendant’s motion, Dr. Rosendorff has provided a sworn declaration. *See*  
11 Exhibit 1, Declaration of Adam Rosendorff, M.D. (hereinafter, “Rosendorff Decl.”). In his declaration,  
12 he addresses the entirety of his lengthy testimony during the trials of both Defendants. *Id.* ¶¶ 1&2.  
13 Reflecting on that testimony, his declaration confirms that he “answered every question put to [him]  
14 completely, accurately, and truthfully to the best of [his] ability.” *Id.* ¶ 3. He further states that nothing  
15 he has learned since testifying has changed his recollection of what he witnessed at Theranos, and that  
16 he “stands by [his] testimony” at both trials “in every respect.” *Id.*

17 Dr. Rosendorff’s declaration also discusses his interactions with the government in connection  
18 with these trials, and the government’s presentation of evidence from his standpoint. On those topics,  
19 Dr. Rosendorff avers that the “only instruction” he received from the government in this case was “to  
20 tell the truth about the events [he] witnessed.” *Id.* ¶ 4. This is consistent with his testimony during trial.  
21 Holmes 9/28/21 Tr. at 1970-1972 (testifying that the government never pressured him to give a specific  
22 answer but only ever instructed him to tell the truth); Holmes 10/5/21 Tr. at 2721-2722 (confirming on  
23 redirect that he met voluntarily with the government because he wanted the story to come out and justice  
24 to be served; confirming that the government never told him how to testify). Looking back on the many

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25 <sup>2</sup> *See, e.g.,* Balwani 4/20/22 Tr. at 3256-3257 (testimony that validation work at Theranos leading up to  
26 the launch was “extremely rushed and hurried”); *id.* at 3263-3269 (testimony regarding TX 1049 and Dr.  
27 Rosendorff’s concerns just before launch); *id.* at 3327-3329 (testimony regarding Dr. Rosendorff’s  
28 decision to halt HCG testing on the Theranos Edison device); *id.* at 3381-3386 (testimony regarding TX  
4323 and Dr. Rosendorff’s refusal to defend inaccurate test results); *id.* at 3390-3391 (testimony  
regarding Dr. Rosendorff feeling uncomfortable at Theranos and his decision to resign).

1 days he spent on the witness stand, he states that he has “no reason to believe that the government  
2 misrepresented or otherwise created a misimpression about Ms. Holmes’ or Mr. Balwani’s conduct at  
3 Theranos.” Rosendorff Decl. ¶ 4.

4 Finally, Dr. Rosendorff offers insight into what likely motivated his attempt to contact Defendant  
5 after the trials, stating that he feels compassion for Holmes and Balwani, and even more so for their  
6 families who will be affected by any punishment that results from Defendants’ conduct. *Id.* ¶ 5.

## 7 ARGUMENT

### 8 **I. The Applicable Legal Standard Disfavors New Trials.**

9 The legal standard governing motions for new trial in this context is not favorable to Defendant’s  
10 motion. For a more thorough discussion of the applicable standard, the government refers the Court to  
11 its Opposition to Defendant’s Motion for New Trial Based on Arguments the Government Made in Co-  
12 Defendant Balwani’s Trial, filed concurrently. Here, the government limits its comments to the critical  
13 elements that Defendant needed to show to obtain the relief she seeks. To prevail on a motion for a new  
14 trial based on alleged newly discovered evidence, a defendant must satisfy a five-factor test and show:  
15 **(1)** that the evidence is newly discovered; **(2)** that the defendant was diligent in seeking the evidence; **(3)**  
16 that the evidence is material to the issues at trial; **(4)** that the evidence is not cumulative or merely  
17 impeaching; and **(5)** that the evidence indicates the defendant would probably be acquitted in a new trial.  
18 *United States v. Harrington*, 410 F.3d 598, 601 (9th Cir. 2005) (citation omitted). “This five-prong test  
19 is difficult to meet.” *United States v. Steel*, 759 F.2d 706, 713 (9th Cir. 1985). A motion for a new trial  
20 “should be granted ‘only in exceptional cases in which the evidence preponderates heavily against the  
21 verdict.’” *United States v. Showalter*, 569 F.3d 1150, 1157 (9th Cir. 2009) (quoting *United States v.*  
22 *Pimentel*, 654 F.2d 538, 545 (9th Cir. 1981)). On appeal, a district court’s denial of a new trial is  
23 reviewed for an abuse of discretion. *United States v. King*, 660 F.3d 1071, 1076 (9th Cir. 2011).

