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13 UNITED STATES DISTRICT COURT

14 NORTHERN DISTRICT OF CALIFORNIA

15 SAN JOSE DIVISION

16

17 UNITED STATES OF AMERICA,) Case No. CR-18-00258-EJD
18 Plaintiff,)
19 v.) MS. HOLMES' SENTENCING MEMORANDUM
20 ELIZABETH HOLMES and) AND MOTION FOR DOWNWARD
21 RAMESH "SUNNY" BALWANI,) DEPARTURE
22 Defendants.)
23) Date: November 18, 2022
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26)
27) Hon. Edward J. Davila
28) PUBLIC REDACTED VERSION
29)

CONTENTS

I.	PRELIMINARY STATEMENT	1
II.	MS. HOLMES' PERSONAL HISTORY AND CHARACTERISTICS	3
A.	Ms. Holmes' Personal History	3
1.	Childhood.....	3
2.	College	5
3.	CEO of Theranos	7
4.	Relationship with Mr. Balwani	11
5.	Ms. Holmes' Current Family Life	18
6.	Volunteer Work	20
B.	Personal Characteristics	21
1.	Deep Interest in Making the World a Better Place	22
2.	Caring and Reliable Friend	24
3.	Advisor and Mentor	25
4.	Intelligent and Visionary.....	26
5.	Positive Impact on Others	27
III.	CALCULATION OF THE SENTENCING GUIDELINES RANGE AND OBJECTIONS TO PRESENTENCE REPORT	28
A.	Ms. Holmes Objects to the PSR's Calculation of Loss.	29
1.	Loss Must Be Proven by Clear and Convincing Evidence.....	30
2.	Each Investor and Associated Loss Must Be Considered Separately.....	31
3.	The Entirety of Each Investment Is Not An Appropriate Measure of Loss [REDACTED]	35
4.	Gain To Ms. Holmes As An Alternative Measure.....	39
5.	If the Court Accepts the PSR's Calculation of Loss, A Downward Departure is Warranted Under Section 2B1.1, Application Note 21(C).	40

1	B. Ms. Holmes Objects to the Calculation of the Number of Victims.....	40
2	C. Ms. Holmes Should Not Receive a [REDACTED] Increase for Her Role.....	41
3	1. [REDACTED]	41
4	2. [REDACTED]	42
5	3. [REDACTED]	43
6	D. [REDACTED]	43
7		
8	IV. 18 U.S.C. § 3553(a) SUPPORTS SUBSTANTIAL LENIENCY FOR MS. HOLMES.....	47
9	A. The Nature and Circumstances of the Offense Strongly Support Leniency.....	48
10	1. The Offense Conduct Occurred Within a Unique World of Investments in Start-Up Companies.....	48
11	2. Theranos Developed Innovative Technology and Provided Real Services to Real Customers in Furtherance of Its Mission to Improve Access to Healthcare.....	52
12	3. The Company Retained Substantial Value Even After the Alleged Fraud Was Revealed.....	59
13	4. The Circumstances Show Ms. Holmes To Be a Founder and CEO Deeply Committed to the Company's Mission, Rather Than Her Own Personal Gain.....	59
14	5. Because of Their Extreme Focus on Loss, the Guidelines Are Unhelpful in Fashioning a Fair, Just, and Reasonable Sentence.....	60
15		
16	B. Ms. Holmes' Personal History and Characteristics Strongly Support Leniency.....	62
17	C. Incarceration Is Not Necessary to Afford Adequate Deterrence or Protect the Public.....	64
18	1. Incarceration Is Not Necessary for Specific Deterrence.....	64
19	2. Incarceration Is Not Necessary for General Deterrence.....	66
20		
21	D. Just Punishment and Respect for the Law Are Not Served by a Lengthy Incarceration.....	68
22	E. Section 3553(a)(6) Supports a Downward Variance from the Guidelines.....	69
23	F. Section 3553(a)(7) Does Not Counsel In Favor of Incarceration.....	71
24		
25	MS. HOLMES' SENTENCING MEMORANDUM	
26	CR-18-00258 EJD	

1	G. Ms. Holmes' Capacity to Do Good Supports a Sentence That, In Part, Orders Ms. Holmes to Engage in Significant Community Service	72
2	CONCLUSION.....	74
3		
4		
5		
6		
7		
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28	MS. HOLMES' SENTENCING MEMORANDUM CR-18-00258 EJD	

TABLE OF AUTHORITIESPage(s)**FEDERAL CASES**

	<u>Page(s)</u>
<i>Gall v. United States</i> , 552 U.S. 38 (2007)	28, 47, 48
<i>Kimbrough v. United States</i> , 552 U.S. 85 (2007)	47, 48
<i>Koon v. United States</i> , 518 U.S. 81, 113 (1996).....	62
<i>United States v. Adelson</i> , 441 F. Supp. 2d 506 (S.D.N.Y. 2006)	<i>passim</i>
<i>United States v. Atilla</i> , 1:15-cr-00867-RMB (S.D.N.Y.).....	70
<i>United States v. Avila</i> , 95 F.3d 887 (9th Cir. 1996).....	41
<i>United States v. Block</i> , 16-cr-595 (S.D.N.Y. Dec. 4, 2017)	39
<i>United States v. Burgum</i> , 633 F.3d 810 (9th Cir. 2011)	72
<i>United States v. Connors</i> , 2007 WL 2955612 (E.D. Pa. Oct. 9, 2007).....	60
<i>United States v. Corsey</i> , 723 F.3d 366 (2d Cir. 2013).....	62
<i>United States v. Dorvee</i> , 616 F.3d 174 (2d Cir. 2010).....	48, 49
<i>United States v. Edwards</i> , 595 F.3d 1004 (9th Cir. 2010).....	66
<i>United States v. Egge</i> , 223 F.3d 1128 (9th Cir. 2000).....	43
<i>United States v. Executive Recycling, Inc.</i> , 953 F. Supp. 2d 1138 (D. Colo. 2013)	32, 33
<i>United States v. Gupta</i> , 904 F. Supp. 2d 349 (S.D.N.Y. 2012)	<i>passim</i>
<i>United States v. Hicks</i> , 217 F.3d 1038 (9th Cir. 2000)	32
<i>United States v. Holden</i> , 908 F.3d 395 (9th Cir. 2018)	28, 42
<i>United States v. Holmes</i> , 2021 WL 2044470 (N.D. Cal. May 22, 2021).....	33
<i>United States v. Hussain</i> , 2019 WL 1995764 (N.D. Cal May 6, 2019)	35, 38, 39, 40
<i>United States v. Johnson</i> , 2018 WL 1997975 (E.D.N.Y. Apr. 27, 2018).....	62
<i>United States v. Jordan</i> , 256 F.3d 922 (9th Cir. 2001).....	30
<i>United States v. Lonich</i> , 23 F.4th 881 (9th Cir. 2022).....	30, 31, 32
<i>United States v. McClellan</i> , 1:16-cr-10094 (D. Mass.).....	70

MS. HOLMES' SENTENCING MEMORANDUM
CR-18-00258 EJD

1	<i>United States v. McFarland</i> , 1:17-cv-00600 (S.D.N.Y.).....	70
2	<i>United States v. Nesbeth</i> , 188 F. Supp. 3d 179 (E.D.N.Y. 2016)	65
3	<i>United States v. Parris</i> , 573 F. Supp. 2d 744 (E.D.N.Y. 2008).....	62
4	<i>United States v. Prosperi</i> , 686 F.3d 32 (1st Cir. 2012).....	60
5	<i>United States v. Rowan</i> , No. 1:16-cr-10343 (D. Mass.)	71
6	<i>United States v. Shor</i> , 1:18-cr-00328 (S.D.N.Y.)	70
7	<i>United States v. Showalter</i> , 569 F.3d 1150 (9th Cir. 2009)	40
8	<i>United States v. Stein</i> , 846 F.3d 1135 (11th Cir. 2017)	32
9	<i>United States v. Taylor</i> , 1:19-cr-00850-JSR (S.D.N.Y.)	69
10	<i>United States v. Tuzman</i> , No. 1:15-cr-00536 (S.D.N.Y.)	70
11	<i>United States v. Wang</i> , 1:16-cr-10268 (D. Mass.).....	70
12	<i>United States v. Zolp</i> , 479 F.3d 715 (9th Cir. 2007).....	35, 36

STATUTES AND RULES

15	18 U.S.C. § 3553(a)	<i>passim</i>
16	Cal. Civ. Code § 3426.1(d)(2)	54
17	U.S.S.G. § 2B1.1.....	<i>passim</i>
18	U.S.S.G. § [REDACTED]	<i>passim</i>
19	U.S.S.G. § [REDACTED]	43, 47

OTHER AUTHORITIES

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22	<i>A Mixed-Methods Examination of Sexual Coercion and Degradation Among Women in Violent Relationships Who Do and Do Not Report Forced Sex</i> , 22 <i>Violence and Victims</i> 71 (2007)	15
23		
24		
25	Deborah K. Anderson & Daniel G. Saunders, <i>Leaving an Abusive Partner: An Empirical Review of Predictors, the Process of Leaving, and Psychological Well-Being</i> , 4 <i>Trauma, Violence, & Abuse</i> (2003).....	16
26		
27	Elizabeth Szockyj, <i>Imprisoning White-Collar Criminals?</i> , 23 <i>S. Ill. Univ. L. J.</i> 485 (1999).....	67
28	MS. HOLMES' SENTENCING MEMORANDUM CR-18-00258 EJD	

1	Francis T. Cullen., <i>Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science</i> , 91 Prison J. 48S, 50S, 60S (2011).....	64
2		
3	Frank O. Bowman, III, <i>Sentencing High-Loss Corporate Insider Frauds After</i> , 20 Fed. Sent'g Rep. 167 (2008)	61
4		
5	Hamberger et al., <i>Coercive Control in Intimate Partner Violence</i> , 37 Aggression & Violent Behavior 1 (2017)	14
6		
7	Jed S. Rakoff, <i>Why the Federal Sentencing Guidelines Should Be Scrapped</i> , Fed. Sent'g Rep. 226 (2017).....	61
8		
9	Jessica R. Goodkind et al., <i>A Contextual Analysis of Battered Women's Safety Planning</i> , 10 Violence Against Women 514 (2004)	16
10		
11	Jillian Hewitt, <i>Fifty Shades of Gray: Sentencing Trends in Major White-Collar Cases</i> , 125 Yale L. J. 1018 (2016).....	61
12		
13	Logan et al., <i>Silenced Suffering: The Need for a Better Understanding of Partner Sexual Violence</i> , 16 Trauma, Violence, & Abuse 111 (2015).....	15
14		
15	Mark H. Allenbaugh, "Drawn from Nowhere": A Review of the U.S. Sentencing Commission's White-Collar Sentencing Guidelines and Loss Data, 26 Fed. Sent'g Rep. 19 (2013)	61
16		
17	Mary Ann Dutton & Lisa A. Goodman, <i>Coercion in Intimate Partner Violence: Toward a New Conceptualization</i> , 52 Sex Roles 743 (2005).....	12
18		
19	Mirko Bagaric, <i>A Rational Theory of Mitigation and Aggravation in Sentencing: Why Less Is More When It Comes to Punishing Criminals</i> , 62 Buff. L. Rev. 1159 (2014)	67
20		
21	Nicolas Rabener, "Portfolio Construction in Venture Capital," Harvest, at 3 (May 24, 2021)....	50
22		
23	Paul A. Gompers et al., <i>How Do Venture Capitalists Make Decisions?</i> , 135 J. Fin. Econ. 169 (2020).....	51, 52
24		
25	Richard Frase, <i>Punishment Purposes</i> , 58 Stanford L. Rev. 67 (2005)	67
26		
27	S. Rep. No. 98-225 (1983).....	66
28		
	Shannon B. Nicholson & David J. Lutz, <i>The Importance of Cognitive Dissonance in Understanding and Treating Victims of Intimate Partner Violence</i> , 26 Journal of Aggression, Maltreatment, & Trauma 475 (2017).....	17
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	MS. HOLMES' SENTENCING MEMORANDUM CR-18-00258 EJD	

MEMORANDUM OF POINTS AND AUTHORITIES

I. PRELIMINARY STATEMENT

Elizabeth Holmes stands before the Court having been convicted of conspiracy to commit wire fraud and three individual counts of wire fraud with respect to certain sophisticated investors in her company, Theranos. In sentencing her, the Court's task is a heavy one. Ms. Holmes was 19 when she founded her company, her first business experience; in 2010, the beginning of the charged period, she was 25 and turned 26; and when her company shut down in 2018 she was just 34 years old. She founded and built Theranos for indisputably good reasons. She worked tirelessly along with hundreds of brilliant and committed employees to improve access to affordable health information. The company achieved incredibly valuable inventions for which the United States government is still issuing patents as recently as July of *this year*. Ex. B.¹ She suffered substantial trauma throughout the time period of the offense. When criticisms arose, she committed fully to identifying, acknowledging, and fixing errors. She never cashed out, and she went down with the ship when the company failed. And regardless of the sentence the Court imposes, for the rest of her life, she and her family will be punished. As her partner knows all too well, “[t]here is no avoiding the scorn that accompanies Elizabeth Holmes.” Ex. A at 7-8 (B. Evans Ltr. at 7-8).

Among the countless people in our society who do not know Elizabeth Holmes yet think they know about her case from the unusually intense media coverage of it, Ms. Holmes has become a caricature to be mocked and vilified. The Court has the opportunity (and obligation) here to look beyond that caricature, as it has throughout this case, and examine Ms. Holmes the human being. More than 130 individuals who actually know Ms. Holmes have written to the Court to help in that process. Among them are friends, family, Theranos investors, Theranos Board members, and former employees who served in a variety of roles at Theranos, all of whom submit these letters despite the risk that they will be criticized for their support. These are people who know Ms. Holmes and her character, remorse, and capacity to do good.

¹ All Exhibits cited herein as “Ex.” are exhibits to the Declaration of Katherine Trefz. Admitted trial exhibits are cited as “TX.”

The real Elizabeth Holmes is “a compassionate friend who is there for the people around her—to support, comfort, cheer on, problem solve, and connect.” Ex. A at 62 (G. Bianchini Ltr. at 1).

The real Elizabeth Holmes is the friend who writes “letters that I still keep and read again anytime I need to be reminded of my purpose and inner strength.” Ex. A at 181 (J. Lamping Ltr. at 2).

The real Elizabeth Holmes is a devoted mother who “turns . . . ordinary moments into magical experiences of unbounded love and wonder” for her son. Ex. A at 6 (B. Evans Ltr. at 6).

The real Elizabeth Holmes is “[e]xtremely genuine, giving, and selfless,” “unlike anyone else I’ve met in Silicon Valley.” Ex. A at 271 (Y. Yu Ltr. at 1).

The real Elizabeth Holmes was an “approachable, attentive, and supportive” “employee focused CEO[.]” Ex. A at 78 (T. Brumett Ltr.).

The real Elizabeth Holmes faced the challenges at Theranos from 2016 to 2018 with “steadfast ethical principles, complete dedication to what was best for Theranos, and admirable courage.” Ex. A at 74 (F. Bonanni Ltr. at 3).

The real Elizabeth Holmes is “driven by a single and simple purpose; she wants to make the world a better place than it would have been without her.” Ex. A at 96 (T. Cooper Ltr. at 1).

The real Elizabeth Holmes “has within her a sincere desire to help others, to be of meaningful service, and possesses the capacity to redeem herself.” Ex. A at 77 (C. Booker Ltr. at 2).

* * *

Section 3553(a) requires the Court to fashion a sentence “sufficient, but not greater than necessary,” to serve the purposes of sentencing. If a period of confinement is necessary, the defense suggests that a term of eighteen months or less, with a subsequent supervised release period that requires community service, will amply meet that charge. But the defense believes that home confinement with a requirement that Ms. Holmes continue her current service work is sufficient. We acknowledge that this may seem a tall order given the public perception of this case—especially when Ms. Holmes is viewed as the caricature, not the person; when the company is viewed as a house of cards, not as the ambitious, inventive, and indisputably valuable enterprise it was; and when the media vitriol for Ms. Holmes is taken into account. But the Court’s difficult task is to look beyond those surface-level views when it

MS. HOLMES' SENTENCING MEMORANDUM
CR-18-00258 EJD

1 fashions its sentence. In doing so, we ask that the Court consider, as it must, the real person, the real
 2 company and the complex circumstances surrounding the offense conduct, and the important principle
 3 that “no defendant should be made a martyr to public passion.” *United States v. Gupta*, 904 F. Supp. 2d
 4 349, 355 (S.D.N.Y. 2012) (Rakoff, J.). As discussed in more detail in the pages that follow, this is a
 5 unique case and this defendant is a singular human with much to give.

6 **II. MS. HOLMES’ PERSONAL HISTORY AND CHARACTERISTICS**

7 As the more than 130 letters submitted on her behalf attest, Ms. Holmes is a warm, thoughtful
 8 friend; a loving and dedicated mother and partner; a good listener; a mentor to young women and
 9 entrepreneurs; a boss who cared about the company’s employees; a chief executive dedicated to her
 10 company’s mission; an intelligent and inventive problem solver; and a humble, hardworking, and
 11 compassionate woman who deeply wants to give what she can to the world. Her positive impact on her
 12 friends, family, and former employees and advisors is evident in this outpouring of support. Despite her
 13 current circumstances, she is an “ardently resilient optimist”—a person whose “devotion to constructive
 14 impact remains natural, profound, and inspirational” even as she faces the prospect of a profound loss of
 15 liberty. Ex. A at 95 (A. & S. Kiessig Ltr.).

16 **A. Ms. Holmes’ Personal History**

17 **1. Childhood**

18 Ms. Holmes began developing her good qualities through a childhood for which she has always
 19 been grateful. Born in Washington, D.C. in 1984, Ms. Holmes was raised primarily in Washington,
 20 D.C. and Houston, Texas with her brother Christian, two years her junior. Her parents were both public
 21 servants. Her mother, Noel, worked on Capitol Hill for Members of Congress and Committees in the
 22 House of Representatives. Ex. A at 31 (N. Holmes Ltr. at 2). Her father, Chris, spent years working at
 23 the Environmental Protection Agency, the United States Agency for International Development
 24 (USAID), and the State Department, focused on issues related to disaster relief. Chris was Ms. Holmes’
 25 personal hero [REDACTED]. He would return from his work abroad with stories about responding to
 26 disease, genocide, war, and natural disasters and imparted the view that the most important thing he
 27 could do with his life was to help others. Ex. A at 16 (C. Holmes Ltr. at 4). From her father, Ms.
 28

1 Holmes learned the lessons of stoicism and sacrifice in service of the greater good, and she took them to
 2 heart early in her childhood as a foundational trait. [REDACTED]

3 [REDACTED]

4 Ms. Holmes was a studious and hard-working child. She had, as her mother describes, a “gritty
 5 determination.” Ex. A at 30 (N. Holmes Ltr. at 1); [REDACTED]. She was naturally curious with
 6 “a deep hunger for knowledge,” Ex. A at 20 (C. Holmes Ltr. at 8), which she explored as a young child
 7 through talking about nature and the world with her parents, *id.* at 14 (C. Holmes Ltr. at 2), 32 (N.
 8 Holmes Ltr. at 3). As a teenager, she poured that curiosity into schoolwork and extracurriculars, such as
 9 spending part of her Saturdays taking Chinese lessons from the time she was a pre-teen. *Id.* at 20 (C.
 10 Holmes Ltr. at 8), 31, 33 (N. Holmes Ltr. at 2, 4), 133 (G. Fan Ltr. at 1). Ms. Holmes’ brother Christian
 11 describes her focus and work ethic as a teenager:

12 She was driven and goal-oriented and thrived in whatever she set her mind to, whether it
 13 was academics, personal challenges she set for herself, developing a new skill, etc. She
 14 had an extraordinary work ethic and has always exceeded as a student. She never cut corners
 15 . . . It was critical to her to apply herself fully to whatever she took on. . . . She especially
 valued the relationships with people she felt she could learn from and be challenged by.
 Teachers and mentors were just as important as friends, and she actively sought out
 direction from people with experience who she could learn from.

16 Ex. A at 162 (Christian Holmes Ltr. at 1).

17 Beyond academics, Ms. Holmes channeled that determination and work ethic into what she
 18 could do to help others. As longtime family friend Mary Crane describes: “I often had the sense that
 19 [Elizabeth and Christian] knew ‘to whom much is given, much is expected.’” Ex. A at 100 (M. Crane
 20 Ltr. at 1). Indeed, Ms. Holmes’ childhood letters to her parents express a deep gratitude for the life she
 21 was given. Ex. A at 32 (N. Holmes Ltr. at 3); Ex. C (letter). In addition to her compassion towards
 22 individuals, Ms. Holmes looked to what she could do for the world. “Even in high school, her idealism
 23 and drive to help people stood out. During sophomore year, Liz led efforts to help victims of the
 24 Kosovo War—a world away from Houston.” Ex. A at 273 (C. Zygourakis Ltr. at 1); *see id.* at 193 (C.
 25 MacCormack Ltr.). As she told her friend in an interview for her high school newspaper, she believed
 26 that “[w]e have the potential to reform and to prevent the horrors of this world if we simply learn and
 27 act.” *Id.* at 273 (C. Zygourakis Ltr. at 1). She organized similar campaigns for other causes, including

28 MS. HOLMES’ SENTENCING MEMORANDUM
 CR-18-00258 EJD

1 Turkey earthquake relief. Ms. Holmes' Chinese tutor describes how, after she "read a story about how
 2 children in the remote areas of China lacked access to education," "[s]he immediately started
 3 contemplating how she could help" and "took action," developing "a plan to work with major software
 4 companies in the United States to provide software to schools in China at a low cost." Ex. A at 133 (G.
 5 Fan Ltr. at 1). "What inspired her was the story, but what made her work so hard . . . was her generous
 6 heart." *Id.* at 134 (G. Fan Ltr. at 2).

7 Ms. Holmes was also a source of support within her own family. Her father describes how,
 8 when Enron collapsed during Ms. Holmes' senior year of high school, he lost his job, savings, and
 9 healthcare. "During that time, Elizabeth was not just my daughter; she was my wise friend and helper."
 10 Ex. A at 20 (C. Holmes Ltr. at 8).

11 **2. College**

12 Ms. Holmes began attending college at Stanford University in the fall of 2002. Consistent with
 13 her longtime interest in science, Ms. Holmes focused on chemical engineering with an eye toward
 14 combining several engineering disciplines. She brought to those difficult classes her deep work ethic
 15 and sound moral compass. As her college friend Lauren Stat describes, Ms. Holmes insisted that there
 16 was no need to rely on study groups who had inherited the answers to problem sets, "those relics of
 17 dubious morality. And so with her leadership, we proceeded to learn the right way, the hard way." Ex.
 18 A at 246 (L. Stat Ltr. at 1). Ms. Holmes started auditing graduate-level courses and working in the
 19 laboratory of Professor Channing Robertson, where she was part of a team developing microfluidic
 20 sensors.

21 Ms. Holmes also enjoyed the social aspects of college life, including the friends she made there.
 22 Her mother describes that in her regular calls "she was full of joy and enthusiasm about her life." Ex. A
 23 at 34 (N. Holmes Ltr. at 5). Her brother Christian recalls how she came out of her academic shell
 24 towards the end of high school and that in the first year at Stanford "she seemed happy and well-
 25 adjusted to college life." Ex. A at 162 (Christian Holmes Ltr. at 1). Her friends describe her as a caring
 26 person who believed in the genuine goodness of people and loved to talk about ideas. She was "full of
 27 vibrancy, curiosity, kindness, and warmth," "extremely intellectual yet unpretentious and always

looking to better herself and those around her.” Ex. A at 180 (J. Lamping Ltr. at 1). As friend Prerna Gupta describes:

We spent countless hours traversing the Stanford hills and discussing the meaning of life. She was raised as a Christian, and I as a Hindu, but we found common ground in our explorations of Buddhism. We shared a belief that we were meant to do good in the world. That the purpose of life was love. That we could achieve anything we set our mind and hearts to, as long as we didn't give up. And that, most of all, we must dedicate our lives to having a positive impact on the world.

Ex. A at 154 (P. Gupta Ltr. at 1); *see id.* at 130 (J. Ewing Ltr. at 1) (“While fraternity boys puked on carpets and tried to coerce us into endless games of beer pong, Elizabeth whispered in the corner about things like philosophy, psychology, consciousness, and the meaning of life.”); *id.* at 255 (A. Sutro Ltr.). This period was one of the happiest of Ms. Holmes’ life. [REDACTED].

The summer following her freshman year at Stanford, Ms. Holmes interned at the Genome Institute in Singapore. Ex. A at 35 (N. Holmes Ltr. at 6). Putting together concepts from various types of research she had conducted, she came up with the idea that would form the basis for her first patent application. When she returned home from the summer abroad, she holed up in her room with her research and filed the provisional patent application with a mind to build something from the invention that would make early detection of disease easier. Ex. A at 35 (N. Holmes Ltr. at 6).

Stanford's autumn quarter began in September 2003. Ms. Holmes had moved into her sorority house at Kappa Alpha Theta, surrounded by friends. Less than two weeks into the quarter, Ms. Holmes attended a fraternity party with some of her sorority sisters. While intoxicated and initially unconscious, she was raped by a friend who was a member of one of the Stanford-affiliated fraternities. [REDACTED]; *see also* Ex. A at 180 (J. Lamping Ltr. at 1), 154 (P. Gupta Ltr. at 1).

Following the rape, Ms. Holmes experienced acute self-blame, isolation, and depression, and struggled with suicidal thoughts. [REDACTED] Her demeanor “instantly changed.” Ex. A at 162 (Christian Holmes Ltr. at 1). She moved out of the sorority house to a smaller dorm across campus, where she lived alone.² As a coping mechanism, Ms. Holmes devoted all of her energy and focus into

² During this time period, Ms. Holmes also felt isolated from her parents because of the extreme self-blame and shame she felt. She felt she had disappointed them because she had been drinking and had been at a party the night she was raped. See Ex. D (10/16/2003 "Elizabeth's Formula" written by C. MS. HOLMES' SENTENCING MEMORANDUM CR-18-00258 EJD)

1 starting a company based around her invention. [REDACTED] Her brother observes that after the assault,
 2 she “became more withdrawn, less social, and mono-focused on the next venture.” Ex. A at 162
 3 (Christian Holmes Ltr. at 1). “After her rape, she was both broken and resolute, using her anger and hurt
 4 as an impetus to make the changes she so strongly believed in.” Ex. A at 247 (L. Stat Ltr. at 2). Rather
 5 than seeking to heal, she came to view the assault as a crucible that would help drive her work as she
 6 turned to the higher purpose of helping solve difficult health care challenges through the company she
 7 was forming. *See* Holmes 11/29/21 Tr. 7848:21-7849:6; Ex. A at 22 (C. Holmes Ltr. at 10); *id.* at 197
 8 (S. Mantri Ltr.).

9 After the winter quarter of 2004, Ms. Holmes chose to take a leave of absence from Stanford to
 10 focus on building the nascent company she was forming around her invention. Holmes 11/29/21 Tr.
 11 7848:21-24. That company, originally called RealTime Cures, became Theranos.

12 **3. CEO of Theranos**

13 When Ms. Holmes started the company that became Theranos, she was a teenager who had four
 14 quarters of college and some laboratory research experience under her belt but no business or
 15 management experience. She learned how to navigate that complex world without the benefit of
 16 completing college, studying for a Masters in Business Administration, or obtaining years of industry
 17 experience, like most CEOs. She relied instead on her personal determination, advisors, employees, and
 18 lessons learned from her own mistakes and successes. She served as CEO from the company’s founding
 19 until her June 2018 indictment. At the time she was indicted, two and a half years after significant
 20 public controversy about Theranos had arisen, Ms. Holmes was just 34 years old, still a relative
 21 newcomer to the business world.

22 Though she lacked business and management experience, Ms. Holmes brought to Theranos the
 23 qualities she had developed in her childhood—a deeply held interest in improving lives and doing good;
 24

25 Holmes for E. Holmes) (indicating that no drinking, no associating with bad quality people, and no
 26 laziness would lead to creativity and achievement, which was the formula for happiness); Ex. E at 1, 2
 27 (1/4/2004 Ltr. from C. Holmes to E. Holmes) (“You have taken a critical step by moving into the
 28 dormitory but there could be tremendous temptation to return to old ways. . . So, put the past behind
 you, begin anew in your new room.”).

MS. HOLMES’ SENTENCING MEMORANDUM
 CR-18-00258 EJD

1 an unmatched work ethic; a creative mind and willingness to learn; and kindness, compassion, and
 2 gratitude. Ms. Holmes recognized (at least some of) her limits and sought out advice from those who
 3 could provide the expertise that she lacked. Sunny Balwani was one of them, and became her most
 4 important advisor. *See* § II(A)(4). But there were others as well. A consultant who worked with Ms.
 5 Holmes in 2004 observes that Ms. Holmes “was very good to acknowledge where she did have expertise
 6 but also to respect when she didn’t and to defer to those who did.” Ex. A at 85 (A. Cavers Ltr. at 1); *see*
 7 *id.* at 53 (A. Ashton Ltr. at 2). As time went on, Ms. Holmes hired experienced scientists and other
 8 personnel with appropriate experience. Over the company’s life, it had hundreds of employees: dozens
 9 of scientists and engineers with Ph.Ds, M.D.s, and Masters degrees; employees who had previously
 10 worked at medical device, pharmaceutical, and software companies; manufacturing personnel who
 11 worked on machining, injection molding, and assembly; experienced marketing personnel; and in-house
 12 lawyers who had worked at major law firms. Theranos also hired outside law firms, including Wilson
 13 Sonsini, Boies Schiller, and Hyman Phelps for corporate, intellectual property, and regulatory work;
 14 outside accounting firms; a leading laboratory consultant to help start and advise on Theranos’ clinical
 15 laboratory; and outside marketing firms. Ms. Holmes accepted recommendations for Board members
 16 whom she believed would provide an appropriate mix of business, public policy, legal, and medical
 17 expertise, and who also had experience making sweeping changes to institutional structures that could
 18 help Theranos in its journey to fulfill its grand but challenging aspirations.³ Ms. Holmes was a visionary
 19 without a college degree who was learning how to be a CEO, but she surrounded herself with
 20 employees, directors, advisors, mentors, and consultants whom she believed had the right experience to
 21 make Theranos successful.

22 People who worked with her describe Ms. Holmes as an enthusiastic, inspiring, compassionate,
 23 and humble CEO. Ms. Holmes’ “drive and ambition was infectious.” Ex. A at 109 (C. Dillon Ltr.).
 24 During some of Theranos’ most difficult periods, “[w]hile there were without question more difficult

25
 26 ³ For example, by Fall 2015, the Board of Directors included the former CEOs of Wells Fargo
 27 and Bechtel Corp., the Chairman and Managing Partner of a prominent national law firm, two medical
 28 doctors, multiple members of the boards of other companies, and multiple individuals with government
 experience.

1 days than not, Elizabeth came to the office every single day with a highly engaging and positive energy
 2 that created the foundation of an environment that allowed us to focus on ‘doing our very best work.’”
 3 Ex. A at 96 (T. Cooper Ltr. at 1). Dr. Fabrizio Bonanni, a former Amgen executive who served on
 4 Theranos’ Board of Directors from 2016 to 2018, was “struck” by Ms. Holmes’ ability to listen: “She is
 5 really interested in hearing feedback, particularly when the feedback is critical of her, her actions, or her
 6 company. She listens intently and internalizes the message for further processing. She may ask
 7 clarifying questions but never interjects biases or defensiveness.” Ex. A at 74 (F. Bonanni Ltr. at 3).
 8 Craig Josephson, who was a member of Theranos’ executive team in the last year of the company,
 9 echoes these sentiments, describing Ms. Holmes as focused on making decisions with integrity, doing
 10 the right thing for the patient, and being responsive to suggested changes. Ex. A at 169 (C. Josephson
 11 Ltr. at 1).

12 Former Theranos employees observe that Ms. Holmes genuinely cared about the people who
 13 worked for her company. *See* Ex. A at 78 (T. Brumett Ltr.) (Over decades-long career, “I found
 14 Elizabeth to be one of the most employee focused CEOs I have ever worked for. She was approachable,
 15 attentive, and supportive.”); *id.* at 87 (L. Cheng Ltr. at 1) (“polite, genuine, and naturally empathetic”);
 16 *id.* at 192 (J. Lu Ltr.) (“She is a hard working woman and was nothing but kind to her employees.”); *id.*
 17 at 204 (J. Moalli Ltr. at 2) (“I personally witnessed Elizabeth working with her team on a daily basis,
 18 and despite the enormous amount of pressure she was under, she was always empathetic, understanding,
 19 and open to new ideas.”). Former Theranos Vice President of Hardware Manufacturing Tim Cooper
 20 notes: “Her display of genuine care for employees drove a tremendous sense of value and worth within
 21 many of us.” Ex. A at 97 (T. Cooper Ltr. at 2). “She also reached out, to her best ability, to thank the
 22 employees for their dedication to the company.” Ex. A at 266 (H. Vu Ltr. at 1). Whether it was
 23 addressing an employee’s health or personal loss or considering difficult staffing decisions at key points
 24 in the company’s history, Ms. Holmes demonstrated “care and compassion” about individual employees.
 25 *Id.* at 98 (T. Cooper Ltr. at 3); *id.* at 266 (H. Vu Ltr. at 1) (“One thing I had noticed was that she cares so
 26 much about the employees and their families.”). One former employee describes how, when Ms.
 27 Holmes heard about [REDACTED], she “came to the Newark facility where I

1 worked, sought me out, embraced me and said she would completely support me in every way possible
 2 [REDACTED] .” *Id.* at 199 (M. McCarthy Ltr.).

3 When staffing reductions were necessary, “Elizabeth struggled with the implications of these
 4 decisions on the individual and was never comfortable with the negative consequences for those
 5 affected, regardless of the business rationalization or justification.” *Id.* at 98 (T. Cooper Ltr. at 3). This
 6 care did not go unnoticed. A former security supervisor for Theranos’ Arizona operations recalls:
 7 “Elizabeth was there for every employee, especially when Theranos closed. Elizabeth made it a point to
 8 be there and show significant support during a sudden and arduous job search. Theranos provided every
 9 employee with a separation package, resume support services, and job placement before it closed its
 10 doors.” Ex. A at 207 (B. Morel Ltr.). Former Theranos Laboratory Director Donald Tschirhart summed
 11 it up: “Everyone at Theranos liked her; she was strong, she fought for us and she treated us well until the
 12 last moments.” Ex. A at 262 (D. Tschirhart Ltr. at 2).

13 Ms. Holmes did not build Theranos for nefarious reasons—indeed, the opposite is true. [REDACTED]

14 [REDACTED] The company’s mission was to provide access to actionable health information to improve human
 15 health on an equitable basis. Ms. Holmes was fundamentally committed to this lofty purpose, and not to
 16 her own monetary gain. As former Board Member Bill Foege, former Director of the Centers for
 17 Disease Control and Prevention (CDC), puts it in his letter to the Court: “Ms. Holmes was not interested
 18 in money.” Ex. A at 136 (W. Foege Ltr. at 2); *see also id.* at 75 (F. Bonanni Ltr. at 4). Former Vice
 19 President of Hardware Manufacturing Tim Cooper notes that through his many interactions with Ms.
 20 Holmes, “it is my view and strong belief that she has never been motivated by anything other than
 21 realizing this vision. She never brought financial considerations into our discussions and always placed
 22 a heavy emphasis and focus on ensuring that a positive experience and outcome for the individual
 23 (patient) was at the forefront of our work.” Ex. A at 97 (T. Cooper Ltr. at 2); *id.* at 109 (C. Dillon Ltr.)
 24 (over 12 years on Theranos’ research and development team, “I never felt that the love of money or
 25 greed was ever a motivation for her hard work and dedication. In fact, I only knew her to be
 26 compassionate wanting to help people receive better and more accurate healthcare.”).

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MS. HOLMES’ SENTENCING MEMORANDUM
 CR-18-00258 EJD

1 Ms. Holmes did not personally profit from the investments of others into Theranos. Those
 2 investments were used to pay for research and development of groundbreaking inventions and the
 3 company's operations—not to enrich Ms. Holmes or anyone else. Ex. A at 136 (W. Foege Ltr. at 2).
 4 Although Ms. Holmes was touted as a billionaire in the media, her purported “fortune” was entirely on
 5 paper based on the Theranos stock she owned. She never cashed in that ownership; in fact, she never
 6 sold a share of stock, despite the opportunity to do so at several points over the years. *See* Holmes
 7 11/29/21 Tr. 7914:23-7915:23 (testimony of E. Holmes); *see* Ex. A at 241 (D. Sokol Ltr. at 4) (“In the
 8 2015 timeframe, Ms. Holmes was offered the opportunity to sell hundreds of millions of dollars in her
 9 stock holdings in Theranos. She turned down that opportunity because she felt that she should not profit
 10 until all of her investors had returned their investment profitably.”). She asked to be paid in Theranos
 11 shares rather than cash for her work as CEO, *see* TX 10510, a request that the Theranos Board denied.
 12 *See also* Ex. A at 74 (F. Bonanni Ltr at 3) (describing how Ms. Holmes was “far from being the most
 13 compensated employee” at Theranos and the Board’s efforts to increase her compensation were met by
 14 “her strong resistance”). Near the end of the company’s life, “she volunteered even to give up her
 15 ownership of the company in hopes of saving it.” Ex. A at 262 (D. Tschirhart Ltr. at 2), and voluntarily
 16 gave investors a “good portion of her own shares,” *see id.* at 74 (F. Bonanni Ltr. at 3). Nor did Ms.
 17 Holmes use corporate resources inappropriately for her own benefit. Dr. Foege, who was a member of
 18 the Board of Directors from 2014 through 2018, recalls: “The Board had an audit performed which
 19 found no evidence of fraud nor diversion of money.” Ex. A at 136 (W. Foege Ltr. at 2).

20 “She always put the interests of the company ahead of her own,” notes Daniel Warmenhoven, a
 21 technology industry executive who served on Theranos’ Board from 2016 to 2018. Ex. A at 269 (D.
 22 Warmenhoven Ltr.). Dr. Fabrizio Bonanni, also a Board member from 2016 to 2018, observes: “In my
 23 almost fifty years in business, I have not seen or heard of a more selfless CEO.” Ex. A at 74 (F.
 24 Bonanni Ltr.) at 3.

25 **4. Relationship with Mr. Balwani**

26 It is impossible to understand Ms. Holmes’ experience at Theranos, and particularly with respect
 27 to the offense conduct, without closely examining her relationship with Sunny Balwani. In the wake of
 28

1 her rape, around the time she was considering leaving Stanford, Ms. Holmes reconnected with Mr.
 2 Balwani. Ms. Holmes first met Mr. Balwani just after she graduated from high school on the Stanford-
 3 sponsored trip to China. Ex. F (photo); Holmes 11/29/21 Tr. 7847:4-7. She was eighteen, and he was
 4 thirty-eight. *Id.* at 7847:8-11. She understood that he was a successful businessman who had built and
 5 sold his own company and had worked with Microsoft, and she viewed him as a potential advisor and
 6 mentor during that summer. *Id.* at 7847:12-24. As Ms. Holmes was thinking about leaving Stanford,
 7 she responded to outreach from Mr. Balwani. Mr. Balwani encouraged and supported her decision and
 8 offered his business advice. Ms. Holmes confided her trauma and depression to him. He told her she
 9 was safe now that she was with him. *Id.* at 7849:10-7850:3. They began a romantic relationship.

10 The relationship between Ms. Holmes and Mr. Balwani was characterized by severe emotional,
 11 psychological, and sexual abuse perpetrated by Mr. Balwani.

12 Mr. Balwani expressed his desire to help Ms. Holmes develop as a person and a leader. As time
 13 went on, that expressed love and desire manifested as progressively controlling behavior. *See What is*
 14 *Domestic Violence*, U.S. Department of Justice Office of Violence Against Women,
 15 <https://www.justice.gov/ovw/domestic-violence> (last visited Nov. 8, 2022) (“Domestic violence is a
 16 pattern of abusive behavior in any relationship that is used by one partner to gain or maintain power and
 17 control over another intimate partner.”); Mary Ann Dutton & Lisa A. Goodman, *Coercion in Intimate*
 18 *Partner Violence: Toward a New Conceptualization*, 52 Sex Roles 743, 747 (2005) (describing intimate
 19 partner abuse as multifaceted and centered around coercive control). Some (but not all) of that behavior
 20 is described below.

21 Mr. Balwani demanded that Ms. Holmes follow a series of prescriptions, including keeping a
 22 strict schedule with little sleep, limiting her food intake, refraining from alcohol, and maintaining a
 23 particular manner and personality style. Mr. Balwani prescribed tenets for Ms. Holmes to follow, which
 24 he wrote for her, *see, e.g.*, TX 7734, and Ms. Holmes was required to write out her schedule regularly
 25 and confirm her commitment to his teachings, *see, e.g.*, TX 7731.