### 24 **II. The Purported New Evidence Does Not Show Government Misconduct.**

25 According to Defendant, Dr. Rosendorff’s purported statements raise the possibility of  
26 government misconduct. Mot. at 10. If Defendant could substantiate that claim and show misconduct—  
27 for instance, the knowing use of perjured testimony—that would trigger a different standard under the  
28

1 fifth *Harrington* factor analyzing the likely effect on the outcome of the trial. *See United States v.*  
2 *Walgren*, 885 F.2d 1417, 1427-28 (9th Cir. 1989) (laying out standard in case of knowing use of  
3 perjury). Defendant concedes, however, that Dr. Rosendorff’s statements as relayed by Mr. Evans “are  
4 not sufficiently precise for Ms. Holmes to accuse the government of misconduct at this time.” Mot. at  
5 10. Critically, Dr. Rosendorff’s declaration disclaims any allegation of government misconduct,  
6 expressly stating that the government did not introduce false testimony through him at all—much less  
7 knowingly. (Rosendorff Decl. ¶¶ 3&4). These facts are far afield from *Walgren* and similar misconduct  
8 cases cited by Defendant.

9 This case does not resemble *United States v. Vozzella*, where the government, despite knowing  
10 that certain records were fictitious, introduced them through a key witness and allowed the witness to  
11 give unqualified testimony about their significance. *United States v. Vozzella*, 124 F.3d 389, 393 (2d  
12 Cir. 1997). Nor is this a case like *United States v. Butler*, where prosecutors were found to have  
13 knowingly “acquiesced in and corroborat[ed]” “egregious” false testimony on the part of a key witness  
14 while concealing benefits promised to that witness. *United States v. Butler*, 567 F.2d 885, 887-91 (9th  
15 Cir. 1978). Defendant’s reliance on these cases is therefore misplaced.

16 Because Defendant cannot show—or even allege—government misconduct, she is subject to the  
17 rigorous standard for new-trial motions set forth in *Harrington* and discussed above. Under that  
18 standard, Defendant’s motion fails for the following reasons.

### 19 **III. The Purported New Evidence Is Cumulative.**

20 With no evidence suggesting government misconduct, Defendant is unable to satisfy the five-  
21 part test outlined in *Harrington*, and her motion fails. Defendant’s showing is particularly deficient as to  
22 the third, fourth, and fifth *Harrington* factors, which focus on whether the new evidence is material, not  
23 cumulative or merely impeaching, and would probably lead to an acquittal. *Harrington*, 410 F.3d at  
24 601. This brief will devote the most attention to those factors, but the government does not concede that  
25 Defendant can satisfy the first two factors either, for the reasons explained below.

26 With respect to the first factor, in cases where a witness recants trial testimony but later  
27 withdraws their recantation, courts have expressed doubts about whether there actually is any “new  
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1 evidence” to support a Rule 33 motion, since that witness would offer the same version of events at  
 2 retrial as they did during their original testimony. *See United States v. Santiago*, 837 F.2d 1545, 1550  
 3 (11th Cir. 1988). Here, there was no recantation, and Dr. Rosendorff’s declaration makes clear that his  
 4 testimony on retrial would match his earlier testimony. Thus, there is no new evidence to form the basis  
 5 of Defendant’s Rule 33 motion. *See also United States v. Matta-Ballesteros*, 213 F.3d 644, \*1 (9th Cir.  
 6 2000) (unpublished) (observing that a witness’s repudiations of his recantation, “by themselves,  
 7 probably doom [the defendant’s] claim of newly discovered evidence.”).

8 With respect to the second *Harrington* factor, the Court should find Defendant was not diligent  
 9 in seeking of the so-called new evidence underlying her motion. For example, Defendant claims that  
 10 Dr. Rosendorff told Mr. Evans that people at Theranos were doing their best and working hard to do  
 11 something good and meaningful. Mot. at 1. To the extent Dr. Rosendorff did not articulate that precise  
 12 thought during his trial testimony, what prevented Defendant from eliciting it?<sup>3</sup> As the following  
 13 examples show, defense counsel obtained equivalent statements from Dr. Rosendorff and other former  
 14 Theranos employee witnesses at trial, rendering this purported new evidence cumulative and  
 15 highlighting Defendant’s lack of diligence.