26 Mr. Balwani also insisted, in the form of verbal and written berating, that Ms. Holmes was
 27 incompetent, fundamentally flawed as a person and a leader, and needed to change who she was—in his
 28

MS. HOLMES' SENTENCING MEMORANDUM
 CR-18-00258 EJD

1 words, “kill” the current Elizabeth and become a new one—to become a worthy leader. Holmes
 2 11/29/21 Tr. 7859:16-21, 7863:11-23. The “advice” he provided was large and small—from live
 3 criticisms of her manner of speaking, *see TX 5387F at -148* (“You are speaking with everyone in your
 4 giddy voice”), -246 (“U r rambling now. Let’s stay focused”), to lengthy diatribes that went to her core
 5 as a leader. Ms. Holmes’ assistant from 2014 through 2018 confirms: “[Mr. Balwani] would constantly
 6 go into her office, shut the door, and then kick out whoever was in her office. He would then scream at
 7 her. I could overhear the screaming.” *See Ex. A at 116* (L. Durkin Ltr.). Because Mr. Balwani insisted
 8 that she write down and repeat back to him what he was saying, Ms. Holmes captured some of these
 9 tirades in iPhone notes, such as one modified April 5, 2015. *See TX 7534 at 2* (“Toughen up. Become
 10 masculine be in battle [sic]. Masculine game. Business masculine game.”); *id.* (“I’m so sick and tired of
 11 this mediocrity you create. It’s astonishing. You’ll never hold anybody responsible for any actions.
 12 You’ll never do that. . . . Monkey’s [sic] can’t fly spaceships.”). Text messages also show Ms. Holmes
 13 seeking Mr. Balwani’s approval as she repeated back his lessons. *See TX 5387F at -63* (Ms. Holmes:
 14 “My new life as of this night and forever more: - total confidence in myself best business person of the
 15 year - focus - details excellent - don’t give what anyone thinks – engage employees in meetings by
 16 stories and making it about them (ie prepare well”) . . . Mr. Balwani: “Awesome. U r listening and
 17 paying attention.”).

18 Ms. Holmes believed Mr. Balwani’s criticisms of her and sought to do better. She likewise
 19 believed he was fundamentally important to the company: in her mind, as in his screeds, setbacks were
 20 due to her failures, but success was due to him—after all, according to him: “I have molded you.” TX
 21 5387F at -207. Although the precise contours evolved over time, this pattern played out on a regular
 22 basis throughout the relationship, including when Mr. Balwani was at the company.⁴ Dynamics such as
 23 these are common in abusive relationships and especially effective at creating a culture of control. *E.g.*,
 24

25

⁴ Mr. Balwani’s rage was not solely directed at Ms. Holmes. Ms. Holmes’ sister-in-law, who
 26 began dating Ms. Holmes’ brother Christian while he was working at Theranos, observed that “the
 27 Sunny I saw was certainly controlling. . . . In the communications I witnessed first hand, it was clear he
 28 was adept at belittling people and making them feel stupid.” Ex. A at 152 (C. Gualy Ltr. at 1). Others
 whom the government interviewed but chose not to call at trial made similar observations.

1 Hamberger et al., *Coercive Control in Intimate Partner Violence*, 37 Aggression & Violent Behavior 1,
 2 3 (2017) (“[I]t is important to note that vulnerabilities and related threats are not limited to violence. For
 3 example, the systematic tearing down of the target’s self confidence and trust in her own decisions,
 4 opinions and abilities commonly seen in IPV may make her vulnerable to threats of abandonment . . . ,
 5 judgment, humiliation, or failure if the perpetrator’s desires are not met. In this way, the consequences
 6 of a pattern of emotional abuse may make a target more vulnerable to coercive control.”).

7 Over the first several years of their relationship, Ms. Holmes became increasingly isolated from
 8 friends and family. *See Holmes* 11/29/21 Tr. 7860:13-7861:8. Friends describe losing contact with Ms.
 9 Holmes. Ex. A at 154 (P. Gupta Ltr. at 1) (“She also fell into an all-consuming relationship with Sunny,
 10 who seemed to pull her farther away from me. She became reserved and withdrawn, and strangely
 11 secretive. I was worried about the effect Sunny was having on her, and I urged her to take caution, but
 12 to no avail.”); *id.* at 130 (J. Ewing Ltr. at 1) (“Sunny was significantly older than we were, to an
 13 alarming degree, but Elizabeth was very taken in by him. He struck me at the time like a father figure,
 14 someone she trusted, who could guide and mentor her, who could validate her, as she shouldered this
 15 incredible undertaking she felt was necessary for the world. I lost contact with Elizabeth after that.”).

16 Ms. Holmes’ parents recall their own discomfort and concern with their daughter’s relationship
 17 with Mr. Balwani. They were aware that Mr. Balwani insisted on listening when they spoke with their
 18 daughter on the phone, and they witnessed Mr. Balwani criticize and yell at Ms. Holmes until she cried,
 19 along with other behavior that made them uncomfortable. *See generally* Ex. A at 35-37 (N. Holmes Ltr.
 20 at 6-8), 22 (C. Holmes Ltr.) at 10. Noel Holmes recalls a trip she took with Ms. Holmes:

21 In January 2007, we were finally able to go away to Big Sur for two days over the weekend
 22 with just our family. Although it was difficult to connect by phone there[,] Sunny kept
 23 calling and berating Elizabeth. He had her in tears and she insisted we needed to leave.
 24 When we started driving back and the connection was better, I could hear him yelling at
 25 her for not working. She became very nervous and kept asking if we could somehow drive
 26 faster to get home.

27 Ex. A at 36 (N. Holmes Ltr. at 7). Ms. Holmes’ brother Christian similarly recalls how his relationship
 28 with Ms. Holmes changed after she began her relationship with Mr. Balwani:

29 In the years that followed, my relationship with my sister was reduced to a series of
 30 formalities around her work. She spent all her time with Sunny and rarely included our

1 family. She stopped coming to family gatherings and became more remote. I lived within
 2 driving distance from Elizabeth for about 5 years during this time period and worked with
 3 her for a number of years, and can't remember sharing a meal with just the two of us more
 than a handful of times, let alone many meaningful conversations.

4 Ex. A at 162 (Christian Holmes Ltr. at 2); *see also* Ex. A at 152 (C. Gualy Ltr. at 1); *id.* at 116 (L.
 5 Durkin Ltr.) ("Elizabeth was not allowed to have lunch or dinner with anyone but Mr. Balwani because
 6 Mr. Balwani would not allow otherwise."); *id.* at 166 (M. Holmes Ltr.). Isolating behavior is a hallmark
 7 abuse tactic.⁵

8 Mr. Balwani's abuse involved severe sexual elements that caused Ms. Holmes particular
 9 distress, including thoughts of suicide. These events occurred in the home they shared, [REDACTED]
 10 [REDACTED]

11 [REDACTED] Contemporaneous records
 12 corroborate the aftermath: after a February 2015 incident, Ms. Holmes both expressed her personal
 13 despair in an iPhone note, and also apologized to Mr. Balwani for her inability to be strong for him. *See*
 14 TX 7517; TX 5387F at -121 (Ms. Holmes: "I'm sorry I wasn't stronger for you this morning. That is
 15 my responsibility and my role. I will never let that happen again." . . . Ms. Holmes: "My job is to love
 16 you when you're stressed." Mr. Balwani: "I know."). [REDACTED]

17 [REDACTED]
 18 [REDACTED] Research
 19 on abusive relationships identifies sexual violence as deeply impactful because it "attack[s] core aspects
 20 of bodily integrity, autonomy, and trust." Logan et al., *Silenced Suffering: The Need for a Better
 21 Understanding of Partner Sexual Violence*, 16 Trauma, Violence, & Abuse 111, 115 (2015); *see also*
 22 Logan et al., *A Mixed-Methods Examination of Sexual Coercion and Degradation Among Women in
 23 Violent Relationships Who Do and Do Not Report Forced Sex*, 22 Violence and Victims 71 (2007).

24 That Ms. Holmes trusted Mr. Balwani and offered expressions of love to him while
 25 simultaneously suffering from his abuse should not come as a surprise. Research on abusive
 26

27 ⁵ *See generally* Dutton & Goodman, 52 Sex Roles at 749 (noting that "interfering with victims'
 28 social networks . . . wear down one's ability or will to resist").

relationships makes clear that the coexistence of love and abuse is a central conundrum of such relationships. See Deborah K. Anderson & Daniel G. Saunders, *Leaving an Abusive Partner: An Empirical Review of Predictors, the Process of Leaving, and Psychological Well-Being*, 4 Trauma, Violence, & Abuse 163, 170-71, 172, 175-78 (2003). Ms. Holmes was fearful of Mr. Balwani's wrath and sought to please him, but she also trusted him completely, believed he had her best interests at heart, and loved him. The text messages between them show expressions of love, apologies, and attempts to appease—placating strategies well-recognized in the literature. E.g., TX 5387F at -42-43. See, e.g., Jessica R. Goodkind et al., *A Contextual Analysis of Battered Women's Safety Planning*, 10 Violence Against Women 514, 528 (2004) (describing placating strategies used by abused women and effects).

The severe abuse Ms. Holmes suffered at the hands of Mr. Balwani affected her deeply, including in her role as CEO of Theranos. As she testified, the abuse occurred throughout the relationship, including during the period when they both worked at Theranos and in the course of and with regard to that work. See Holmes 11/29/21 Tr. 7860:4-8, 7870-7872; see also TX 7534; Ex. A at 116 (L. Durkin Ltr.). At Theranos, Mr. Balwani took primary responsibility for “operational” aspects of the company. That included preparing the company’s financial statements (including revenues and revenue projections), managing the retail partnership with Walgreens, overseeing operations of the clinical laboratory, as well as manufacturing operations and general personnel matters. Mr. Balwani was also responsible for following up with potential investors after an initial meeting, as he was the best positioned to answer questions about Theranos’ financial model and projections, as well as the operational issues that are often the topics of due diligence requests. Mr. Balwani not only ran Theranos’ operations but was also Ms. Holmes’ most important advisor, and he had outsized influence given the circumstances of their relationship. That is reflected in the government’s most recent assessment of the relationship:

Besides his position that we talked about, you can also infer that his close relationship with Ms. Holmes would have given him a lot of influence over her, more than just his title alone would provide. Remember also that Mr. Balwani was older and more experienced than Ms. Holmes. So it would be no surprise that his advise [sic], his input would carry a lot of weight with her. And that’s what showed up in the text messages.

MS. HOLMES’ SENTENCING MEMORANDUM
CR-18-00258 EJD

1 Balwani 6/24/22 Tr. 7652:9-17 (government rebuttal closing in S. Balwani trial). Until late 2015 or
 2 early 2016, Ms. Holmes trusted Mr. Balwani completely. Holmes 11/29/21 Tr. 7875:15-25, 7876:1-
 3 7877:10, 7879:16-21. As Ms. Holmes explained, between 2010 and 2016, Mr. Balwani “had taught me
 4 everything that I thought I knew about business, and I thought he was the best business person that I
 5 knew. And I think that I didn’t question him in the way that I otherwise would have.” *Id.* at 7875:21-
 6 25. Ms. Holmes is still processing what effect the relationship had on her. As she testified, Mr. Balwani
 7 “impacted everything about who I was, and I don’t fully understand that.” *Id.* at 7879:12-15.⁶ The fact
 8 that the abusive dynamic affected their workplace relationship and the fact that Ms. Holmes deferred to
 9 Mr. Balwani, especially in areas where he was formally responsible, is consistent with research on
 10 intimate partner abuse. *E.g.*, Logan et al., 16 Trauma, Violence, & Abuse at 121 (“In essence, coercive
 11 control erodes an individual’s capacity for independent decision making or personal agency. . . . Stark
 12 (2007) argues that the net effect of coercive control on a victim is global: Victims suffer from
 13 cumulative harms rather than just suffering from injuries resulting from specific and definable
 14 incidents.”); Dutton & Goodman, 52 Sex Roles at 748-752; Hamberger et al., 37 Aggression & Violent
 15 Behavior at 2-3 (“Multiple authors agree that coercive control impacts virtually all dimensions of the
 16 target’s life, including everyday actions, use of economic resources, relationships with family and
 17 friends, educational and occupational opportunities, sexuality, and general life activities.”).

18 Ms. Holmes was finally able to leave her relationship with Mr. Balwani once he left the
 19 company. When he was on a trip abroad, Ms. Holmes enlisted her brother to help her move out of their
 20 shared residence. Ex. A at 152 (C. Gualy Ltr. at 2); *id.* at 116 (L. Durkin Ltr.). Once Mr. Balwani
 21 understood what was happening, he began to text and call Ms. Holmes—he insisted she wait until he
 22 came home, told her she was making a mistake, and moved up his international travel to fly back to
 23 California from Asia as soon as possible. TX 5387F at -440.

24

25 ⁶ This makes sense. *See, e.g.*, Dutton & Goodman, 52 Sex Roles at 751-52 (“The day-to-day
 26 ‘rules’ imposed by an abusive partner may be those that one becomes accustomed to as a personal risk
 27 management strategy—even without recognizing the extent of compliance.”); Shannon B. Nicholson &
 28 David J. Lutz, *The Importance of Cognitive Dissonance in Understanding and Treating Victims of
 Intimate Partner Violence*, 26 Journal of Aggression, Maltreatment, & Trauma 475 (2017).

1 Since leaving the relationship, Ms. Holmes has been able to begin processing its effects and
 2 healing from it. *See* Ex. A at 249 (D. Sterling Glasband Ltr. at 2). Part of that has been supporting
 3 friends and family who have had similar experiences as they work through their own trauma. Ex. A at
 4 180, 181 (J. Lamping Ltr. at 1, 2); *id.* at [REDACTED]; *id.* at 123-24 (G. Evans Ltr. at 1-2).

5 **5. Ms. Holmes' Current Family Life**

6 Ms. Holmes began dating her partner, Billy Evans, in the first half of 2018. Mr. Evans and
 7 multiple friends who have submitted letters describe their initial hesitation in befriending Ms. Holmes
 8 once they realized who she was, and how the woman they came to know despite their trepidation was a
 9 “gentle and naive,” hopeful, loving, humble, patient, and dedicated “beyond what most people have ever
 10 experienced.” Ex. A at 1-2, 8 (B. Evans Ltr. at 1-2, 8); *see also id.* at 126 (S. Evans Ltr. at 1), 212 (T.
 11 Offer Ltr. at 1). To Mr. Evans, Ms. Holmes has become a supportive partner and coparent. “She
 12 approaches my greatest mistakes the same as my limited triumphs, with an unwavering love and gentle
 13 touch.” Ex. A at 4 (B. Evans Ltr. at 4).

14 Ms. Holmes and Mr. Evans seek to live a private, quiet life with meaningful relationships with
 15 family and friends. Family has always been important to Ms. Holmes, and she brings that value into her
 16 new family—Billy’s family—as well. Mr. Evans describes how Ms. Holmes helps keep him close to his
 17 original nuclear family. Sometimes this is through seemingly small things, like sending individually
 18 curated sets of photos to each of their son’s grandparents each day “because she knows how much it
 19 means to our parents to be a part of our lives.” Ex. A at 4 (B. Evans Ltr. at 4). But she has had a more
 20 significant role as well. Mr. Evans describes how Ms. Holmes’ love and patience helped heal his
 21 relationship with his brother, who had gone through his own hardships: “My closeness to my brother is
 22 all thanks to her. . . . I am so proud of the man he has become, in no small part because of Liz’s
 23 determination and patience.” *Id.* at 4 (B. Evans Ltr. at 4); *see id.* at 214 (K. O’Neill Ltr. at 1). Others in
 24 the Evans family agree that Ms. Holmes has been an overwhelmingly positive addition to the family,
 25 describing her as having “a soft-spoken manner and a generous heart,” a person who “is happy to give
 26 her time to other family members when they need her help or advice,” a person who “lift[s] others up
 27 and help[s] to make room at the table for one another,” a “comforter” who is “very attentive to the needs

1 of others and is often helping with advice or just lending a listening ear.” Ex. A at 64 (A. Billings Ltr),
 2 120 (A. Evans Ltr.), 70 (G. Bolster Ltr.), 126 (S. Evans Ltr. at 1). “All these characteristics make me
 3 very proud to know Elizabeth and to have her join our family circle,” say Mr. Evans’ mother. Ex. A at
 4 127 (S. Evans Ltr. at 2).

5 Ms. Holmes and Mr. Evans welcomed their son, W [REDACTED] Evans in July 2021.

6 Family and friends observe Ms. Holmes’ total love for and devotion to this little boy. Mr. Evans
 7 describes Ms. Holmes in this new role of mother:

8 I wish you could see his happiness; his deep belly laughs that Liz helps encourage and the
 9 confidence of a young mind who does not yet appreciate some of the difficulties this
 10 world has to offer him. His bond with Liz is incredible . . . I wish you could hear how
 11 she sings to him every morning when she brings him out of his crib and tells him how his
 12 day and the life ahead has so much good in store for him. I wish you could walk with us
 13 in the mornings and see how she has turned the fear he once had for the neighbors’ horses
 14 into a carrot feeding frenzy . . . I wish you could see Liz and I dancing in the kitchen,
 W [REDACTED] in our arms, giving him “doubles” as we kiss both sides of his cheeks. . . . I wish
 you could see how she is as enthusiastic to change his diaper as she is to paint with him
 and read to him. . . . I wish you could see how she rocks him to sleep every night while
 singing Amazing Grace and telling him the tales of a boy who values kindness, honesty,
 and generosity above all else. I wish you could hear how quickly she can turn his cries of
 exasperation to giggles as she helps calm his tired mind.

15 Ex. A at 5 (B. Evans Ltr. at 5).

16 Friends and family concur with Mr. Evans. “To join Elizabeth, Billy, and their son W [REDACTED] on a
 17 Sunday afternoon at their home in Woodside is to experience a family with strong roots at peace in a
 18 loving atmosphere.” *Id.* at 138 (J. Fogelsong Ltr.); *id.* at 198 (N. Mason Ltr.). “I have been witness to a
 19 mother falling completely and utterly head over heels in love with her son,” says one friend. Ex. A at
 20 194 (T. MacNiven Ltr. at 1). She is a “hands-on, loving, attentive mother,” with W [REDACTED] “waddl[ing] after
 21 her like a baby satellite,” notes another. Ex. A at 258 (M. Thompson Ltr. at 2). *See also* Ex. A at 127
 22 (S. Evans Ltr. at 2) (“Elizabeth is the most nurturing and loving parent to W [REDACTED].”), 37 (N. Holmes Ltr. at
 23 8), 157 (J. Hamilton Ltr. at 2) (“I watched Elizabeth sit with little W [REDACTED] for hours on the outside patio
 24 of their home, overlooking the trees in the distance, explaining to him the sights and sounds of the
 25 beauty in front of him. . . . And despite this incredibly difficult stage in her life, Elizabeth has continued
 26 to build a beautiful life for W [REDACTED] where he is loved with all the adoration and support one could
 27 imagine providing this little human being.”); 150 (H. Grenier Ltr. at 1); 176 (J. Koch Ltr. at 2) (“Liz sees

1 the world through W [sic] eyes and helps him to engage with his surroundings. Liz creates a caring,
 2 calm, and loving environment for W ."); 223 (B. & T. Raleigh Ltr.). Ms. Holmes has "spared" W
 3 "any inkling of her worry and sadness" related to this case: "All he has experienced is his mother's joy
 4 to be with him and her love for him." Ex. A at 27 (C. Holmes Ltr. at 15).

5 **6. Volunteer Work**

6 Despite her current circumstances, Ms. Holmes has worked to find ways to continue contributing
 7 what she can to the world. Dr. Foege, the former Director of the CDC who served on Theranos' Board
 8 from 2014 to 2018, describes a conversation with Ms. Holmes after Theranos shut down, after her
 9 indictment, in which "she was still asking for advice on how her skills could be used for good. . . . Her
 10 questions revolved around what else could she do that would be of benefit to society. She was not trying
 11 to revive Theranos, but was looking for alternative ways of contributing to the world." Ex. A at 137 (W.
 12 Foege Ltr. at 3). She can't help but think about solutions to the problems she learned so much about and
 13 tried to solve while at Theranos, and has ideas about how technology can make it easier for consumers
 14 to access and control their health care records. [REDACTED]

15 More immediately, however, Ms. Holmes has dedicated herself to help those who have suffered
 16 from traumas similar to her own. After her conviction, Ms. Holmes became certified as a rape crisis
 17 counselor and advocate, and has spent over five hundred hours volunteering in support of sexual assault
 18 survivors, including victims of domestic violence, with the [REDACTED]

19 [REDACTED]. Ex. A at 46 ([REDACTED] Ltr. at 1).⁷ This work has included scores of shifts manning a
 20 recently launched statewide helpline [REDACTED] that provides survivors with trauma advocacy and support
 21 and, as appropriate, connects survivors to resources they need, including law enforcement, government
 22 agencies, and shelters. *Id.*; [REDACTED] "She has worked with a variety of callers, including calls with
 23 actively suicidal victims of sexual assault, calls with community professionals, and calls to local law
 24 enforcement and/or [the Division of Child and Family Services] when necessary." Ex. A at 47 ([REDACTED]

25
 26

27 ⁷ Ms. Holmes applied to volunteer with several organizations local to the Bay Area, but those
 28 organizations declined to work with her.