- 16 • Dr. Rosendorff testified that he joined Theranos because he “really bought into the idea of  
 17 laboratory testing being done from a very small pinprick sample and thought that would be  
 18 advantageous to patients.” Holmes 9/24/21 Tr. at 1709. He was also “impressed by the  
 19 earnestness and the dedication” that he sensed in the Theranos personnel he met, and thought  
 20 the company had great potential. *Id.*
- 21 • By late 2014, the number and severity of problems at Theranos “reached a crescendo” in Dr.  
 22 Rosendorff’s view, despite making his “best efforts to improve assays” and “to work [his]  
 23 hardest with the company.” Holmes 9/28/21 Tr. at 1939.
- 24 • Discussing a time in November 2013 when Dr. Rosendorff was working on a Sunday,  
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26 <sup>3</sup> Courts routinely deny new-trial motions based on newly discovered evidence where the witness was  
 27 available, and even subject to cross-examination, but the defendant did not elicit the relevant  
 28 information in the precise form. *See United States v. Hinkson*, 585 F.3d 1247, 1257-58, 1264-65 (9th  
 Cir. 2009) (en banc); *see also United States v. Tamez*, 44 F. App’x 790, 791 (9th Cir. 2002); *United  
 States v. Lockett*, 919 F.2d 585, 591-92 (9th Cir. 1990).

1 defense counsel observed that Dr. Rosendorff was “working hard,” and he responded that he  
2 was “trying to get the lab to come into compliance” with regulations, raising issues and  
3 making sure people knew they had to be addressed. Holmes 9/29/21 Tr. at 2156; *see also id.*  
4 at 2160 (defense counsel emphasizing that Dr. Rosendorff had been working hard).

- 5 • When Theranos encountered serious problems with its HCG test, Dr. Rosendorff agreed with  
6 defense counsel on cross that “[e]veryone was working hard to get that study done,” in order  
7 to investigate the issue. Holmes 10/1/21 Tr. at 2510.
- 8 • Similarly, when problems arose with the company’s lipids test, Dr. Rosendorff agreed with  
9 defense counsel that “everyone... [was] working really hard to figure out what the issue  
10 [was].” Holmes 10/5/21 Tr. at 2608.
- 11 • In connection with a Theranos study examining variability and bias in third-party analyzers,  
12 defense counsel highlighted Dr. Rosendorff’s message thanking everyone at Theranos for  
13 looking into the issue and Dr. Rosendorff agreed with defense counsel that this represented  
14 “a good team collaborative effort.” *Id.* at 2617-2618.

15 Other former Theranos employees testified similarly:

- 16 • Erika Cheung testified that she was excited about working for Theranos based on the promise  
17 of its technology to provide patients with accessible, affordable, and less painful medical  
18 testing. Defendant’s charisma and “strong sense of conviction” also increased Ms. Cheung’s  
19 positive feelings about the company. Holmes 9/14/21 Tr. at 793-794.
- 20 • Surekha Gangakhedkar agreed with defense counsel that, during the early period of the  
21 company, “everyone was working hard,” including herself and Defendant Holmes, and that  
22 they were “making progress” and “accomplishing things along the way.” Holmes 9/21/21  
23 Tr. at 1263; *see also id.* at 1279-1280 (discussing “hard work” and success in connection  
24 with assay development work by a team at Theranos).
- 25 • So Han Spivey testified that she and Defendant Holmes worked hard on cash management at  
26 Theranos and that Defendant cared a lot about ensuring the company made payroll. Holmes  
27 9/41/21 Tr. at 745-746.

- 1           • Daniel Edlin testified, in connection with Theranos’s potential partnership with the military,  
2           that he worked hard in good faith on the project because he thought it would benefit  
3           Theranos and members of the military, and that he observed Defendant “working very hard  
4           every day” in a “hectic environment.” Holmes 10/20/21 Tr. at 4156-4158.

5 Nothing prevented the defense from eliciting even more testimony from Dr. Rosendorff and other  
6 former Theranos employees about whether people at the company were working hard or whether  
7 problems with the tests were large or small.

8           To the extent the defense seeks a retrial to draw out more testimony from Dr. Rosendorff in this  
9 same vein, that evidence is plainly cumulative of what the jury already heard. To the extent the defense  
10 seeks to impeach Dr. Rosendorff with his post-trial statements, that would be equally cumulative in light  
11 of the extensive, four-day cross-examination of Dr. Rosendorff at trial. *See United States v. Glantz*, 884  
12 F.2d 1483, 1486 (1st Cir. 1989) (affirming denial of new trial where the defendants had attacked the  
13 relevant witness’s testimony and credibility “comprehensively” and “in all directions,” noting the chaos  
14 that would ensue “if defendants had an unlimited number of opportunities to attack the credibility of the  
15 prosecution’s witnesses”).

16 **IV. At Best, the Purported New Evidence Is Merely Impeaching.**

17           It is self-evident that a request for a new trial based on newly discovered evidence generally must  
18 be based on *new substantive evidence*. Defendant’s motion is missing that key ingredient. At most, Dr.  
19 Rosendorff’s unverified statements to Mr. Evans might be used for impeachment were the case to be  
20 tried again. The defense would undoubtedly seek to confront Dr. Rosendorff with his post-trial  
21 statements in an effort to undermine his credibility. But as the Ninth Circuit has repeatedly held,  
22 “evidence that would merely impeach a witness cannot support a motion for a new trial,” even where a  
23 defendant argues that such evidence would “seriously impeach” the testimony of a key witness. *United*  
24 *States v. Kulczyk*, 931 F.2d 542, 549 (9th Cir. 1991); *see also United States v. Brashier*, 548 F.2d 1315,  
25 1327 (9th Cir. 1976) (“Evidence which may impeach a government witness, although discovered after  
26 trial, is not enough without a greater showing that a new trial is required under the standard articulated  
27  
28

1 in *Cervantes*.”).<sup>4</sup> This element of the *Harrington* test would present an obstacle for Defendant even  
 2 under the most aggressive view of Dr. Rosendorff’s statements treating them as a recantation of his trial  
 3 testimony. *See United States v. Call*, 73 F. App’x 268, 274 (9th Cir. 2003) (“A repudiated recantation is  
 4 mere impeachment evidence that may not be used as substantive evidence at a new trial.”).

5 The bar against new trials based on mere impeachment evidence applies with extra force in cases  
 6 where the conviction was supported by strong evidence unrelated to the witness in question, that is,  
 7 where the conviction did not rise and fall with the testimony and credibility of that one witness. *See*  
 8 *United States v. Harris*, 534 F.2d 1371, 1374 (9th Cir. 1976) (affirming denial of new trial where new  
 9 evidence “went merely to the impeachment or lack of credit of a witness who testified against the  
 10 appellant, which ordinarily is not sufficient,” particularly in cases with otherwise strong evidence); *Call*,  
 11 73 F. App’x at 274 (“Newly discovered impeachment evidence can form the basis of a new trial motion  
 12 only if the testimony it seeks to impeach was ‘uncorroborated and provided the only evidence of an  
 13 essential element of the government’s case.’”) (quoting *United States v. Davis*, 960 F.2d 820, 825 (9th  
 14 Cir. 1992)). As discussed in the following section, Dr. Rosendorff’s testimony was heavily corroborated  
 15 by documentary evidence and other witness testimony, and there was extensive evidence of Defendant’s  
 16 criminal conduct.

17 **V. The Purported New Evidence Is Not Material and Would Not Result in an Acquittal.**

18 Defendant submits that the materiality and likelihood-of-acquittal prongs of the five-part test are  
 19 closely related and are essentially “two means of measuring the same thing.” Mot. at 10 (quoting *United*  
 20 *States v. Krasney*, 607 F.2d 840, 845 n.3 (9th Cir. 1979). At their core, both of these factors assess the  
 21 impact of newly discovered evidence on the outcome of a hypothetical retrial based on how effectively  
 22 that evidence answers or negates the elements of the charged offenses and the proof at trial that led to a  
 23 conviction. The government agrees that it makes sense to consider these two factors together. Indeed,  
 24 Defendant’s proffered new evidence fails both prongs for the same reasons.

25 //

26  
 27 \_\_\_\_\_  
 28 <sup>4</sup> *See United States v. Cervantes*, 542 F.2d 773, 779 (9th Cir. 1976) (applying the established five-factor  
 test for a new trial under Rule 33).