1 Ltr. at 2). Her work on the helpline has received praise from callers and law enforcement alike. *Id.* at
 2 46-47 ([REDACTED] Ltr. at 1-2).

3 The organization reports that Ms. Holmes has also worked on “assisting with the compilation of
 4 sexual assault and domestic violence resources statewide for callers as well as identifying gaps in
 5 resources available [REDACTED] victims of crime throughout the state.” Ex. A at 47 ([REDACTED] Ltr. at 2). This
 6 includes hours working on draft legislation to support survivors’ rights and resources. *See* Ex. A at 6 (B.
 7 Evans Ltr. at 6).

8 This work is deeply personal to Ms. Holmes. She sees it as a way to try to help others, and apply
 9 learnings from her own journey toward being there for people in their hardest moments. According to
 10 [REDACTED]: “The hours that Elizabeth has volunteered over the past months have filled a great need in the
 11 community.” Ex. A at 47 ([REDACTED] Ltr. at 2).

12 **B. Personal Characteristics**

13 “There has been a great deal said and written about the fictional Elizabeth Holmes.” Ex. A at 13
 14 (C. Holmes Ltr. at 1). Ms. Holmes has been the subject of caricature in extensive and intrusive media
 15 portrayals, whether that portrayal is couched as a nonfiction book or a fictionalized dramedy. Those
 16 caricatures, presented by people who do not know Ms. Holmes, are strikingly false, as the scores of
 17 people who actually know Ms. Holmes make clear in their letters to the Court. “I’ve been taken aback
 18 by just how dramatically divergent the fictional character of Elizabeth Holmes presented in the media is
 19 from the entrepreneur, woman, partner, mother, and friend I have come to know and care about.” Ex. A
 20 at 62 (G. Bianchini Ltr. at 1); *id.* at 101 (M. Crane Ltr. at 2) (“I am offended by these portrayals of her
 21 and find them infuriating and tragic.”). One of Ms. Holmes’ friends describes the contrast between a
 22 caricature who is “robotic, devoid of emotions” and the real human being: “She puts on a stoic face in
 23 public, as she was trained to do, but with her trusted friends and family, Elizabeth is full of love,
 24 empathy, kindness, and grace. Sadness and despair, too. When I dropped her off for court one morning,
 25 . . . the tears welled up in her eyes as the unimaginable gravity of what she was facing hit her yet again.”
 26 Ex. A at 181 (J. Lamping Ltr. at 2).

27

28 MS. HOLMES’ SENTENCING MEMORANDUM
 CR-18-00258 EJD

1 The collection of letters attached as Exhibit A paint a consistent picture of Ms. Holmes as a
 2 compassionate, generous, optimistic, honest, and thoughtful person. The fact, volume, and substance of
 3 those letters is particularly meaningful given their context in this sensationalized case. As Mr. Evans
 4 notes: “The fact that Liz still has the support she does despite the risks of associating with her is a
 5 testament to her goodness. Many of the letters you will read were written and submitted by loyal people
 6 who know their careers and public standing will be put in jeopardy because of their public support for
 7 her. . . . But the ones you’ll see nonetheless feel compelled to . . . tell you what otherwise might be
 8 missed.” Ex. A at 8 (B. Evans Ltr. at 8). One of Ms. Holmes’ childhood friends emphasizes: “There are
 9 so many people who genuinely know and love Elizabeth, who is a real person with a resilience I have
 10 never seen in anyone else.” Ex. A at 58 (M. Thompson Ltr. at 2).

11 Friends, family, former employees, advisors, and others who know her describe her in positive
 12 terms. She is “incredibly warm, intelligent, engaging, with a kind and gentle demeanor,” Ex. A at 57 (E.
 13 Batzoglou Ltr.); a person of strong faith in God, *id.* at 60 (P. Berloty Ltr. at 1); “the kindest soul,” “the
 14 kind of person who picks something up when she sees it has fallen,” *id.* at 117 (L. Durso Ltr. at 1);
 15 “humble, extremely curious about others, always willing to put her priorities second, a bit quiet and very
 16 gracious,” *id.* at 209 (R. Gross Ltr. at 2). Several additional aspects of her character also stand out in the
 17 letters.

18 **1. Deep Interest in Making the World a Better Place**

19 Ms. Holmes’ heartfelt desire to do good in the world is core to her character. As Senator Cory
 20 Booker, a champion of criminal justice reform and restorative justice, writes: “I’ve always been struck
 21 by the way our conversations focused on her desires to make a positive impact on the world. . . . Her
 22 focus was always thoughtful, demonstrating a depth of knowledge about such issues, a curiosity to know
 23 more, and a determination to make a difference herself.” Ex. A at 76 (C. Booker Ltr. at 1). Friends,
 24 family, former coworkers, and advisors from all facets of her life consistently emphasize Ms. Holmes’
 25 intent to make the world a better place from the time she was a child to today and talk about the projects
 26 she has pursued to do so. For example:

27
 28 MS. HOLMES’ SENTENCING MEMORANDUM
 CR-18-00258 EJD

- 1 • A former employee notes: “Elizabeth is and has always been driven by a single and simple
2 purpose; she wants to make the world a better place than it would have been without her.” Ex. A
3 at 96 (T. Cooper Ltr. at 1); *see also id.* at 75 (F. Bonanni Ltr. at 4) (“[T]he Elizabeth Holmes I
4 met in May 2016 and whom I got to know well and admire over the following years is a
5 principled, deeply ethical, intelligent, hardworking, selfless woman, dedicated to the worthwhile
6 mission of improving health care.”).
- 7 • A former government official who first met Ms. Holmes in the hopes of a government
8 partnership on widespread disease testing and tracking opines: “I believe the reason Elizabeth
9 has so much passion about promoting this vision is her deep sense of humanitarian purpose. She
10 cares deeply about making the world a healthier and better place for future generations.” Ex. A
11 at 270 (A. Weber Ltr.).
- 12 • An intellectual property attorney who served as an outside advisor observes that Ms. Holmes
13 “had the right intentions—she wanted to put out a quality, accurate product that would expedite
14 diagnosing ailments and thus improve our collective public health.” Ex. A at 82 (T. Carroll Ltr.
15 at 1).
- 16 • A college friend explains: “That has always been her goal and the driving force behind her work.
17 To serve people and make the world a better place.” Ex. A at 255 (A. Sutro Ltr.); *see id.* at 197
18 (S. Mantri Ltr.).
- 19 • A longtime family friend describes: “She wanted to learn things to do things and to make an
20 important contribution to society.” Ex. A at 139 (S. Freeman Ltr. at 1); *see also* Ex. A at 218 (C.
21 Perez-Rubio Ltr.).
- 22 • A friend since 2019 says: “The woman who sits in front of you is humble, thoughtful, and a
23 committed citizen of this country who truly and passionately wants to make the world a better
24 place.” Ex. A at 245 (E. Sorgi Ltr. at 2); *see also id.* at 50 (I. Aboyeji Ltr. at 3) (“[T]he Liz I
25 know is a kind, driven young woman who only seeks to leverage technology and innovation to
26 change the world by making health care more accessible to billions of people . . .”).

1 These letters also describe how Ms. Holmes' devotion to doing good persists to this day, part of her
 2 authentic core.

3 Ms. Holmes combines this desire to do good with a persistent optimism and determination that
 4 friends and family find especially notable given her current circumstances. Mr. Evans explains: "Liz
 5 has always approached life through the lens of what is possible. . . . She approaches hard problems and
 6 easy alike, constantly in search of a solution and with a belief in doing what most others would deem
 7 impossible." Ex. A at 2 (B. Evans Ltr. at 2). "She believes deeply in the goodness of the world and all
 8 those around her." *Id.* at 3 (B. Evans Ltr. at 3). One letter describes the handwritten note Ms. Holmes
 9 wrote for her friends' newborn shortly after her indictment, which ends "Welcome to a wonderful
 10 world"—a testament to Ms. Holmes' "ardently resilient optimis[m]." Ex. A at 95 (A. & S. Kiessig Ltr.).
 11 Ms. Holmes' mother observes that the technology developed at Theranos is "out there in the world, and
 12 someone will finish doing it and make Elizabeth's vision come true. . . . Maybe that is why she remains
 13 so full of gratitude and optimism about the future of this world." Ex. A at 39 (N. Holmes Ltr. at 10).

14 **2. Caring and Reliable Friend**

15 Ms. Holmes' desire to do good in the world does not come at the expense of touching the lives of
 16 individuals she loves. "[T]he thing about her is that she is not all about herself; she is into 'you.' When
 17 you are speaking to her, it's as if she 'disappears' herself to focus on you and what you are saying." Ex.
 18 A at 139 (S. Freeman Ltr. at 1). It is therefore perhaps not surprising that, as Mr. Evans notes, "in
 19 reading these letters you will come to realize how Liz is the go-to person for so many that are dealing
 20 with life's hard moments." Ex. A at 3 (B. Evans Ltr. at 3).

21 Numerous letters describe Ms. Holmes' thoughtful commitment to being there for her friends
 22 despite her personal travails. Ex. A at 62 (G. Bianchini Ltr. at 1); *see also* Ex. A at 143 (K. Gavrieli Ltr.
 23 at 1). She is a person who drives hours to ensure a friend [REDACTED]

24 [REDACTED]; who offers her support to a friend [REDACTED]
 25 [REDACTED]; who leaves an event on a moment's notice to let a
 26 friend vent frustrations about that friend's professional life, *see* Ex. A at 274 (C. Zygourakis Ltr. at 2);
 27 and who supports a friend in the aftermath of personal tragedy, *see* Ex. A at [REDACTED]. As one

1 friend explains: “When I went through a deeply broken heart in 2018, Elizabeth could feel my pain from
 2 all the way across the country without me saying a word. She sent flowers, called every day for weeks,
 3 and held space for me, never rushing away to deal with managing her own challenges. During another
 4 difficult life event, she sent a teddy bear because she couldn’t be there to hug me in person.” Ex. A at
 5 181 (J. Lamping Ltr. at 2); *see id.* at 231-32 (J. Randolph Ltr. at 1-2). Mr. Evans’ sister Grace describes
 6 how Ms. Holmes was there for her “[d]espite the chaos going on in [Ms. Holmes’] world”:

7 She would send me heartfelt messages reminding me of my worth or a simple call to see
 8 how I was doing. Her calmness talked me through panic attacks when I was unable to get
 9 off my bathroom floor or say a coherent word. She had patience with me – she was always
 there. She became my escape, when I needed a place to go, I was always welcome at her
 home. During this time, she showed me her inherent kindness and empathy.

10 Ex. A at 124 (G. Evans Ltr. at 2). Another friend notes that “small as they may be compared to hers, my
 11 life’s needs and challenges have often taken center stage in our friendship,” including navigating
 12 professional challenges and “several difficult personal situations.” Ex. A at 271 (Y. Yu Ltr. at 1).
 13 Another writes: “You truly get a sense of someone’s character and heart when they are going through
 14 intense adversity. Elizabeth was always there for me even as she was progressing through the toughest
 15 time of her life. No matter how small or big of an issue I was dealing with, Elizabeth consistently
 16 listened to me and provided me with the support/guidance to overcome the issue.” Ex. A at 145 (A.
 17 Goldberg Ltr. at 1). Other friends echo these sentiments. *E.g.*, Ex. A at 248 (D. Sterling Glasband Ltr.
 18 at 1) (“Liz is a thoughtful and loyal friend – the kind of person who calls you on your birthday, who
 19 remembers when you have a big pitch meeting and checks in to see how it went.”). Mr. Evans’ father
 20 succinctly observes: “In her world she comes last.” Ex. A at 121 (W. Evans Ltr. at 1).

21 **3. Advisor and Mentor**

22 Consistent with Ms. Holmes’ desire to help others and make a difference, she makes time to
 23 mentor and advise others—whether it is reflecting on and sharing her own mistakes and lessons learned,
 24 helping connect individuals who may face social barriers to the resources they need, or just encouraging
 25 a young person to pursue his or her entrepreneurial dream. Mr. Evans’ sister notes: “I often say I should
 26 write a book – everything I have learned through Elizabeth being in my life. It would certainly be a
 27 page turner but endless.” Ex. A at 123 (G. Evans Ltr. at 1). One friend describes how Ms. Holmes’

1 “mentorship and advice” “contributed considerably” to the success of a young Kenyan entrepreneur who
 2 was working to bring greater medical care to small African clinics. Ex. A at 49 (I. Aboyeji Ltr. at 2).
 3 Another attributes her own literacy startup to the role model she found in Ms. Holmes: “Elizabeth
 4 inspired me to start my own company, Literati, which helps kids find books and become stronger
 5 readers. We all need heroes that look like us.” *Id.* at 131 (J. Ewing Ltr. at 2). One writer tells how, at
 6 Theranos’ apex, Ms. Holmes encouraged her young daughter in scientific pursuits and continued an
 7 email relationship with her, “inspir[ing] her to dream at a critical time.” *Id.* at 201 (B. McIntyre Ltr. at
 8 1); *see also id.* at 207 (B. Morel Ltr.) (describing Ms. Holmes’ efforts to mentor female entrepreneurs
 9 while she was CEO of Theranos). A family friend similarly notes that Ms. Holmes met virtually with
 10 her “10 year old niece who declared that she wanted to start her own business.” *Id.* at 219 (V. Perez-
 11 Rubio Maffia Ltr.). And a female venture investor recounts how Ms. Holmes “took time away from her
 12 trial preparations to help me recruit advisors to support my career (with incredible insights as a function
 13 of her own experience on who can truly be valuable versus who I might perceive to be valuable).” Ex.
 14 A at 271 (Y. Yu Ltr. at 1).

15 **4. Intelligent and Visionary**

16 Those who know her also describe Ms. Holmes as a brilliant thinker whose vision has
 17 contributed to the scientific community. Her talents lie in bringing concepts from different scientific
 18 contexts together for a new use. Former Theranos Technology Advisory Board Member Dr. John
 19 Moalli views Ms. Holmes as “the most intelligent person I have ever met. The depth and breadth of her
 20 brilliance cannot be overstated, and, perhaps more importantly, should not be overshadowed by mistakes
 21 she has made in the business environment.” Ex. A at 203 (J. Moalli Ltr. at 1). A lawyer who reviewed
 22 Theranos’ patent portfolio explains that “Elizabeth created valuable technologies; she contributed
 23 greatly to science; and she is a brilliant innovator.” Ex. A at 83 (T. Carroll Ltr. at 2). Theranos Board
 24 members Dr. Foege and Dr. Bonanni agree. Ex. A at 137 (W. Foege Ltr. at 3) (noting “scientific gifts”);
 25 *id.* at 74 (F. Bonanni Ltr. at 3) (noting company’s valuable technological developments). Theranos
 26 Laboratory Director Donald Tschirhart, who joined the company in 2016, asks that the Court “consider
 27 the immense contributions that she has made to the field of laboratory medicine and to humanity, even if
 28

1 at this point they don't understand what they have been given. I hope in some way that you can find her
 2 redemption in these good deeds." Ex. A at 262 (D. Tschirhart Ltr. at 2).

3 **5. Positive Impact on Others**

4 Ms. Holmes' positive qualities have the effect of inspiring those around her. Former employees
 5 describe how her dedication, mission, and gratitude inspired them to work hard. For example, one
 6 Theranos employee explains how Ms. Holmes inspired her colleagues by "develop[ing] and foster[ing] a
 7 special energy within many of us to think differently about our work and impact it has on others," a
 8 worldview that he and others have taken with them to other endeavors: "I know of several colleagues
 9 who pivoted their experiences at Theranos into much the same with a higher motivation than before to
 10 make lasting positive change on those they work with and the world around us." Ex. A at 98 (T. Cooper
 11 Ltr. at 3).

12 This is true for her friends as well. As her friend Lauren Stat puts it: "She learns the hard way,
 13 and challenges those around her to grow and learn as well." Ex. A at 247 (L. Stat Ltr. at 2). Another
 14 college friend emphasizes the point: "In my journey as a young professional woman facing challenges in
 15 the business world of healthcare, Elizabeth has always extended a hand to motivate me to take small
 16 steps while thoughtfully dreaming big." Ex. A at 235 (S. Samagh Ltr.); *see id.* at 237 (B. Smith Ltr.)
 17 ("Throughout the years she has been there for me when I faced a headwind in my own career and her
 18 own strength has inspired and motivated me to persevere and pursue my ambitions and dreams.").

19 Mr. Evans reflects that because of his partnership with Ms. Holmes

20 I finally like the person who I have become. I'm proud of the father Liz has helped me
 21 become, I am proud of the relationship we have with our families and friends, I am proud
 22 of many things now that I was not before I met her. She may have ultimately failed to
 23 change the world in the way she set out, but she has undeniably changed mine. She
 continues to hold me accountable, not with harsh words or criticism but with a love and
 acceptance that caused me deep reflection on the improvements I can make in my life to
 begin to reciprocate the immense unjudging and unwavering support she has shown me.

24 *Id.* at 6 (B. Evans Ltr. at 6). Friends of Mr. Evans confirm the positive effect she has had on him. Ex. A
 25 at 253 (J. Stern Ltr.) ("I recall when Elizabeth and Billy returned from a months long camping trip
 26 across the western United States, he displayed a new level of compassion in his demeanor, a strong
 27 sense of intention with his actions, and a heightened desire to listen to and look at others with purpose. I

1 attribute these changes, at least in part, to Elizabeth's ability to have a positive impact on those around
2 her.”).

3 **III. CALCULATION OF THE SENTENCING GUIDELINES RANGE AND OBJECTIONS
4 TO PRESENTENCE REPORT**

5 “[A] district court should begin all sentencing proceedings by correctly calculating the applicable
6 Guidelines range.” *Gall v. United States*, 552 U.S. 38, 49 (2007). [REDACTED]

7 [REDACTED]

8 [REDACTED]

[REDACTED]

9 [REDACTED]

[REDACTED]

10 [REDACTED]

[REDACTED]

11 [REDACTED]

[REDACTED]

12 [REDACTED]

[REDACTED]

13 [REDACTED]

[REDACTED]

14

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED] [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

26 [REDACTED]

27 [REDACTED]

1 [REDACTED]
2 [REDACTED].
3 A. Ms. Holmes Objects to the PSR's Calculation of Loss.
4 [REDACTED]

5 [REDACTED]. As a matter of policy, Ms. Holmes objects to the application of
6 § 2B1.1(b)(1) to increase her offense level in any amount. For the reasons discussed in more detail in
7 Section IV(A)(5), below, loss is unhelpful in assessing the statutory sentencing factors.

8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED] [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24
25 _____
26 8 [REDACTED]
27 [REDACTED]
28

1 [REDACTED] calculating loss is complex in a case like this one, where the company
2 (and therefore investments in it) indisputably had substantial value regardless of any fraud. As
3 discussed in the sections that follow, the government has not and cannot meet its burden to prove loss.
4 Accordingly, no loss enhancement should apply.