1 As an initial matter, it is worth noting that Defendant’s motion quotes extensively from an email  
2 from Mr. Evans describing an interaction between him and Dr. Rosendorff. Though Mr. Evans may  
3 have done his best to capture what Dr. Rosendorff said, there seems to be no recording or transcript of  
4 that conversation, and the Court should not treat Mr. Evans’s account as equivalent to a sworn affidavit  
5 from Dr. Rosendorff himself. In *United States v. Pointer*, the Seventh Circuit affirmed the denial of  
6 new-trial motion based on a letter from a witness recanting grand jury testimony, noting among other  
7 things that the letter was not a sworn affidavit, was written in suspect circumstances to a former  
8 boyfriend now in prison, and contradicted the witness’s prior sworn testimony. *United States v. Pointer*,  
9 17 F.3d 1070, 1074 (7th Cir. 1994). Similar factors should cause this Court to discount the report of Dr.  
10 Rosendorff’s statements offered by Defendant’s partner—especially because Dr. Rosendorff has now  
11 submitted a sworn declaration addressing these issues.

12 Even if Dr. Rosendorff’s statements to Mr. Evans could be interpreted as a recantation of his trial  
13 testimony—which they are not—a new trial still would not be warranted. It is well-established that  
14 courts view post-trial recantations with skepticism. *United States v. Matta-Ballesteros*, 213 F.3d 644, \*1  
15 (9th Cir. 2000) (unpublished); *United States v. Connolly*, 504 F.3d 206 (1st Cir. 2007) (same). That  
16 skepticism is doubly appropriate here, since the unverified statements at issue are too ambiguous to  
17 qualify as a recantation.

18 If Dr. Rosendorff had unambiguously recanted his testimony, his recent sworn statements would  
19 cancel out the effect of that recantation. The Ninth Circuit has repeatedly held that repudiated  
20 recantations do not merit new trials. For example, in *Lindsey v. United States*, a fraud victim testified  
21 against the defendant, then made an affidavit recanting her trial testimony. *Lindsey v. United States*, 368  
22 F.2d 633, 635 (9th Cir. 1966). Shortly thereafter, the victim made a second affidavit recanting the first  
23 affidavit and reaffirming her trial testimony. *Id.* The victim’s third affidavit was another reversal,  
24 stating her belief that the trial jury had been deprived of the full picture and that the defendant should  
25 have been acquitted. *Id.* With the victim’s *fourth* and final affidavit, she confirmed that her trial  
26 testimony was true and that she did not wish to change one word of it. *Id.* Reviewing that tortuous  
27 record, the Ninth Circuit affirmed the district court’s denial of a new trial, viewing the victim’s final  
28



1 affidavit as controlling. *Id.* at 636. That court explained that, while a recantation can be substantial and  
2 material evidence in some circumstances, “where the recantation has itself been repudiated,” “the  
3 recantation becomes merely impeaching.” *Id.*; *see also United States v. Lespier*, 266 F. App’x 5, \*7 (2d  
4 Cir. 2008) (“[A] district court should give little evidentiary weight to a recantation affidavit that has  
5 since been repudiated.”). Here, because Dr. Rosendorff’s declaration repudiates any interpretation of his  
6 earlier statements as a recantation, his statements provide no basis for a new trial.

7         The Ninth Circuit also has declined to order new trials in cases where third parties made  
8 affidavits purporting to contain statements from trial witnesses, as is the case here. *See, e.g., United*  
9 *States v. Nace*, 561 F.2d 763 (9th Cir. 1977). In *Nace*, the defendant moved for a new trial based on  
10 newly discovered evidence consisting of affidavits relaying statements made to the affiants by a key  
11 witness to the effect that the witness had been “out to get” the defendant by means of the prosecution.  
12 *Id.* at 772. The government responded with the witness’s own affidavit in which he denied making  
13 those statements. *Id.* On that record, the Ninth Circuit held it was appropriate for the trial court to rely  
14 on the witness’s affidavit, which rendered evidence of his other alleged statements mere impeachment.  
15 *Id.* The Court should follow the sound reasoning of *Nace* and deny Defendant’s motion in reliance on  
16 Dr. Rosendorff’s declaration.<sup>5</sup>

17         There is another reason Defendant cannot show materiality or a probable acquittal from new  
18 evidence relating to Dr. Rosendorff: her conviction did not hinge on his testimony. The Ninth Circuit  
19 has held that, even in a case where the government knowingly uses false testimony, a new trial may not  
20 be warranted if the government “presented substantial evidence against [the defendant] independent of  
21 [the suspect witness’s] courtroom testimony” and if there was sufficient corroboration for that  
22 testimony. *United States v. Endicott*, 869 F.2d 452, 456 (9th Cir. 1989); *see also Harrington*, 410 F.3d  
23 at 601 (evidence of inconsistencies in police officer testimony insufficient for new trial in light of  
24 “significant evidence in the record implicating” the defendant in the charged conduct); *Connolly*, 504  
25

26 <sup>5</sup> Besides his declaration affirming that he told the truth at Defendant’s trial, the fact that Dr. Rosendorff  
27 testified consistently in two trials months apart should increase confidence in the truth of his testimony.  
28 *See U.S. ex rel. Rice v. Vincent*, 491 F.2d 1326, 1332 (2d Cir. 1974) (reversing grant of new trial in case  
where government witness recanted trial testimony, noting that recanting witness had testified  
consistently in multiple trials before and after recantation).

1 F.3d at 214 (recantation insufficient for new trial where other witnesses corroborated aspects of witness  
2 testimony and testimony had “substantial circumstantial corroboration”). That logic applies here.

3 First, Dr. Rosendorff’s views about the problems with Theranos’s technology and practices were  
4 unmistakable from the actions he took as lab director. He would not have sought to delay the launch,  
5 repeatedly raised the alarm to management, halted HCG testing on the Edison, refused to defend  
6 questionable results, and quit his job—all while preserving potentially incriminating evidence in case of  
7 a future investigation—if he did not recognize that the situation at Theranos was dire.

8 Moreover, the vast majority of Dr. Rosendorff’s testimony was corroborated by documentary  
9 evidence whose authenticity was undisputed. Over the course of Dr. Rosendorff’s examinations, the  
10 government introduced more than one hundred trial exhibits through him. *See generally* Holmes  
11 9/24/21 Tr., 9/28/21 Tr., 10/5/21 Tr. & 10/6/21 Tr. The Court will recall that those exhibits consisted of  
12 internal Theranos records documenting the performance of Theranos’s testing systems as well as emails  
13 between Theranos employees discussing problems encountered during the operation of the Theranos  
14 clinical lab. Those records provided the foundation of Dr. Rosendorff’s testimony. His accompanying  
15 explanations helped the jurors to appreciate the significance of those documents and the underlying  
16 events. Any assault on Dr. Rosendorff’s testimony or credibility based on his post-trial statements  
17 would leave all of that incriminating documentary evidence intact, making a different outcome unlikely.

18 Dr. Rosendorff’s testimony about problems with Theranos’s technology also was corroborated  
19 by similar testimony from other former Theranos employees, including Surekha Gangakhedkar and  
20 Erika Cheung. In particular, there was significant overlap between Dr. Rosendorff’s and Ms. Cheung’s  
21 testimony. *Compare, e.g.,* Holmes 9/15/21 Tr. at 961-969 *with* Holmes 9/24/21 Tr. at 1756-1759 (Dr.  
22 Rosendorff and Ms. Cheung reviewing and making similar comments on TX 1633 documenting  
23 monthly quality control failure rates for Theranos’s Edison); *compare* Holmes 9/15/21 Tr. at 942-952  
24 *with* 9/28/21 Tr. at 1914-1917 (Dr. Rosendorff and Ms. Cheung providing similar testimony upon  
25 review of TX 1548 showing Edison proficiency testing sample results). Because multiple Theranos  
26 employees testified about the negative experiences they had with Theranos’s technology, there is no  
27 reason to believe that undermining Dr. Rosendorff’s testimony would cause a jury to reach different  
28

1 conclusions following a retrial. After all, Dr. Rosendorff was just one of thirty-two witnesses (including  
2 the Defendant herself) in a four-month trial with over 900 exhibits.

3 Defendant’s claim that Dr. Rosendorff’s statements would probably result in an acquittal at  
4 retrial is especially dubious given that Defendant was convicted only on counts relating to investor fraud  
5 and was acquitted on the counts that related to her scheme to defraud patients. As lab director, Dr.  
6 Rosendorff testified about problems with the accuracy and reliability of Theranos’s blood tests—an  
7 issue that was at the heart of the fraud on patients. *See* Third Superseding Indictment (ECF No. 469)  
8 ¶ 16. In contrast, the fraud on investors involved misrepresentations on a wide range of topics beyond  
9 the accuracy of Theranos tests, including: (1) Theranos’s reliance on third-party devices, (2) whether  
10 Theranos’s technology had been validated by pharmaceutical companies, (3) the current and future  
11 status of Theranos’s partnership with Walgreens, (4) whether Theranos’s technology was in use by the  
12 military, (5) the regulatory status of Theranos’s technology, and (6) the overall financial health of the  
13 company. *See id.* ¶ 12. Dr. Rosendorff had minimal, if any, personal knowledge regarding most of  
14 these topics. Nor was he in a position to testify about the false or misleading representations Defendants  
15 made to investor victims, as he was not present for those conversations. In sum, Dr. Rosendorff’s  
16 testimony was more relevant to the counts on which Defendant was acquitted; that makes it difficult to  
17 see how alleged out-of-court statements undercutting his testimony would have led to a different result  
18 on the investor counts.