5 **1. Loss Must Be Proven by Clear and Convincing Evidence.**

6 Given its dominant effect on the ultimate offense level and Guidelines range, the government
7 must show loss by clear and convincing evidence. “[C]lear and convincing evidence is required for
8 proof of disputed enhancements” when “the challenged sentencing factors [have] an extremely
9 disproportionate effect on [the defendant’s] sentence relative to the offense of conviction.” *United*
10 *States v. Jordan*, 256 F.3d 922, 927, 929 (9th Cir. 2001). The Ninth Circuit has articulated a non-
11 exhaustive six-factor test to determine when “due process may require the government to demonstrate
12 facts underlying disputed enhancements by clear and convincing evidence.” *United States v. Lonich*, 23
13 F.4th 881, 910 (9th Cir. 2022).⁹ Key among those factors are the last two, which focus on the increase
14 in the number of offense levels caused by the disputed enhancements, and the increase in the sentence
15 caused by the disputed enhancements. *See id.* at 911-12. Those concerns militate in favor of applying
16 the higher standard. [REDACTED]

17 [REDACTED]

18

19

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 MS. HOLMES’ SENTENCING MEMORANDUM
25 CR-18-00258 EJD

1 In *Lonich*, the Ninth Circuit noted that the question of which standard applies becomes more
2 difficult in conspiracy cases because it can be difficult to determine what conduct was part of the
3 conviction. 23 F.4th at 913. That difficulty is present here. Count 1 charged an investor conspiracy
4 lasting from 2010 to 2015, but Ms. Holmes was only convicted of three of the six individual wire fraud
5 counts that went to the jury, all of which were for investments made in 2014. [REDACTED]

6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]

14 **2. Each Investor and Associated Loss Must Be Considered Separately.**

15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]

22 As a matter of law, the government must prove that the offense conduct—here, wire fraud with
23 respect to investor victims—was the but-for and proximate cause of the loss. *Lonich*, 23 F.4th at 916
24 (“The term ‘resulted from’ establishes a causation requirement, which includes both cause-in-fact (but-
25 for causation) and proximate cause. . . . These basic causation requirements apply to loss
26 enhancements.” (internal quotation marks omitted)). To prove “but-for” causation where fraudulent
27 investments are concerned, the government generally must show that an investor relied on fraudulent
28

1 information in making the investment, *see United States v. Stein*, 846 F.3d 1135, 1153 (11th Cir. 2017)
 2 (assessing but-for causation for loss under § 2B1.1(b)(1) for a securities fraud conviction), or, put
 3 differently, that the fraud was material to the particular investment argued to constitute loss, *see United*
 4 *States v. Executive Recycling, Inc.*, 953 F. Supp. 2d 1138, 1146 (D. Colo. 2013) (assessing loss in the
 5 context of a wire fraud conviction). Intervening causes, meanwhile, can lead to the failure to prove
 6 proximate cause. *Lonich*, 23 F.4th at 917-18; *United States v. Hicks*, 217 F.3d 1038, 1048-49 (9th Cir.
 7 2000). Where the government fails to produce sufficient evidence to show proximate or but-for
 8 causation for asserted loss amounts, a sentence based on those loss amounts cannot stand. *Lonich*, 23
 9 F.4th at 916.

10 [REDACTED]
 11 [REDACTED]
 12 [REDACTED]

13 First, this is a case where the circumstances of each individual investment were different. [REDACTED]
 14 [REDACTED]
 15 [REDACTED]
 16 [REDACTED] For
 17 example, none of the C-1 investors who testified at trial were provided financial models, while the C-2
 18 investors whose representatives testified at trial were provided such models.

19 The trial record made clear that this is *not* a case where all investors received the same
 20 information or spoke to the same people, nor did their investments happen at the same time. Some
 21 investors spoke with Ms. Holmes, some didn't. Some investors received financial models, some didn't.
 22 Some investors received demonstrations of the proprietary technology that Theranos was developing,
 23 some didn't. Some conducted extensive due diligence, some didn't. Some invested multiple times over
 24 many years, some invested once. Some anticipated forming a broader business or strategic partnership
 25 with Theranos, some didn't. Some had detailed and privileged information about the company because
 26 they were members of the Board of Directors, some didn't. Because the circumstances of each
 27 investment were different, and because different investors received different information, the

28 MS. HOLMES' SENTENCING MEMORANDUM
 CR-18-00258 EJD

1 government has not shown and cannot show that each of the transactions that it has identified, much less
2 all transactions from 2010 through 2015, were part of a conspiracy to defraud investors. The jury's
3 verdict confirms this understanding. While the jury found Ms. Holmes guilty of Counts 6, 7, and 8—
4 each a specific and unique C-2 transaction that took place *in 2014*—the jury was unable to reach
5 agreement on Counts 3, 4, and 5, which were separate C-1 transactions with different individuals under
6 different circumstances that all took place in 2013. *See Executive Recycling, Inc.*, 953 F. Supp. 2d at
7 1146 (“The fact that the jury only convicted Defendants on half of the fraud counts shows that it
8 carefully considered the evidence related to each Count and the customer named in that Count and, in
9 the process, clearly determined that the Government’s evidence was adequate with respect to some
10 customers, and lacking with regard to others.”). In situations like this one, each transaction must be
11 considered on its own merits.

12 To be clear, even the convictions for wire fraud do not satisfy this standard. Unlike its current
13 burden in connection with proving loss under § 2B1.1, at trial the government was not required to prove
14 causation or reliance as to any particular investment in order to prove wire fraud. *United States v.*
15 *Holmes*, No. 5:18-CR-00258-EJD-1, 2021 WL 2044470, at *30 (N.D. Cal. May 22, 2021) (“Causation is
16 not an element of wire fraud that the Government must prove.”); Holmes 10/26/21 Tr. 4609:12 (“We
17 don’t need to prove reliance.”) (gov’t argument). [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

26 [REDACTED]

27 [REDACTED]

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED] [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]

10 Second, the nature of the investment opportunity further explains why a specific showing as to
11 each investor is necessary. Theranos was a start-up company with limited operating and commercial
12 history. It also was a privately held company with securities that never traded on a public market and it
13 did not issue market-wide statements. Investors expressly acknowledged at the time of their investment
14 that the opportunity was unique and speculative in nature, that there were serious risks of investing in
15 the company, that the financial projections were speculative and unreliable, and the investors were
16 themselves sophisticated actors. *See, e.g.*, TX 3530 at 7-8, §§ 4.3, 4.4, 4.5, 4.6. It cannot be assumed
17 that all of the sophisticated, wealthy investors who knew about these risks but proceeded to invest
18 anyway would say that they relied on projections they previously affirmed in writing were inherently
19 speculative—if they received financial projections at all. As recent events have revealed, the reasons
20 why sophisticated investors invest in an enterprise may have nothing to do with the representations
21 made by a company, and instead be driven “more by vibes and grievances than due diligence.” Charlie
22 Warzel, “Elon Musk’s Texts Shatter the Myth of the Tech Genius,” *The Atlantic* (Sept. 30, 2022)¹¹; *see*
23 *id.* (“Looking at these texts, it seems much easier to understand Andreessen Horowitz’s recent \$350

24 _____
25 10 [REDACTED]
26 [REDACTED]

27 ¹¹ Available at <https://www.theatlantic.com/technology/archive/2022/09/elon-musk-texts-twitter-trial-jack-dorsey/671619/>.

1 million investment in WeWork founder Adam Neumann's new real-estate start-up, or [Samuel]
 2 Bankman-Fried's admission that most venture-capitalist investments are not 'the paragon of efficient
 3 markets' and driven primarily by FOMO and hype. 'Like, all the models are made up, right?' he
 4 infamously told *Bloomberg* last April.").

5 [REDACTED] the loss calculation requires a showing
 6 that each investor the government contends suffered loss received and relied on the fraudulent
 7 misrepresentations alleged in the indictment. If the government fails to make that showing, the loss
 8 cannot be counted. [REDACTED]

9 [REDACTED]

10 3. **The Entirety of Each Investment Is Not An Appropriate Measure of Loss**

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 "The Guidelines do not present a single universal method for loss calculation under § 2B1.1—nor could
 16 they, given the fact-intensive and individualized nature of the inquiry." *United States v. Zlop*, 479 F.3d
 17 715, 718 (9th Cir. 2007). The law distinguishes between the loss calculation involving investments in a
 18 "sham" company, in which a security is "literally worthless after the fraudulent scheme is exposed," and
 19 the loss calculation involving an "otherwise legitimate company." *Id.* at 719. In the case of an
 20 otherwise legitimate company, "because the stock continues to have residual value after the fraudulent
 21 scheme is revealed, the court may not assume that the loss inflicted equals the full pre-disclosure value
 22 of the stock; rather, the court must disentangle the underlying value of the stock, inflation of that value
 23 due to the fraud, and either inflation or deflation of that value due to unrelated causes." *Id.*; see also
 24 *United States v. Hussain*, No. 16-cr-00462-CRB-1, 2019 WL 1995764, at *4-6 (May 6, 2019) (analyzing
 25 complexity of calculating loss for a wire fraud related to investments in an otherwise legitimate
 26 company that was overvalued as a result of the fraud).

1 This case fits into the latter type: Unlike a Ponzi scheme, Theranos was a real company—a fact
 2 which the government does not dispute. *See Holmes* 9/8/21 Tr. 553:7-8 (gov’t opening). It developed
 3 valuable, innovative technology (assays, hardware, and software), including inventions and
 4 advancements that were recognized as innovative by the United States Patent & Trademark Office. It
 5 had real commercial relationships and provided real services to customers. The investments were not
 6 used to line Ms. Holmes’ pockets or those of anyone else; to the contrary, the investments went toward
 7 the company’s mission to make health information more accessible.

8 [REDACTED]

9 [REDACTED] *See Zlop*, 479 F.3d at 719. [REDACTED] the Guidelines suggest an appropriate
 10 measure can be “[t]he reduction that resulted from the offense in the value of equity securities or other
 11 corporate assets.” U.S.S.G. § 2B1.1 cmt. n.3(C)(v). Calculating loss in such a circumstance is complex,
 12 even impossible to do with any reasonable degree of certainty at this point given the backward-looking,
 13 assumption-driven nature of such an analysis. But there are indicators of substantial value in the
 14 company.

15 Theranos developed a highly valuable intellectual property portfolio over time. As of the second
 16 half of 2017, the value of that intellectual property was assessed by multiple outside parties to be at least
 17 in the hundreds of millions of dollars, and potentially over one billion dollars. In 2017, an outside law
 18 firm, Perkins Coie, performed an analysis of Theranos’ patent portfolio to “see if there was an
 19 opportunity to use it for licensing and whether the portfolio had significant value.” Ex. A at 82 (T.
 20 Carroll Ltr. at 1). The lawyer who led that charge explains the breadth of the portfolio in both number of
 21 assets and different technologies: the team “discovered that Theranos had more than 1200 patent assets
 22 across the globe” and “a vast number of patents in the Theranos patent portfolio were directed to
 23 invention other than a testing machine,” including real-time influenza detection and patents “that solved
 24 technical problems related to aspects of blood testing.” *Id.* at 82, 83 (T. Carroll Ltr. at 1, 2). “Theranos
 25 had scores of inventions like these that were valuable on their own, even if they were never successfully
 26 aggregated into a full and accurate testing machine.” *Id.* at 83 (T. Carroll Ltr. at 2). Ultimately, Perkins
 27 Coie prepared a series of analyses, in the form of PowerPoint presentations, which valued the potential

1 licensing opportunities for various subsets of patents and various potentially infringing companies. One
 2 such presentation dated August 2017 showed licensing opportunities at between \$700 and \$800 million
 3 based on a small subset of Theranos' large asset portfolio and the products of eight companies. Ex. G at
 4 46 (Overview of Theranos' IP Assets and Near-Term Licensing Opportunities). Notably, all of the
 5 patents assessed in that presentation were issued by the end of 2014. *Id.* at 9-15.¹²

6 An outside counterparty also valued Theranos' patent portfolio at several hundred million
 7 dollars. In November 2017, with Theranos in distress after two years of unrelenting public criticism,
 8 Fortress Credit Corporation agreed to give a loan of \$100 million in cash to Theranos, secured by the
 9 value of the patent portfolio. Ex. I (Term Sheet) at Dynasty003471-72. Fortress had done its own
 10 independent due diligence on the patent portfolio and "believe[d] that Theranos' patents are
 11 foundational patents in the POC [Point of Care] field." Ex. J (Fortress investment analysis) at SEC-
 12 DEPO-004683. A Fortress executive testified under oath in a separate proceeding that Fortress would
 13 have expected to receive a return on its investment in the event Theranos defaulted and Fortress took
 14 ownership of the patents, Ex. K (E. Levy Dep. Tr.) at 29:12-31:14; the return targeted by the Theranos-
 15 related investment fund was "two to three times the money invested at a rate of return of about 25
 16 percent," *id.* at 90:2-24; and Fortress "will not do the deal unless it meets certain return criteria," *id.* at
 17 92:24-25. *See also* Ex. A at 74 (F. Bonanni Ltr. at 3). Other outside analyses also indicated that
 18 Theranos' device had the potential to generate a substantial return. Ex. A at 261 (D. Tschirhart Ltr. at 1)
 19 ("Near the end, we had an independent third party consultant evaluate the business case for the machine
 20 as it actually was and they concluded it would generate a billion dollars in revenue in the first ten
 21 years.").¹³ In fact, "[t]he technology and clinical concepts that Theranos[] championed are becoming a
 22 reality today." Ex. A at 128 (Dr. Evans Ltr. at 1).

23

24

25 ¹² Perkins Coie completed analyses that included additional patents and additional potentially
 26 infringing products identified an even greater potential revenue amount. *See* Ex. H (2018 CIM with
 cover email cc'ing Perkins Coie), at Slides 83-103.

27

28 ¹³ The C-2 investors, including RDV, approved the Fortress loan from Theranos' side in
 November 2017.

MS. HOLMES' SENTENCING MEMORANDUM
 CR-18-00258 EJD

1 Theranos also had hundreds of millions of dollars cash on hand several months after the alleged
2 fraud was revealed. On April 17, 2016, six months after the *Wall Street Journal* had begun publishing
3 articles on Theranos and two and half months after CMS's report on Theranos' laboratory became
4 public, Theranos had over \$367 million in cash on hand. TX 5172 at col. JQ, row 16. After Walgreens
5 announced it was terminating the relationship with Theranos in June 2016, Ex. L, Theranos still had
6 over \$334 million of cash on hand, TX 5172 at col. JZ, row 16.

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

26 [REDACTED]

27 [REDACTED]

28 MS. HOLMES' SENTENCING MEMORANDUM
CR-18-00258 EJD

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]

9 To be clear, it is the government's burden to prove loss, and *not* Ms. Holmes' burden to disprove
10 it. Even courts that have expressed a view that a defendant's conduct was "brazen" have declined to
11 find loss where the government has failed to prove it. For example, in *United States v. Block*, the court
12 noted that the defendant, the Chief Financial Officer of a publicly traded real estate investment trust, had
13 "brazenly" inflated values "by simply making up numbers to plug a gap that resulted from what would
14 have been a proper calculation of the company's numbers." Dkt No. 169 at 68, No. 16-cr-595 (S.D.N.Y.
15 Dec. 4, 2017) (Sentencing Tr.). The court nevertheless determined that the government had failed to
16 prove the \$300 million loss it sought, declined to apply the loss enhancement, and gave the defendant an
17 18-month sentence in view of, among other things, the defendant's personal circumstances, the complex
18 circumstances surrounding the offense, and the court's view that a longer sentence would not
19 meaningfully affect general deterrence. *Id.* at 68-72.

20 [REDACTED]
21 [REDACTED], another approach must be
22 considered.

23 **4. Gain To Ms. Holmes As An Alternative Measure**

24 Where loss amount cannot be reasonably estimated, the Guidelines indicate that the proper
25 measure is gain to the defendant from the offense. U.S.S.G. § 2B1.1 cmt. n.3(B); *see Hussain*, 2019 WL
26 1995764, at *7 (calculating gain as the premium on the stock that the defendant owned and sold). Here,
27 the appropriate measure of gain is \$0. Ms. Holmes never sold any of her equity in the company. Ms.

28 MS. HOLMES' SENTENCING MEMORANDUM
CR-18-00258 EJD

1 Holmes received a total of \$1,546,025.37 in salaried compensation over the six years from 2010 through
 2 2015. *See* Ex. N (E. Holmes Interrogatory Resp. in *Partner Investments, L.P. v. Theranos, Inc.*) at
 3 No. 8. But as the *Hussain* court pointed out, salaried compensation in a case where the company was
 4 engaged in legitimate business activities presents challenges because the Court may only include gain
 5 that “resulted from the offense.” U.S.S.G. § 2B1.1 cmt. n.3(B); *Hussain*, 2019 WL 1995764, at *6-7.
 6 Here, the government has not proven and cannot prove that Ms. Holmes’ salary resulted from the
 7 offense conduct as opposed to the legitimate activities of Theranos.

8 **5. If the Court Accepts the PSR’s Calculation of Loss, A Downward Departure
 9 is Warranted Under Section 2B1.1, Application Note 21(C).**

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 **B. Ms. Holmes Objects to the Calculation of the Number of Victims.**

21 [REDACTED]

22 [REDACTED] “The Guidelines do not … allow a district court to ‘estimate’ the number
 23 of victims to enhance a sentence under § 2B1.1(b)(2).” *United States v. Showalter*, 569 F.3d 1150, 1160
 24 (9th Cir. 2009). A “victim” under § 2B1.1 is a person (including corporations) “who sustained any part
 25 of the actual loss determined under subsection (b)(1).” § 2B1.1 cmt n.1.

26 [REDACTED]

27 [REDACTED]

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]

10 C. Ms. Holmes Should Not Receive a [REDACTED] Increase for Her Role.

11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 1. [REDACTED]

18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED]

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 2. [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 _____
25 [REDACTED]
26 [REDACTED]
27 [REDACTED]
28 MS. HOLMES' SENTENCING MEMORANDUM
CR-18-00258 EJD

1 3. [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 D. [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 _____
27 [REDACTED]
28 MS. HOLMES' SENTENCING MEMORANDUM
CR-18-00258 EJD

1 [REDACTED]
 2 [REDACTED] But both before she was charged and repeatedly during the trial, she
 3 made extensive efforts to uncover and acknowledge responsibility for errors made by her or the
 4 company, including with respect to issues the government has argued were criminal.

5 In response to criticisms that began in late 2015, Ms. Holmes embarked on a broad, resource-
 6 intensive effort to bring outside voices into Theranos and to identify, acknowledge, and correct errors or
 7 missteps, and restructure the company as appropriate. Testimony, documents, and letters to the Court
 8 from reform-era Board members, employees, and consultants describe some of these efforts. *See, e.g.,*
 9 Ex. A at 97 (T. Cooper Ltr. at 2).

- 10 • **Reconstituted Board:** In 2016, Mr. Balwani left the company and Ms. Holmes reconstituted the
 11 Board of Directors in response to criticisms that its members lacked appropriate knowledge. The
 12 new Board included physician and former head of the CDC Dr. William Foege (who had been on
 13 the Board previously); former Amgen senior executive Dr. Fabrizio Bonanni, who had expertise
 14 in medical devices; and technology industry executive Daniel Warmenhoven, who was asked to
 15 join the Board to help Ms. Holmes by a Board member who was retiring for medical reasons.
 16 All three members of that reconstituted Board of Directors have written letters in support of
 17 leniency. Ex. A at 72 (F. Bonanni Ltr.), 135 (W. Foege Ltr.), 269 (D. Warmenhoven Ltr.).
- 18 • **Scientific and Technical Advisory Boards:** Ms. Holmes invited into the company new
 19 advisory boards whose members consisted of outside experts. Dr. Susan Evans (no relation to
 20 Billy Evans), who has spent her career in diagnostics product development and technology
 21 assessment, was a member of the new Scientific and Medical Advisory Board. She observes that
 22 “when the SAB was created in 2016 to help the company, I found a CEO who took ownership of
 23 previous missteps and shortfalls, and genuinely sought advice, input and guidance from
 24 advisors.” Ex. A at 128 (Dr. Evans Ltr. at 1); *see* Ex. A at 136 (W. Foege Ltr. at 2) (“[Ms.
 25 Holmes] had outside experts spend time at the Theranos facility. She allowed them to talk to
 26 anyone. She allowed those experts to inspect the hardware, and make suggestions.”). Dr. John
 27 Moalli, who was a member of the Technical Advisory Board (also formed around the same

time), notes: “As a member of the TAB, I found that Elizabeth received advice openly and was constantly looking to fix things she recognized had been done incorrectly.” Ex. A at 203 (J. Moalli Ltr. at 2).