19 Defendant next argues that Dr. Rosendorff’s statements are material because they cast doubt on  
20 the government’s investigation. But Defendant’s case law on this point is inapposite. For example,  
21 *Kyles v. Whitley* did not involve a new trial motion evaluated under Rule 33, but rather a habeas corpus  
22 petition based on the prosecution’s failure to disclose specific evidence favorable to the defense in  
23 violation of its duties under *Brady v. Maryland*, 373 U.S. 83 (1963). *Kyles v. Whitley*, 514 U.S. 419,  
24 421-22 (1995). The standard used in that case—under which withheld information is deemed material if  
25 its disclosure would create a “reasonable probability” of a different result—does not apply here. *See, id.*  
26 at 434. Moreover, in contrast to cases cited by Defendant, Dr. Rosendorff’s post-trial statements have  
27 no bearing on the “reliability,” “thoroughness,” or “good faith” of the government’s investigation here—  
28

1 especially when viewed in the context of his declaration. *See id.* at 446; *United States v. Howell*, 231  
2 F.3d 615, 625 (9th Cir. 2000) (holding that *Brady* violation did not warrant mistrial).

3 Finally, a significant portion of the “new evidence” identified by Defendant would not be  
4 admissible and thus cannot support her request for a new trial. For example, any statements by Dr.  
5 Rosendorff regarding the intent or good faith of workers at Theranos would be entirely speculative and  
6 thus inadmissible. *See United States v. Felix*, 663 F. App'x 557, 559 (9th Cir. 2016) (no new trial  
7 warranted where new evidence included witness’s subjective beliefs about defendant’s motives, which  
8 would have been “inadmissible as speculation”).

9 Accordingly, Defendant is unable to show that new evidence derived from Dr. Rosendorff’s  
10 purported statements meets the standard for a new trial under Rule 33.<sup>6</sup>

#### 11 **VI. Defendant Has Not Shown a Need for an Evidentiary Hearing**

12 As discussed above, the facts of this scenario fall well short of meeting the threshold that would  
13 warrant a new trial. The Court should deny Defendant’s new-trial motion without holding an  
14 evidentiary hearing. The decision whether or not to conduct an evidentiary hearing on a motion for a  
15 new trial is a matter of discretion. *United States v. Thompson*, 493 F.2d 305, 310 (9th Cir. 1974).  
16 Circuit courts note that “evidentiary hearings on new trial motions in criminal cases are the exception  
17 rather than the rule,” as such motions “ordinarily are decided on the basis of affidavits.” *United States v.*  
18 *Connolly*, 504 F.3d 206, 220 (1st Cir. 2007); *see also United States v. Kelly*, 790 F.2d 130, 134 (D.C.  
19 Cir. 1986) (“A motion for a new trial can ordinarily be decided on the basis of affidavits without an  
20 evidentiary hearing.”). In deciding whether to make an exception and convene a hearing, a district court  
21 engages in a “practical, commonsense evaluation” focusing on whether the defendant “made a threshold  
22 showing sufficient to warrant such a hearing.” *Connolly*, 504 F.3d at 219. In this case, Defendant is  
23 unable to make that showing because the statements Dr. Rosendorff allegedly made to Mr. Evans are  
24 unsworn and too vague to merit further inquiry.

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26 <sup>6</sup> The government also incorporates by reference both its harmlessness argument and its argument that  
27 Defendant’s motion is untimely under *Eberhart* because it does not assert any newly discovered  
28 evidence, as described in more detail in its contemporaneously filed Opposition to Defendant Elizabeth  
Holmes’ Rule 33 Motion re: Government Argument in Balwani Trial, filed at ECF No. 1585.