- **New, Experienced Staff Focused on Compliance and Quality Control:** “Elizabeth hired additional staff with extensive diagnostic industry experience in engineering, assay development, and quality systems, and worked to establish a culture based on a quality management system.” Ex. A at 128 (Dr. Evans Ltr. at 1); *see* Ex. O (July 2016 Press Release). One of those consultants observes: “During my committee involvement, Ms. Elizabeth Holmes was thoroughly engaged, wanted to learn and make improvements at Theranos. She embraced our recommendations, worked hard to implement the recommendations, and understood what went wrong previously. I felt her openness to continuous improvement was adopted within the company and was extremely helpful in making rapid changes and continuous improvements.” Ex. A at 265 (M. VanTrieste Ltr.); *see also* Ex. A at 187 (B. Liptzin Ltr.) (“She did not avoid difficult conversations and demonstrated an understanding and care about doing the right thing.”). Dr. Bonanni reiterates: “As the board committee and the newly hired executives developed the quality system and compliance program, Elizabeth Holmes absorbed the relative concepts rapidly, as a sponge, and became their champion serving as a role model for the rest of the organization.” Ex. A at 73 (F. Bonanni Ltr. at 2).
- **New, Experienced Laboratory Directors to “Turn Over Rocks”:** Theranos hired new laboratory directors, Dr. Kingshuk Das and Dr. Donald Tschirhart. Ms. Holmes gave them the imprimatur to “turn over rocks,” to look into errors and make any and all needed corrections, with her full support—reporting, for the first time in the company’s history, to Ms. Holmes directly. Holmes 11/10/21 Tr. 5933:18-20, 5996:12-18, 5997:1-3 (testimony of laboratory director Dr. Das). Ultimately, Theranos shut down its clinical laboratory business and refocused its work on the small sample technology.
- **Openness with the Scientific Community:** Theranos made efforts to explain and share its inventions with the scientific community. In August 2016, Ms. Holmes presented the miniLab to

1 a hostile audience at the American Association of Clinical Chemistry conference. TX 7673A.¹⁶

2 Additionally, Theranos worked to publish papers on its research. *E.g.*, TX 7695, TX 7717,
3 TX 7718, TX 7719.

4 Ms. Holmes' recognition, acknowledgement, and assumption of responsibility of her mistakes as
5 Theranos' CEO were central to her reform efforts. She took public personal responsibility for Theranos'
6 failings as early as April 2016—more than two years before her indictment—in an interview with NBC
7 News correspondent Maria Shriver.¹⁷ She told Ms. Shriver: "I feel devastated that we did not catch and
8 fix these issues faster." And when asked directly by Ms. Shriver what she held herself responsible for,
9 Ms. Holmes said: "I'm the Founder and CEO of this company. Anything that happens in this company
10 is my responsibility at the end of the day." She did the same in her SEC testimony, before her
11 indictment in this case. *See* Ex. T (SEC Tr.) at 347:12-13 ("I was the CEO of the company, so I take
12 responsibility for this company."); *id.* at 353:12-13, 353:19-22, 620:22-621:2, 689:19-20, 697:2-3.

13 Ms. Holmes also did the same on the witness stand in this case. *See* Holmes 11/30/21 Tr.
14 8005:13-15 (testimony on cross-examination) ("Q. And you take responsibility for the company; is that
15 your testimony? A. I do."). For example, with respect to the company's response to the *Wall Street*
16 *Journal*'s 2015 investigation, Ms. Holmes told the jury repeatedly that she wishes Theranos had handled
17 its interactions with specific employees, and the entire response to the *Wall Street Journal*'s inquiries,
18 differently. Holmes 11/30/21 Tr. 7973:17-18, 7978:23-25, 7998:13-15 (testimony of E. Holmes); *see*
19 *also id.* at 8136:18 ("There are many things that I wish I did differently."). Ms. Holmes also did not shy
20 away from personally acknowledging her role in conduct that the government questioned. For example,
21 with respect to pharmaceutical reports, Ms. Holmes testified about her own role in affixing pharma
22 company logos to the reports, and also acknowledged she wishes she had handled it differently. *Id.* at
23 8140:13, 8155:5-7; *see* Holmes 11/23/21 Tr. 7479:2-10.

24

25 ¹⁶ This presentation is available at <https://www.youtube.com/watch?v=n6JRG733ReQ&t=1s> (last
26 accessed Oct. 20, 2022).

27 ¹⁷ The video of that interview is available at [https://www.today.com/video/theranos-ceo-](https://www.today.com/video/theranos-ceo-elizabeth-holmes-i-m-devastated-about-blood-test-issues-43442757745)
28 [elizabeth-holmes-i-m-devastated-about-blood-test-issues-43442757745](https://www.today.com/video/theranos-ceo-elizabeth-holmes-i-m-devastated-about-blood-test-issues-43442757745) (last accessed Sept. 25, 2022).

1 Letters from Ms. Holmes' friends and family make clear that in her personal life she regularly
 2 acknowledges her errors with sincere reflection and remorse. *See, e.g.*, Ex. A at 268 (J. Walker Ltr. at 1)
 3 ("Her contrition is real and appreciable"), 271 (Y. Yu Ltr. at 1) ("Liz showed more introspection and
 4 remorse than what I'd personally witnessed in any other failed founder, and I had seen many in my
 5 decade of investing."), 143 (K. Gavrieli Ltr. at 1), 140 (S. Freeman Ltr. at 2), 148 (K. Goldman Ltr. at
 6 1), 160 (S. Heuser Ltr.), 197 (S. Mantri Ltr.), 250 (D. Sterling Glasband Ltr. at 3).

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 IV. 18 U.S.C. § 3553(a) SUPPORTS SUBSTANTIAL LENIENCY FOR MS. HOLMES.

14 The Court's task in sentencing is to identify and "impose a sentence sufficient, but not greater
 15 than necessary, to comply with the purposes" of sentencing. 18 U.S.C. § 3553(a). Although the
 16 Sentencing Guidelines are the starting point for the calculation of an appropriate sentence, a district
 17 court "may not presume that the Guidelines range is reasonable." *Gall v. United States*, 552 U.S. 38, 50
 18 (2007). Instead, the Court "must make an individualized assessment based on the facts" of each case,
 19 recognizing that a within-Guidelines sentence may be greater than necessary to serve the purposes of
 20 sentencing. *Id.*; *Kimbrough v. United States*, 552 U.S. 85, 91 (2007); *see United States v. Gupta*, 904 F.
 21 Supp. 2d 349, 350 (S.D.N.Y. 2012) ("Imposing a sentence on a fellow human being is a formidable
 22 responsibility. It requires a court to consider, with great care and sensitivity, a large complex of facts
 23 and factors."). If the Guidelines calculation in a given case results in an "inordinate emphasis" on
 24 "putatively measurable quantities," like financial loss, a court should focus more on the statutory factors
 25 set forth in 18 U.S.C. § 3553(a) to determine an appropriate sentence. *United States v. Adelson*, 441 F.
 26 Supp. 2d 506, 509-12 (S.D.N.Y. 2006), *aff'd*, 301 F. App'x. 93 (2d Cir. 2008). Indeed, the Court "may
 27

28 MS. HOLMES' SENTENCING MEMORANDUM
 CR-18-00258 EJD

1 vary [from Guidelines ranges] based solely on policy considerations, including disagreements with the
 2 Guidelines." *Kimbrough*, 552 U.S. at 101.

3 The Court must make an assessment of what sentence is reasonable based on all the factors,
 4 including: (1) the nature and circumstances of the offense and history and characteristics of the
 5 defendant; (2) the purposes of sentencing, including the need for deterrence and to protect the public; (3)
 6 the kinds of sentences available; (4) the Sentencing Guidelines; (5) any relevant policy statements issued
 7 by the Sentencing Commission; (6) the need to avoid unwarranted sentence disparities; and (7) the need
 8 to provide restitution to any victims of the offense. 18 U.S.C. § 3553(a). “[T]he amount by which a
 9 sentence deviates from the applicable Guidelines range is not a measure of how ‘reasonable’ a sentence
 10 is. Reasonableness is determined instead by the district court’s individualized application of the
 11 statutory sentencing factors.” *United States v. Dorvee*, 616 F.3d 174, 184 (2d Cir. 2010) (citing *Gall*,
 12 552 U.S. at 46-47). These factors support a sentence with no to minimal incarceration.

13 **A. The Nature and Circumstances of the Offense Strongly Support Leniency.**

14 Ms. Holmes has been convicted of defrauding certain sophisticated investors who knew they
 15 were investing in a company with a big, world-changing dream and substantial potential that had not yet
 16 been, and might never be, realized. Far from a house of cards, Theranos was well on its way to
 17 achieving its mission: it was a technology company that developed substantial, innovative technology
 18 over its fourteen-year life through the research and development efforts funded by investments and
 19 performed by Theranos’ many qualified, brilliant scientists and engineers. Ms. Holmes, whose first real
 20 job was CEO of this company she founded at 19, was all-in on the company’s mission to increase access
 21 to health information: she worked constantly, never sold any stock, and remained firmly committed to
 22 the company’s mission until the company’s end. For the reasons discussed below, the circumstances of
 23 the offense strongly support a lenient sentence.

24 **1. The Offense Conduct Occurred Within a Unique World of Investments in
 25 Start-Up Companies.**

26 Theranos was never a public company. It had limited operational history and had never paid
 27 dividends to its shareholders. Both Theranos and the offense conduct are best understood through the

lens of a Silicon Valley start-up company. That is the environment in which Theranos was founded, in which it was built, and in which investors decided whether and how much to invest. Theranos had massive potential, but its success was uncertain—even highly unlikely, in light of the overall odds for start-ups.¹⁸ The company and Ms. Holmes faced the typical challenges that confront such companies and their inexperienced CEOs. No one is arguing these factors excuse fraud, but they do situate the offense conduct in context, as § 3553(a) requires.

It is common sense that investing in any uncertain venture brings with it substantial risk. Investors know that is especially true with investments in startups, the majority of which fail. Tim Draper is a venture capitalist with 35 years of experience whose company backed some of Silicon Valley's greatest technology success stories and was an early investor in Theranos. Ex. A at 112 (T. Draper Ltr. at 1). Mr. Draper makes the simple observation that some companies succeed and some fail. *Id.* David Sokol, an experienced venture capital investor who has built and led several companies, including for Berkshire Hathaway, echoes that sentiment: "Through my career, I have invested in venture capital transactions which have been failures and successes." Ex. A at 239 (D. Sokol Ltr. at 2). He goes on to explain that because a venture investment usually relies on estimates of the business's value *if* it succeeds, "[v]enture capital is inherently very risky investing and often only 1 out of 10 such investments prove successful. The reason is obvious in that most venture capital ideas are attempting to do something never before tried or achieved." *Id.* Yinne Yu, an investor in early-stage companies, similarly observes: "A few of my first-time founders made it; most did not. . . . Even with the best of intentions, all can go wrong." Ex. A at 271 (Y. Yu Ltr. at 1). Alex Moore, also a venture capitalist, agrees: "90% of my 'bets' (they are bets, nothing is certain) fail and go to 0. This is expected." *Id.* at 206 (A. Moore Ltr. at 2).

Academic research supports these points: “On average, seven out of ten portfolio companies will not return even the money invested in those startups; the majority will need to be written off. . . . Two

¹⁸ E.g., Patel, Neil, “90% Of Startups Fail: Here’s What You Need to Know About the 10%,” *Forbes*, Jan. 16, 2015, available at <https://www.forbes.com/sites/neilpatel/2015/01/16/90-of-startups-will-fail-heres-what-you-need-to-know-about-the-10/?sh=559e79966792> (last visited 11/7/2022).

MS. HOLMES' SENTENCING MEMORANDUM
CR-18-00258 EID

1 are expected to return enough to cover all the losses; the third to provide the 20 to 30 percent internal
 2 rate of return (IRR) investors [in a venture fund] anticipate.” Hassan, Kama et al., “The Pervasive,
 3 Head-Scratching, Risk-Exploding Problem With Venture Capital, *Institutional Investor*, at 1 (Sept. 29,
 4 2020). Venture capitalists “are keenly aware of [the] asymmetrical return distribution” in which the
 5 results of a portfolio are explained by the performance of a minority of the stocks—in particular, the
 6 small number of winners. Nicolas Rabener, “Portfolio Construction in Venture Capital,” *Harvest*, at 3
 7 (May 24, 2021). Well-established investment theories explain why (even in an efficient capital market)
 8 a sophisticated investor may choose to include a high-risk investment like venture investing in a Silicon
 9 Valley startup as part of a broader portfolio of assets. See B. Raasch & W. Cafaro, 58 N.Y.U. Annual
 10 Institute on Fed’l Taxation § 22.02 (2022) (“adding a riskier asset class . . . could actually reduce the
 11 risk of a portfolio”).

12 “All but the most naïve of investors know there are risks that go along with potential rewards of
 13 investments.” Ex. A at 67 (L. Blue Ltr. at 2). Theranos did not seek investments from naïve investors,
 14 but it nevertheless made sure that investors understood and could take on the risks that came with
 15 investing in it. Cf. Ex. A at 101 (M. Crane Ltr. at 2) (“We were certainly aware of the risks involved as
 16 in any such venture, and having weighted those risks, we were comfortable in the amount we invested. .
 17 . We believe no one should invest more than they are prepared to lose.”). To that end, investors
 18 expressly acknowledged at the time of their investment that the opportunity was unique and speculative
 19 in nature, that there were serious risks of investing in the company, that the projections were unreliable,
 20 and the investors were themselves sophisticated actors. TX 1505 §§ 4.3, 4.4, 4.5, 4.6.

21 Ms. Holmes’ conduct should also be considered in the context of this world, and filtered through
 22 her role as a young, first-time founder without independent business experience. Venture investors,
 23 advisors, and founders describe the unique challenges faced by a founder and CEO and the unique
 24 perspective required to bring a new venture to success. “Inventing the future is hard. Founders are
 25 called upon to strike the incredibly difficult balance between painting a picture of the world as it could
 26 be, and as it actually is.” Ex. A at 81 (J. Carr Ltr. at 1); id. at 217 (J. Orr Ltr. at 2) (noting the “delicate
 27 balance” involved in seeking investments). “The CEO and founder must carry the torch of the vision

1 through every obstacle and terrain and protect its flame from naysayers, doubters, and challengers day in
 2 and day out to create an environment for innovation to take hold.” Ex. A at 143 (K. Gavrieli Ltr. at 1).

3 Set against that backdrop is the role that optimism and lack of experience play in business
 4 challenges faced by start-up founders, who may not anticipate the setbacks. “Most first-time founders
 5 are visionary but naïve about how to build a business and how long it takes to build a business”—
 6 especially the latter. Ex. A at 271 (Y. Yu Ltr. at 1). “For example, recently one of my companies gave
 7 me a set of financial projections to review before fundraising. I cut the numbers by over 50% because I
 8 see operational hiccups that the first time CEO doesn’t yet have the foresight to see.” *Id.*; *see* Paul A.
 9 Gompers et al., *How Do Venture Capitalists Make Decisions?*, 135 J. of Fin. Econ. 160, 181 (2020)
 10 (“VCs report that fewer than 30% of the companies meet projections.”). Dr. Susan Evans, a member of
 11 Theranos’ Scientific and Medical Advisory Board (SMAB) beginning in 2016, has spent her career in
 12 product development and technology assessment in the diagnostics industry. She writes: “I have met
 13 many young entrepreneurs who have a dream and many if not most, oversell what they have, and when
 14 it will be ready for market. This optimism is what often drives innovation, and the development of new
 15 products that go beyond what is the norm.” Ex. A at 128 (Dr. Evans Ltr. at 1); *see also id.* at 112 (T.
 16 Draper Ltr at 1) (“Venture-backed startup companies often announce and deliver products to the market
 17 before they are ready.”).

18 These challenges are only compounded for female founders, as letters by female founders
 19 explain in sharing those writers’ experiences. For example:

20 Liz and I attended some of the same entrepreneurship events in Silicon Valley while
 21 she was at Theranos. These events often featured panels and fireside chats, where
 22 prominent people in business would make the case that a key reason less than 2%
 23 of venture capital goes to women is because female founders don’t present bold
 24 enough visions. The advice at these conferences was to picture what massive
 success would look like in 5 or 10 years, and sell *that* vision, because *that’s* what
 male founders were doing, and *that’s* what venture capitalists expect to see. When
 I think back on my younger days as a CEO, I was frequently told that my financial
 projections were too conservative.

25 Ex. A at 250 (D. Glasband Sterling Ltr. at 3). Likewise:

26 Speaking as a woman who has raised \$60M in venture capital, I can confirm it is
 27 not easy. It is not easy for anyone, but I feel it’s worth noting that approximately
 28 3% of venture capital goes to women CEOs. The only scientific evidence I have

1 encountered between men and women when it comes to raising capital is that men
 2 are more frequently asked about opportunities and women are more frequently
 3 asked about risks.

4 Ex. A at 131 (J. Ewing Ltr. at 2). “The nuanced elements of Elizabeth being a female CEO cannot be
 5 overstated.” Ex. A at 182 (J. Lamping Ltr. at 3); *see also id.* at 145 (A. Goldberg Ltr. at 1).

6 While they do not excuse fraud, these perspectives provide useful context for the circumstances
 7 of the offense conduct, as § 3553(a) requires. First, they provide relevant context for the aspirational
 8 way Ms. Holmes spoke to investors: as she explained when she testified, Ms. Holmes was frequently
 9 speaking about projects Theranos was working on, ambitions, and the next generation device. Holmes
 10 11/19/21 Tr. 7238:22-25; Holmes 11/23/21 Tr. 7619:22-7620:3, 7623:19-23; Holmes 12/8/21
 11 Tr. 8586:11-14; Holmes 11/29/21 Tr. 7912:12-7914:11. Industry context and expectations help place
 12 Ms. Holmes’ focus on the company’s vision and future in its environment and explain how such efforts
 13 were perceived by Ms. Holmes as focusing the conversation on what investors in Silicon Valley startups
 14 expect to and were asking to hear from her. They also help explain why she may have viewed a
 15 proactive detailed discussion of risks and uncertainties as less important to sophisticated investors
 16 investing in her company who would have been used to seeing failure in the vast majority of startup
 17 companies. Second, the challenges that inexperienced CEOs have in setting financial projections and
 18 anticipating operational hurdles provide additional context for Ms. Holmes’ reliance on Mr. Balwani to
 19 create and convey financial models that investors appropriately understand and to run Theranos’
 20 operations. Third, they contextualize the challenges that surround making statements about the expected
 21 course of the development and commercialization of new technology, which could be set back by
 22 scientific, regulatory, and operational hurdles that a new CEO may not see.

23 **2. Theranos Developed Innovative Technology and Provided Real Services to
 24 Real Customers in Furtherance of Its Mission to Improve Access to
 25 Healthcare.**

26 Also crucial to understanding the nature and circumstances of the offense is the fact that
 27 Theranos “was a real company.” Holmes 9/8/21 Tr. 553:7 (government opening). This was not an
 28 empty vehicle for Ms. Holmes’ gain. Money that was invested went into the research and development
 29 and operations of the company with real results.

1 **a. Theranos developed real, valuable technology.**

2 Theranos spent most of its efforts developing products and improving the products it had
 3 developed. Financial records show that the majority of the company's funds were spent on research and
 4 development and operations. Holmes 9/14/21 Tr. 780:13-781:18 (testimony of Theranos controller S.
 5 Spivey). Theranos also built and improved its sophisticated manufacturing capabilities in California to
 6 have the infrastructure to build its inventions as products. The technology Theranos invented can be
 7 broadly categorized into three categories:

- 8 • Assays: Assays include the chemicals and processes for testing blood samples for particular
 9 substances. Theranos developed hundreds of small sample assays over its many years of
 10 research and development, and also developed the ability to manufacture the chemicals in-house.
- 11 • Hardware: This set of technology included the various versions of Theranos Sample Processing
 12 Units ("TSPU"), as well as the small sample collection device (called the nanotainer) and various
 13 other hardware and components that Theranos developed to perform analysis of blood, urine,
 14 swabs, and other samples (and to complete other tasks). Between 2010 and 2015, the time
 15 period at issue here, Theranos was working to build, perfect, and continuously improve its 4-
 16 series TSPU (the minilab), which had the capability to run a host of different types of assays at
 17 once. Theranos submitted an application for approval of this device and one blood test to the
 18 FDA in 2014, and the FDA approved that application in 2015. Theranos planned to put the 4-
 19 series TSPU into operation when a sufficient number of assays were approved. Other hardware
 20 inventions, including other versions of the TSPU, were also developed.
- 21 • Software: Theranos' software developments included medical recordkeeping software,
 22 laboratory applications, diagnostic tracking, patient- and doctor-specific applications, and
 23 infectious disease modeling.

24 *See generally* Ex. H (2018 CIM) (describing some assay, hardware, and software inventions Theranos
 25 had developed).

26 The company obtained hundreds of patents in the United States and across the world covering
 27 many of its inventions. *See* Ex. A at 82 (T. Carroll Ltr. at 1); Ex G at 3 (Overview of Theranos' IP

1 Assets and Near-Term Licensing Opportunities).¹⁹ The company chose to protect other innovative
 2 breakthroughs as trade secrets. Holmes 11/23/21 Tr. 7584:6-7585:19 (testimony of E. Holmes). To
 3 receive such protection under California law, Theranos was required to make “efforts that are reasonable
 4 under the circumstances” to ensure the continued secrecy of its technology. Cal. Civ. Code §
 5 3426.1(d)(2). Theranos employed common methods, including nondisclosure agreements, security
 6 measures, limiting knowledge to “need to know,” and legal enforcement of breaches of nondisclosure
 7 agreements. *See* 1 Melvin F. Jager, Trade Secrets Law §§ 5:21, 5:26, 13:3 (2022); 1 Roger M. Milgrim
 8 & Eric E. Benson, Milgrim on Trade Secrets § 1.04 (2020).

9 **b. Theranos was on its way to achieving its mission to make health**
 10 **information more accessible through its commercial activities.**

11 The company also executed real contracts and provided real services to real customers. In its
 12 early years, it worked with 10 pharmaceutical companies. TX 7742 at 6-7; TX 7753. Many of the
 13 pharmaceutical companies praised what Theranos had developed. Theranos also ran studies in
 14 conjunction with leading academic medical institutions, including the Mayo Clinic. TX 7742 at 6, 7. It
 15 ultimately formed retail partnerships with Walgreens and Safeway in 2010 and, beginning in fall 2013,
 16 offered tests to customers in retail stores. TX 372 (Walgreens); TX 387 (Safeway); TX 12464 (noting
 17 November 2013 public launch).

18 Theranos worked toward its goal of making health information more accessible through a
 19 number of different avenues. Making the process of drawing blood more comfortable and humane,
 20 including by drawing smaller samples, was one. Advocating to allow patients to order their own tests
 21 directly, without a doctor’s visit, was another.²⁰ Working to bring the lab testing equipment to retail

22 ¹⁹ The United States has continued to issue patents on which Ms. Holmes is an inventor based on
 23 Theranos’ inventions after Ms. Holmes was indicted and, indeed, after her conviction. In the past four
 24 years, nearly 100 U.S. patents have been issued on Theranos’ inventions. At least 15 have been issued
 25 this year, with the most recent issued on July 12, 2022. *See* Ex. B (U.S. Patent No. 11,385,252 B2).

26 ²⁰ Theranos worked with Arizona legislators on a law that would allow patients to order their own blood work without a doctor’s prescription. The goal was to give patients control over their own
 27 health information and to ensure that patients were not prevented from doing so because they did not
 28 have access to, or could not afford, a visit with a primary care physician. Ms. Holmes testified to
 lawmakers in support of that law. The Arizona legislature passed the law nearly unanimously and HB
 MS. HOLMES’ SENTENCING MEMORANDUM
 CR-18-00258 EJD

1 locations was a third. While Theranos' brand symbol became the small sample collection device known
 2 as the nanotainer, Theranos learned that what was most important to patient-consumers was *cost*. In that
 3 arena, Theranos was revolutionary: Theranos offered tests at substantially lower prices than the industry
 4 leaders; it offered the same price to insured and uninsured patients; and it posted the prices on its
 5 website—a practice that was unusual at the time. Theranos' offering was so groundbreaking with regard
 6 to cost that customers *flew from other states* to get their blood tested at Theranos, and still paid less
 7 (including airfare) than what they would have paid to the industry incumbents. Ex. U at 1 (“[Bot
 8 Anecdote] Mother and daughter came from California for a day to visit there [sic] Dr. and he sent them
 9 here for labs because at Quest Diagnostics the labs were \$2,400 (she showed me the print out of the
 10 cost!) and they paid \$177.00 and \$192.00. With there [sic] plane tickets, taxi, and labs they spent a total
 11 of 300.00 they said. That isn't even half of what there [sic] labs would have been. They were so
 12 thankful and love everything about Theranos[.]”); *see also* Ex. V, Ex. W. The vast majority of
 13 Theranos' tests were processed using FDA-approved machines and processes. All tests were processed
 14 in government-certified Theranos laboratories. Customers raved about the experience in feedback
 15 provided to Ms. Holmes. *See, e.g.*, Ex. U at 50 (“The main reason I went was because of the cost. I am
 16 often sent a high bill for my bloodwork with insurance. When I got there, the service was fast, the ladies
 17 were super and professional and I must say, it was the best experience I have ever had. Plus, no bruising
 18 whatsoever! I will continue going there for my bloodwork from now on and thank you!”).

19 **c. Theranos employed hundreds of employees.**

20 These technological and commercial accomplishments were the work of hundreds of individual
 21 members of the community employed by Theranos over its life. Investments in Theranos also paid the
 22 salaries of the many brilliant, talented, and committed members of the Theranos employee family
 23 working to achieve its mission. As former employees describe, Ms. Holmes was personally invested in
 24 the well-being of these individuals and their families, and took their personal circumstances and
 25 professional accomplishments seriously. *See* § II(A)(3), *supra*.

26

27

28 2645 went into effect on July 1, 2015. *See* <https://apps.azleg.gov/BillStatus/BillOverview/66902>.

MS. HOLMES' SENTENCING MEMORANDUM
 CR-18-00258 EJD

d. Theranos' technology and operations involved scientific and regulatory complexity.

Theranos operated in a space that involved serious scientific and regulatory complexities—challenges that were known or knowable to investors through public research, beyond the information they got from Theranos (if any). Ms. Holmes did not work to address these complexities alone. Company scientists—all more highly educated and experienced than she was—reported on the state of the technology, including successes, efforts to resolve challenges, and response to criticisms or questions from those now considered whistleblowers. The company worked through regulatory questions and solutions with sophisticated partners and experienced outside lawyers. And policies and procedures were also in place. None of this is to say that Theranos operated without error; it is simply context to understand (i) that Ms. Holmes did not sit at the top of a company that simply implemented her commands and (ii) that Ms. Holmes understood there were teams and processes in place to address issues. This ambitious venture was full of the complications that come with launching any business, with the added complexities of scientific advancement and government regulatory schemes.

One regulatory challenge was how Theranos and its retail partners would operate the testing as a practical matter. Early in the retail partnerships, the parties had envisioned putting Theranos devices in retail locations. Those partners and Theranos soon recognized the potential regulatory barriers to that approach—namely, a risk the devices might need to be FDA-approved or each retail location would need to be certified as a high-complexity CLIA laboratory—and shifted the rollout strategy. Theranos and Walgreens agreed that Phase I of the company’s retail operations would involve shipping samples back to certified central CLIA laboratories and Phase II, putting Theranos devices in retail locations, would occur once the Theranos devices had been FDA-approved. As a result of this shift, during Phase I, because the samples were being shipped to the Theranos laboratory for processing, the device used for testing a sample was less important to the commercial project than the experience customers had in stores. Theranos shared the details of this strategic plan with the FDA shortly after it publicly announced its partnership with Walgreens. TX 7751 at 2, 3.²¹

21

1 Laboratory testing is also highly regulated. By 2015, Theranos had two laboratories certified by
 2 authorities in California and Arizona (working under the authority of federal agency CMS (Centers for
 3 Medicaid & Medicare Studies)). Those laboratories, which were staffed with qualified employees,
 4 processed blood samples collected at retail locations (such as the Walgreens locations). The vast
 5 majority of the eight million-plus test results produced by Theranos were generated on FDA-approved
 6 methods²²; tests performed on lab-developed methods had been validated under appropriate standards,
 7 with validation reports signed by a qualified laboratory director. *See Holmes* 9/28/21 Tr. 1990:12-18,
 8 1991:3-13, 2087:15-18, 2621:17-21 (testimony of lab director Dr. A. Rosendorff). Ms. Holmes, who
 9 does not have a college degree, was not qualified to and did not process patient samples. Nor did she
 10 determine what methods were appropriate for patient use. *Id.* at 1986:23-1987:13, 1991:6-13, 2087:1-18
 11 (testimony of Dr. Rosendorff).

12 In addition to being highly regulated, blood testing is scientifically complex. Laboratory testing
 13 has inherent imprecision and imperfections. Even FDA-approved tests can produce inaccuracies for a
 14 particular patient at a particular time. Government regulations indicate that test results can be
 15 considered “accurate” even if they differ from a target by large percentages. *See, e.g., TX 7603 at*
 16 § 493.931 (criteria for acceptable performance of HDL is plus or minus 30%), § 493.933 (criteria for
 17 acceptable performance of hCG is plus or minus three standard deviations), § 493.941 (criteria for
 18 acceptable performance of platelet count is plus or minus 25% of the target). Every test has some
 19 expected inaccuracy rate, as its associated FDA labeling information makes clear. Ex. P (FDA label for
 20 FDA-approved HIV assay) at 12. Even among well-accepted testing methodologies, different
 21 measurement procedures can lead to different results that are difficult to compare. *See Myers, Gary L.*
 22 *& W. Greg Miller, The International Consortium for Harmonization of Clinical Laboratory Results*

23
 24 [REDACTED] Walgreens also had physical possession of an Edison machine for its own use.
 25

26 ²² For example, patient E.T.’s blood test for HIV, which forms the basis of acquitted Count 10,
 27 was performed using FDA-approved methods and following the CDC’s recommended testing algorithm.
 28 TX 14259; *see Holmes* 9/29/21 Tr. 2264:18-20 (testimony of Dr. Rosendorff).

1 (*ICHCLR – a pathway for harmonization*, 27 The Journal of the International Federation of Clinical
 2 Chemistry and Laboratory Medicine 30, 30 (2016) (“A basic problem in laboratory medicine is that
 3 different laboratory measurement procedures that intend to measure the same measurand may give
 4 different results for the same specimen.”). And for some tests the risks of inaccuracy are common
 5 enough that physicians’ groups recommend against giving the test in many circumstances because the
 6 risks of an inaccurate test outweigh the benefits. *E.g.*, Holmes 11/18/21 Tr. 6879:20-6880:7, 6881:3-6;
 7 Ex. Q (TX 12332, American College of Physicians Statement re: PSA). Additionally, even companies
 8 that make FDA-approved assays sometimes produce faulty chemicals or errant calculations that lead to
 9 erroneous results. *E.g.*, Ex. R (Siemens HbA1C), S (Siemens Estradiol). Whether and why any
 10 particular laboratory test result is incorrect is a deeply technical scientific issue. These scientific
 11 complexities provide context for the impact that any anecdotal potential errors and inaccuracies that
 12 were brought to Ms. Holmes’ attention may have had on her own beliefs in the state of Theranos’
 13 laboratory when she spoke to investors.

14 **e. Theranos’ wide-ranging operations presented both promise and
 challenges.**

15 In addition to the scientific and regulatory complexities, Ms. Holmes’ lack of prior executive or
 16 operational experience created challenges as Theranos grew. Without a disciplined operational
 17 approach, Theranos’ operations became scattered and overburdened as the company tried to achieve all
 18 of its potential use cases concurrently. For example, at the same time that Theranos began rolling out its
 19 retail offering, the company was also working on several other projects for different phases of the
 20 company, including working to scale manufacturing operations and designing technology for low cost
 21 testing in developing countries. Additionally, Theranos had a number of other projects that aligned with
 22 its broader mission: it was exploring infectious disease testing and tracking projects with international
 23 aid organizations, and it put millions of dollars of resources into customizing and improving its devices
 24 for potential future military use. Over the course of 2016, when Ms. Holmes narrowed the company’s
 25 operational focus at the suggestion of experienced executives and Board members she brought in, the
 26 company returned to being a manageable endeavor, though it then faced other challenges.
 27

28 MS. HOLMES’ SENTENCING MEMORANDUM
 CR-18-00258 EJD

1 * * *

2 The very real assets and commercial operations of Theranos, combined with the serious
 3 complexities of its business, made the company's financial health and upcoming challenges all more
 4 difficult to understand, measure, and communicate—especially for a first-time CEO with vision and
 5 determination but no business experience. One employee who worked at Theranos from 2013 through
 6 2018 describes how Ms. Holmes grew as a leader as she started to understand the challenges that faced
 7 Theranos:

8 I observed Elizabeth mature during this time and develop a deeper appreciation for the
 9 importance and quality of interim milestones towards end objectives. She made necessary
 10 changes that broadened responsibilities and decentralized decision-making while also
 11 holding individual leaders to a higher accountability standard. Elizabeth made difficult
 12 leadership changes in the later stages of the company's life and surrounded herself with
 13 individuals that were proven capable of navigating the organization under such challenging
 14 and complex conditions. While she remained committed to the purpose and vision, she
 15 realized the importance and need to shift the approach and strategy based on changing
 16 assumptions and circumstances.

17 Ex. A at 97 (T. Cooper Ltr. at 2).

18 **3. The Company Retained Substantial Value Even After the Alleged Fraud
 19 Was Revealed.**

20 Although difficult to measure with precision, there is no question that Theranos had substantial
 21 value, both at the time of the investments at issue and after the revelation of the fraud. As discussed
 22 above, *see Section III(A)(3), supra*, Theranos was not a worthless investment after alleged
 23 misstatements were brought to light. To the contrary, the company had valuable intellectual property,
 24 substantial cash and capital goods, and a product with FDA approval for one assay, with more
 25 applications and technology in the pipeline. *See Section III(A)(3), supra*. The fact that Theranos had
 26 and retained substantial value is a mitigating factor with respect to the seriousness of the offense.

27 **4. The Circumstances Show Ms. Holmes To Be a Founder and CEO Deeply
 28 Committed to the Company's Mission, Rather Than Her Own Personal
 Gain.**

29 Ms. Holmes' actions showed her to be a selfless CEO focused on the success of the company and
 30 its mission, and not on increasing her own wealth. As the Court knows, Ms. Holmes did not personally
 31

1 profit from the investments Theranos received, never sold any of her stock, and was, as Dr. Bonanni
 2 described it, a “selfless CEO.” Additionally, Ms. Holmes’ actions in the wake of criticism that began in
 3 late 2015 show a CEO interested in identifying errors, fixing them, and learning from them—not
 4 running from them. She did not flee the enterprise when the company faced criticism. To the contrary,
 5 as described in section III(E), above, Ms. Holmes embarked on a broad, resource-intensive effort to
 6 bring outside voices into Theranos and to identify, acknowledge, and correct errors or missteps, and
 7 went down with the ship when the company shuttered. Ms. Holmes’ extensive efforts in this regard are
 8 relevant to consider when weighing the circumstances of the offense, especially given her youth and the
 9 fact that her role as CEO of Theranos was her first business experience. The fact that Ms. Holmes was
 10 not motivated by personal gain or greed is a mitigating factor under § 3553(a)(2). *See, e.g., United*
 11 *States v. Prosperi*, 686 F.3d 32, 50 (1st Cir. 2012) (affirming district court’s sentence, including based
 12 on finding that the defendants had not “sought to enrich themselves”); *United States v. Connors*, 2007
 13 WL 2955612, at *3 (E.D. Pa. Oct. 9, 2007) (considering as a mitigating factor the fact that the defendant
 14 was “motivated by a desire to save the company and to save the jobs of its employees,” in contrast to
 15 “greed and pure personal gain,” which “are usually the driving force for many, if not most, fraud
 16 offenders”).

17 **5. Because of Their Extreme Focus on Loss, the Guidelines Are Unhelpful in**
 18 **Fashioning a Fair, Just, and Reasonable Sentence.**

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED] But in the event the Court finds the government has proven loss under § 2B1.1,
 23 the Court should decline to impose any sentence primarily driven by the calculation of loss.

24 First, [REDACTED] this is the type of
 25 case where the impact of the loss enhancement means that the Guidelines fail to “provide reasonable
 26 guidance,” and are of no “help to any judge in fashioning a sentence that is fair, just, and reasonable.”
 27 *United States v. Adelson*, 441 F. Supp. 2d 506, 515 (S.D.N.Y. 2006), *aff’d*, 301 F. App’x 93 (2d Cir.
 28

1 2008). “For the small class of defendants... convicted of fraud offenses associated with very large
 2 guidelines loss calculations, the guidelines now are divorced both from the objectives of Section 3553(a)
 3 and, frankly, from common sense. Accordingly, the guidelines calculations in such cases are of
 4 diminished value to sentencing judges.” Frank O. Bowman, III, *Sentencing High-Loss Corporate Insider*
 5 *Frauds After Booker*, 20 Fed. Sent’g Rep. 167, 168 (2008). Across the country, judges seem to agree:
 6 the Sentencing Commission’s own data shows that there is an “increasing divergence between the
 7 average Guidelines minimum and the average sentence actually imposed as loss amount grows.” Mark
 8 H. Allenbaugh, “*Drawn from Nowhere*”: A Review of the U.S. Sentencing Commission’s White-Collar
 9 *Sentencing Guidelines and Loss Data*, 26 Fed. Sent’g Rep. 19, 22 (2013); see Jillian Hewitt, *Fifty*
 10 *Shades of Gray: Sentencing Trends in Major White-Collar Cases*, 125 Yale L. J. 1018, 1025 (2016)
 11 (concluding that review of the post-*Booker* sentencing data “empirically corroborate[d] scholarly
 12 criticism that the loss table often vastly overstates the seriousness of an offense”). [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 Second, more generally, the loss guideline does not bear the weight the Sentencing Guidelines
 17 give it. Under § 2B1.1, in any modern white-collar case, loss has an inordinate and inappropriate effect
 18 on the calculation of a Guidelines sentence that flies in the face of the statutory considerations in 18
 19 U.S.C. § 3553(a). The loss table “frequently produces arbitrary and unduly severe sentences for two
 20 related reasons”: (1) loss is “defined so broadly that it can produce lifelong sentencing ranges for
 21 defendants who neither cause much economic harm nor derive much economic benefit from their
 22 crimes” and (2) “the loss table’s enhancements are so large that, in practice, they dwarf other potentially
 23 more relevant considerations.” Hewitt, 125 Yale L.J. at 1032, 1033. As result, like with narcotics
 24 sentences, “[s]omewhere between 50 and 70 percent of the Sentencing Guidelines calculation . . . is
 25 based on a single factor[.]” Jed S. Rakoff, *Why the Federal Sentencing Guidelines Should Be Scrapped*,
 26 29 Fed. Sent’g Rep. 226, 227 (2017). “But it should be obvious that in a great many, perhaps most,
 27 cases, . . . the amount of the loss does not fairly convey the reality of the crime or the criminal.” *Id.*

28 MS. HOLMES’ SENTENCING MEMORANDUM
 CR-18-00258 EJD

1 “By making a Guidelines sentence turn, for all practical purposes, on this single factor, the . . .
 2 Commission . . . effectively guaranteed that many such sentences would be irrational on their face.”
 3 *United States v. Gupta*, 904 F. Supp. 2d 349, 351 (S.D.N.Y. 2012); *see also United States v. Johnson*,
 4 2018 WL 1997975, at *3 (E.D.N.Y. Apr. 27, 2018); *United States v. Parris*, 573 F. Supp. 2d 744
 5 (E.D.N.Y. 2008). As a result, “[t]he higher the loss amount, the more distorted the guideline’s advice to
 6 sentencing judges.” *United States v. Corsey*, 723 F.3d 366, 380 (2d Cir. 2013) (Underhill, J.,
 7 concurring). These issues are compounded by the fact that the loss Guideline “was not developed by the
 8 Sentencing Commission using an empirical approach based on data about past sentencing practices.” *Id.*
 9 at 379; *see id.* at 380 (describing the history of amendments to the Guideline and noting that “[t]he
 10 history of bracket inflation directed by Congress renders the loss guideline fundamentally flawed”).

11 As Judge Rakoff has observed:

12 Where the Sentencing Guidelines provide reasonable guidance, they are of considerable
 13 help to any judge in fashioning a sentence that is fair, just, and reasonable. But where, as
 14 here, the calculations under the guidelines have so run amok that they are patently absurd
 15 on their face, a Court is forced to place greater reliance on the more general considerations
 16 set forth in section 3553(a), as carefully applied to the particular circumstances of the case
 17 and of the human being who will bear the consequences.

18 *Adelson*, 441 F. Supp. 2d at 515; *see also id.* at 509 (Guidelines place an “inordinate emphasis” on
 19 “putatively measurable quantities, such as . . . the amount of financial loss in fraud cases,” but they have
 20 failed to “explain[] why it is appropriate to accord such huge weight to such factors.”); *Corsey*, 723 F.3d
 21 at 380 (“[T]he low marginal utility of the guideline in this very high intended loss case should have
 22 prompted greater, not lesser, reliance on the section 3553(a) factors other than the Guidelines.”). Ms.
 23 Holmes urges the Court to focus on the § 3553(a) factors that allow the Court to engage in the “uniform
 24 and constant” exercise “in the federal judicial tradition” of “consider[ing] every convicted person as an
 25 individual and every case as a unique study in the human failings that sometimes mitigate, sometimes
 26 magnify, the crime and the punishment to ensue.” *Koon v. United States*, 518 U.S. 81, 113 (1996).