1 Defendant's fallback position is that the Court should hold an evidentiary hearing to "ascertain  
2 the meaning" of Dr. Rosendorff's statements, in light of defense counsel's inability to have a direct  
3 conversation with this represented witness. Mot. at 11. But neither a hearing nor a meeting with  
4 counsel is necessary for the Court to understand Dr. Rosendorff's position regarding his trial testimony  
5 and the government's presentation of evidence. Dr. Rosendorff's declaration provides the Court with  
6 any clarification it needs to rule on Defendant's motion now. To the extent a hearing would probe  
7 whether Dr. Rosendorff offered false or inaccurate testimony at trial, his declaration confirms that he  
8 testified truthfully and that he stands by all of his trial testimony in every respect. Rosendorff Decl. ¶ 3.  
9 If a hearing would have focused on whether Dr. Rosendorff disapproved of the government's  
10 presentation of evidence, his declaration states that he does not believe the government misrepresented  
11 Defendants' conduct at Theranos. *Id.* ¶ 4. Dr. Rosendorff's declaration similarly lays to rest any  
12 questions regarding whether the government improperly sought to influence his testimony, stating that  
13 the government asked him only to tell the truth about what he witnessed at Defendants' company. *Id.*  
14 With these questions answered by an uncontroverted affidavit from the only witness who can speak to  
15 them with authority, an evidentiary hearing would be pointless.

16 The Ninth Circuit consistently recognizes that, when deciding a new trial motion, "[t]he decision  
17 on whether to hold a hearing or to proceed by affidavit is within the sound discretion of the trial court."  
18 *United States v. Nace*, 561 F.2d 763, 772 (9th Cir. 1977). In *Nace*, the Ninth Circuit rejected a  
19 defendant's argument that an evidentiary hearing was necessary, holding that it was proper for the  
20 district court to proceed based on affidavits on facts close to these, as discussed above. Similarly, in  
21 *United States v. Clay*, the Ninth Circuit affirmed the denial of a new-trial motion and held that the  
22 district court was not required to hold an evidentiary hearing in response to a post-trial affidavit from the  
23 defendant's coconspirator attempting to clear the defendant and take the blame for the offense conduct.  
24 *United States v. Clay*, 476 F.2d 1211, 1216 (9th Cir. 1973).

25 Defendant's vague references to theoretical government misconduct do not change the analysis.  
26 Defendant cites *United States v. Navarro-Garcia* for the proposition that the Court must hold a hearing  
27 to determine whether any government misconduct occurred. Mot. at 11. There are at least two  
28

1 problems with that argument. First, the new-trial motion in *Navarro-Garcia* did not involve newly  
2 discovered substantive evidence or government misconduct, but rather a jury’s improper consideration  
3 of extrinsic evidence. *United States v. Navarro-Garcia*, 926 F.2d 818, 822 (9th Cir. 1991). The  
4 standards that apply in that situation do not automatically govern this one. Second, to the extent that  
5 case instructs that the decision whether to hold a hearing should turn on “the content of the allegations,  
6 including the seriousness of the alleged misconduct” (*id.*), it cuts against a hearing in this case, where  
7 there are no such allegations pending either from Dr. Rosendorff or the defense. Defendant cites no  
8 authority entitling her to an evidentiary hearing that would amount to a fishing expedition seeking  
9 evidence of government wrongdoing.

10 An evidentiary hearing is particularly unnecessary given this Court’s deep familiarity with the  
11 evidence in this case—including the testimony of Dr. Rosendorff and similar witnesses in two multi-  
12 month trials. Reviewing courts give extra deference to rulings made in these circumstances, recognizing  
13 that the judge who presided over the original trial and watched the case unfold from day to day is  
14 “exceptionally well qualified” to decide a new trial motion based on affidavits. *United States v.*  
15 *Kearney*, 682 F.2d 214, 221 (D.C. Cir. 1982) (quoting *United States v. Johnson*, 327 U.S. 106, 112  
16 (1946)).

17 Under the applicable law, Defendant has failed to show that an evidentiary hearing is necessary  
18 or appropriate.

19 //

**CONCLUSION**

Because Defendant has failed to meet the standard for a new trial under Rule 33 and has not established the need for an evidentiary hearing, the Court should deny Defendant’s Motion for a new trial based on alleged statements by Dr. Adam Rosendorff (ECF No. 1574) in its entirety.

DATED: September 21, 2022

Respectfully submitted,

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