27 **B. Ms. Holmes’ Personal History and Characteristics Strongly Support Leniency.**

28 “[I]f ever a [person] is to receive credit for the good [she] has done, and [her] immediate conduct
 29 assessed in the context of [her] overall life hitherto, it should be at the moment of [her] sentencing, when

[her] very future hangs in the balance." *Adelson*, 441 F. Supp. 2d at 513-14. Described by over [130] different letters as a compassionate, honest, and humble woman with much to give the world and a deep commitment to doing so, Ms. Holmes' personal history and characteristics (outlined in section II, above) strongly counsel against a lengthy incarceration. "Anyone who knows Liz recognizes that she is a genuine and generous person who cares deeply for those around her," someone to rely on "for an honest opinion, words of encouragement, and a selfless interest in [their] life and well-being." Ex. A at 198 (N. Mason Ltr.).

Ms. Holmes asks the Court to consider the words of those who know her when weighing the importance of § 3553(a)(1) in this case, including on the following points:

- Ms. Holmes is no danger to the public. She has no criminal history, has a perfect pretrial services compliance record, and is described by the people who know her repeatedly as a gentle and loving person who tries to do the right thing.
- Ms. Holmes is deeply devoted to her partner and son, and plays an integral and irreplaceable role in their lives.
- Ms. Holmes has lived her life with a purpose to change the world for the better, on scales large and small. These basic qualities motivated her in founding and leading Theranos, and they continue to shine in the way she lives her life today. She is the person her friends turn to when they need support, regardless of what is going on in her life.
- Ms. Holmes lives with this kindness, purpose, and selflessness despite significant personal trauma that occurred before and during the time period of the offense, and from which she is still recovering.
- Friends and family note with admiration that she has handled her indictment and trial with grace and without expressing and indeed discouraging ill-will towards the prosecutors who seek to incarcerate her, the media that has vilified her, or those who have been unwilling to stand by her. E.g., Ex. A at 121 (W. Evans Ltr. at 1); *id.* at 157 (J. Hamilton Ltr. at 2).

Additionally, the letters are striking in showing how Ms. Holmes wholeheartedly commits to the things that matter to her—today, the people she loves and the service work she cares about.

MS. HOLMES' SENTENCING MEMORANDUM
CR-18-00258 EJD

Courts in other cases have exercised their discretion to impose non-Guidelines sentences based on the personal characteristics of the defendant. *E.g., United States v. Gupta*, 904 F. Supp. 2d 349, 353 (S.D.N.Y. 2012) (premising downward variance, in part, on defendant’s “big heart and helping hand, which he extended without fanfare or self-promotion, to all with whom he came in contact”); *Adelson*, 441 F. Supp. 2d at 513 (premising downward variance, in part, on letters from “persons from all walks of life . . . attesting, from personal knowledge, to [defendant’s] good works and deep humanity,” his “generosity of spirit,” and his “integrity and generosity”). Similar considerations are present here. Ms. Holmes’ mother “beg[s] you to see her goodness, her unique circumstances and her promise.” Ex. A at 39 (N. Holmes Ltr. at 10).

C. Incarceration Is Not Necessary to Afford Adequate Deterrence or Protect the Public.

The needs “to afford adequate deterrence to criminal conduct” and “protect the public from further crimes of the defendant,” 18 U.S.C. § 3553(a)(2)(B)-(C), are not served by a custodial sentence for Ms. Holmes.

1. Incarceration Is Not Necessary for Specific Deterrence.

Incarceration is not necessary to either protect the public from Ms. Holmes or to deter her from committing future offenses.²³ Ms. Holmes is not a danger to society. She has been out of custody, with a perfect pretrial services record, for more than four years. █ And there is no reason to believe she would commit another fraud—or that she will ever be in a position to do so. Ms. Holmes has readily and repeatedly acknowledged the many mistakes she made while serving as CEO of Theranos—in interviews, *see n.17, supra*; to the SEC, Ex. T (SEC Tr.) at 347:12-13, 353:12-13, 353:19-22, 620:22-621:2, 689:19-20, 697:2-3; on the witness stand in front of the jury, *e.g.*, Holmes 11/30/21 Tr. 8005:13-15; and to friends and family, *see p. 47, supra*.

“Elizabeth understands what has been lost.” Ex. A at 129 (Dr. Evans Ltr. at 2). Ms. Holmes has suffered the consequences of the offense daily for years, in ways large and small. She has been formally

²³ Social science research makes clear that “across all offenders, prisons do not have a specific deterrent effect.” Francis T. Cullen et al., *Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science*, 91 Prison J. 48S, 50S, 60S (2011).

1 penalized for her mistakes in other forums—through the administrative state by CMS and by this Court
 2 in connection with her settlement with the SEC. Ms. Holmes spent her entire adult life building
 3 Theranos until its collapse—a personal and public failure she feels deeply. *E.g.*, Ex. A at 25, 26 (C.
 4 Holmes Ltr. at 13, 14). Beyond that failure and loss of this company she loved so much, eight years of
 5 investigations and lawsuits have taken their toll. Having never cashed in on the value of Theranos to her
 6 own benefit, Ms. Holmes has incurred substantial debt from which she is unlikely to recover. *See* [REDACTED]
 7 [REDACTED] Ex. A at 243 (D. Sokol Ltr. at 6). She is unable to get a job and was prevented from
 8 investing what money she did have when her trading accounts were repeatedly closed by financial
 9 institutions as a result of her indictment. [REDACTED] She has lost personal friendships to the process
 10 surrounding investigations, lawsuits, and lawyers, Ex. A at 6-7 (B. Evans Ltr. at 6-7), and it is difficult
 11 to make new ones, *id.* at 274 (C. Zygourakis Ltr. at 2). Her conviction also brings with it so-called
 12 “civil death,” the operation of the “[m]yriad laws, rules, and regulations” which prevent the reintegration
 13 of offenders into society, even after they have served their sentence. *United States v. Nesbeth*, 188 F.
 14 Supp. 3d 179, 180 (E.D.N.Y. 2016) (internal quotation marks omitted); *id.* at 184-86 (describing the
 15 “nearly 50,000 federal and state statutes and regulations that impose penalties, disabilities, or
 16 disadvantages on convicted felons” covering a “range of subject matter” that “can be particularly
 17 disruptive to an ex-convict’s efforts at rehabilitation and integration into society”).

18 Moreover, the incessant drum of media criticism has ensured Ms. Holmes will be punished for
 19 the rest of her life. The Court is well aware of the unusually intense media attention on this case before,
 20 during, and after Ms. Holmes’ trial. The coverage of her as a person is universally negative. Portrayals
 21 of Ms. Holmes are at best unflattering caricature and at worst dehumanizingly cruel. Almost all depict
 22 her—inaccurately, as the scores of letters submitted with this filing make clear—as unfeeling and self-
 23 absorbed. Even putting aside the fact that her appearance and voice are considered appropriate for
 24 mockery (a gender-specific punishment), her worst personal traumas have been treated as appropriate
 25 for derision as well. Following Ms. Holmes’ testimony about the psychological and sexual abuse she
 26 endured at the hands of Mr. Balwani, one outlet ran a *humor* column in which the author wondered
 27 whether she would have been able to comply with Mr. Balwani’s demands. Alexandra Petri, “Opinion:
 28 MS. HOLMES’ SENTENCING MEMORANDUM
 CR-18-00258 EJD

I tried the Elizabeth Holmes schedule, and here is how it went," *Wash. Post* (Dec. 3, 2021), available at <https://www.washingtonpost.com/opinions/interactive/2021/elizabeth-holmes-schedule-tried-myself/>. Ms. Holmes will never be able to seek another job or meet a new friend without the negative caricature acting as a barrier. She worries about how her notoriety affects friends and family—and those effects are meaningful. *See, e.g.*, Ex. A at 7-8 (B. Evans Ltr. at 7-8), 38 (N. Holmes Ltr. at 9), 153 (C. Gualy Ltr. at 2), 122 (W. Evans Ltr. at 2). Several letters describe how Ms. Holmes avoids friends' life events and social occasions because she does not want to be a distraction. "I cannot overemphasize the degree to which Liz is ostracized by people who do not know her and the degree to which this social isolation has affected Liz, Billy, and their families." Ex. A at 274 (C. Zygourakis Ltr. at 2).

Ms. Holmes has also suffered a substantial loss of privacy, despite her best attempts to stay out of the public eye and to respect the legal process around this case. Mr. Evans describes the precautions he and Ms. Holmes have taken in furtherance of their own privacy and safety, from dressing in hats and glasses to using P.O. boxes for mail to living in private buildings or a secluded location. Yet members of the press have taken dramatic steps to identify and publish Ms. Holmes' address, leading to cameras, visits from the press and the public (as well as a recent visit from a key government witness), and threats. Ex. A at 7 (B. Evans Ltr. at 7). Ms. Holmes and Mr. Evans have moved several times as a result. *Id.*; [REDACTED] Threats are also ever-present online.

These forms of punishment, including the extrajudicial collateral consequences going well beyond "civil death" that Ms. Holmes will endure for the rest of her life regardless of her sentence, make clear why incarceration is unnecessary and unhelpful in achieving specific deterrence in this case.

2. Incarceration Is Not Necessary for General Deterrence.

Nor does incarceration of Ms. Holmes serve the goal of general deterrence of crime. Section 3553(a)(2)(B) "does not require the goal of general deterrence be met through a period of incarceration." *United States v. Edwards*, 595 F.3d 1004, 1016 (9th Cir. 2010) (not unreasonable for district court to reject prison sentence to promote general deterrence; defendant sentenced to five years of probation with seven months of home confinement on Guidelines range of 27-33 months); *see also* S. Rep. No. 98-225, at 92 (1983) ("It may very often be that release on probation under conditions designed to fit the

1 particular situation will adequately satisfy any appropriate deterrent or punitive purpose.”). This makes
 2 sense. As the Department of Justice recognizes: “Sending an individual convicted of a crime to prison
 3 isn’t a very effective way to deter crime.” United States Department of Justice National Institute of
 4 Justice, *5 Things About Deterrence* (2016), at 1; *see also* Mirko Bagaric, *A Rational Theory of*
 5 *Mitigation and Aggravation in Sentencing: Why Less Is More When It Comes to Punishing Criminals*,
 6 62 Buff. L. Rev. 1159, 1205 (2014) (“[D]eterrence properly informs sentencing only to the extent that it
 7 requires a hardship to be imposed for criminal offending. It does not require a particularly burdensome
 8 penalty, merely one that people would seek to avoid.”). While some courts take the view that some
 9 period of incarceration serves the goal of general deterrence, “there is a considerable evidence that even
 10 relatively short sentences can have a strong deterrent effect on prospective ‘white collar’ offenders.”
 11 *Adelson*, 441 F. Supp. 2d at 514; *see* Richard Frase, *Punishment Purposes*, 58 Stanford L. Rev. 67, 80
 12 (2005) (“White-collar and regulatory offenders are more likely to be deterred, even by selective
 13 enforcement and modest penalties; such offenders have many lawful alternatives and much to lose from
 14 being convicted, regardless of the penalty.”); Elizabeth Szockyj, *Imprisoning White-Collar Criminals?*,
 15 23 S. Ill. Univ. L. J. 485, 493 (1999) (finding empirical research on general deterrence “inconsistent”).
 16 The intense media scrutiny on this matter does not change the dynamic. *See* Biz Carson, “Guilty or not,
 17 the Elizabeth Holmes verdict won’t change Silicon Valley,” *Protocol* (Dec. 21, 2021), *available at*
 18 <https://www.protocol.com/theranos-elizabeth-holmes-verdict-impact> (“For Holmes, the verdict will have
 19 obvious personal consequences, including the threat of up to 20 years of prison. But for the rest of tech,
 20 experts outside the Silicon Valley bubble say it’s unlikely there will be some dramatic revelation or
 21 change in behavior, regardless of the outcome.”).²⁴

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23

24

25

26 24 [REDACTED]

27 [REDACTED]

28 MS. HOLMES’ SENTENCING MEMORANDUM
CR-18-00258 EJD

1 **D. Just Punishment and Respect for the Law Are Not Served by a Lengthy
2 Incarceration.**

3 Section 3553(a)(2)'s goals "to promote respect for the law" and "to provide just punishment for
4 the offense" are likewise not achieved by the incarceration of Ms. Holmes. "Where offenders appear to
5 have been unfairly singled out, respect for the law and law enforcement suffers." Frase, *Punishment*
6 *Purposes*, 58 Stanford L. Rev. at 80.

7 The prosecutorial and cultural focus on punishing Ms. Holmes stands out. As numerous letters
8 observe, the decision to prosecute Ms. Holmes and the associated vilification of her stands in stark
9 contrast to the treatment of other prominent entrepreneurs who have been accused in media of fraud.
10 See Ex. A at 131 (J. Ewing Ltr. at 2); see also id. at 221 (J. Pfeffer Ltr. at 2). Take Adam Neumann, the
11 founder of WeWork, who was accused of diverting millions of corporate assets for personal gain and
12 walked away from his first company with hundreds of millions of dollars. Mr. Neumann recently
13 received a *\$350 million investment* in his next venture.²⁵ Even observers who believe Ms. Holmes was
14 rightly the subject of prosecution cannot help but notice the discrepant treatment.²⁶ And within the
15 Theranos story, Ms. Holmes has borne the brunt of the vitriol despite the fact that many factors—some
16 failures of judgment on her part, some simply the operational hurdles of a complex endeavor, and some
17 no doubt the missteps of others—contributed to Theranos' failures. The government's decision to
18 charge Ms. Holmes personally with wire fraud in connection with Theranos' laboratory practices is one
19 example of that singling-out, given the regulatory and personnel structures that governed Theranos'
20 laboratory operations. Its attempt to paint Theranos' trade secrets practices as nefarious when such
21 practices are commonplace and required by law is another. See, e.g., 1 Melvin F. Jager, *Trade Secrets*

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23
24 ²⁵ See Sean Harper, "Adam Neumann Gets A \$350 Million Do-Over and Diverse Entrepreneurs
25 Barely Get a Start," *Forbes* (Aug. 16, 2022), available at
26 <https://www.forbes.com/sites/shaunharper/2022/08/16/entrepreneurial-inequity-is-exacerbated-with-new-investment-into-failed-wework-founder-adam-neumann/?sh=622add8243c5> (last accessed Nov. 8,
2022).

27 ²⁶ Ellen Pao, "The Elizabeth Holmes Trial Is a Wake-Up Call for Sexism in Tech," *New York*
28 *Times* (Sept. 15, 2021).

1 Law §§ 5.21, 5.26, 13.3; 1 Roger M. Milgrim & Eric E. Benson, Milgrim on Trade Secrets § 1.04
 2 (2020).

3 **E. Section 3553(a)(6) Supports a Downward Variance from the Guidelines.**

4 The “need to avoid unwarranted sentence disparities among defendants with similar records who
 5 have been found guilty of similar conduct” counsels in favor of a below-Guidelines sentence. 18 U.S.C.
 6 § 3553(a)(6). In this district, the majority of defendants convicted of crimes for which the main
 7 Guideline is § 2B1.1 have received below-Guidelines sentences. Exs. Y-1, Y-2 (Sentencing
 8 Commission Data Capture). From 2015 through 2021, in this district, the median sentence for a
 9 defendant convicted of fraud, with no criminal history, and in Zone D of the guidelines received a
 10 sentence that included a term of incarceration of 24 months. Ex. Z (Sentencing Commission Data
 11 Capture). The national statistics are similar. Exs. AA-1, AA-2 (Sentencing Commission Data Export);
 12 Ex. BB (Sentencing Commission Data Capture).

13 Even if the Court determines—over Ms. Holmes’ objection—that the government has proven a
 14 substantial loss, the Court would be in good and abundant company in varying downward from the
 15 Guidelines range. Given the numerous and duplicative enhancements that apply to cases driven by
 16 § 2B1.1, courts frequently sentence defendants with high loss figures and no criminal history to
 17 substantially below-Guidelines sentences. For example:

- 18 • In February 2021, the COO of a publicly traded biopharmaceutical company was sentenced after
 19 a trial guilty verdict on one count of wire fraud to 12 months in custody in light of the ongoing
 20 economic hardship he would face in the future, his general good works, his comparatively lower
 21 culpability than his codefendant, and the need for some prison time to address general
 22 deterrence; the “[b]izarre, barbaric,” and “absurd” Guidelines range was the statutory maximum
 23 of 20 years (on an initial range of 262 to 327 months). *United States v. Taylor*, 1:19-cr-00850-
 24 JSR (S.D.N.Y.), Sentencing Tr., Dkt. 157, at 2.
- 25 • In November 2019, a hedge fund trader who was found guilty after trial of overinflating the
 26 hedge fund’s assets by \$100 million was sentenced to 40 months’ imprisonment; the government
 27
 28

1 and the Probation Office had calculated a Guidelines range of 168 to 210 months. *See United*
 2 *States v. Shor*, 1:18-cr-00328 (S.D.N.Y.), Dkt. Nos. 297, 301.

- 3 • In November 2018, an individual who was convicted of securities fraud after trial in the District
 4 of Massachusetts, was sentenced to a term of six months' imprisonment where the government
 5 had calculated a Guidelines prison sentence of 63 to 78 months. *See United States v. Wang*, 1:16-
 6 cr-10268 (D. Mass.), Dkt. Nos. 346, 429.
- 7 • In October 2018, a former State Street executive who was convicted after trial of securities fraud,
 8 was sentenced to a term of 18 months' imprisonment; the government had calculated a
 9 Guidelines sentence of 14 to 17 years. *See United States v. McClellan*, 1:16-cr-10094 (D. Mass.),
 10 Dkt. Nos. 517, 520.
- 11 • In October 2018, a serial fraudster who committed additional crimes while awaiting sentencing
 12 after his fraud guilty plea, was sentenced to 72 months' imprisonment where the government
 13 calculated a Guidelines sentence of 188 to 235 months and the government requested a sentence
 14 of 15 or more years. *See United States v. McFarland*, 1:17-cv-00600 (S.D.N.Y.), Dkt. Nos. 63,
 15 68.
- 16 • In May 2018, a defendant convicted at trial of four conspiracies, including conspiracy to commit
 17 bank fraud, and facing a PSR Guidelines range of life and a Court-determined Guidelines range
 18 of 97 to 121 months was sentenced to 32 months based on his otherwise exemplary life and
 19 relative role. *United States v. Atilla*, 1:15-cr-00867-RMB (S.D.N.Y.), Sentencing Tr., Dkt. 520.

20 Even in cases where the conduct at issue has centered around personal greed, defendants have received
 21 substantially below-Guidelines sentences based on the totality of the § 3553(a) factors. For example, in
 22 *United States v. Tuzman*, No. 1:15-cr-00536 (S.D.N.Y.), after a hard-fought case and trial, defendant
 23 Kaleil Tuzman was convicted of multiple different securities fraud and wire fraud schemes related to the
 24 publicly-traded company he founded and of which he served as CEO. The court found that the frauds
 25 were motivated by the defendant's desire to make the company an attractive acquisition target, "sell the
 26 company[,] and become fantastically wealthy." Sentencing Tr., Dkt. No. 1216, at 62. The guidelines
 27 range was 210-262 months. Based on his service work while on pretrial release, the lack of a criminal

1 record, and severe trauma he experienced in a Colombian prison after his arrest, the court sentenced him
 2 to time served. *Id.* at 66-67. In *United States v. Rowan*, No. 1:16-cr-10343 (D. Mass.), defendant
 3 Joseph Rowan was convicted after trial with respect to his role in a racketeering conspiracy to bribe
 4 doctors to prescribe Insys Therapeutics Inc.’s fentanyl spray and to defraud insurance companies. The
 5 government and probation calculated his Guidelines range at 324-405 months, and the government
 6 sought a sentence of 10 years. Dkt. No. 1064, at 1. The court calculated the Guidelines range at 135-
 7 168 months and imposed a sentence of 26 months’ imprisonment, noting that the defendant had
 8 otherwise lived a “good life and a respectful life” marked by “real decency.” Sentencing Tr., Dkt. No.
 9 1167, at 40.

10 Ultimately, the touchstone of this factor is the idea of treating defendants who are found to have
 11 committed similar crimes similarly. It is nearly impossible to do that here given the unique
 12 circumstances of the offense—the sophisticated investors investing in a non-public, novel technology
 13 company with limited history seeking to change a complex, established industry and the indisputable
 14 value of that company regardless of the offense conduct—and of Ms. Holmes—her intent to do good,
 15 her lack of greed, her commitment to fixing her errors, and her positive personal qualities. “Whereas
 16 apples and oranges may have but a few salient qualities, human beings in their interactions with society
 17 are too complicated to be treated like commodities, and the attempt to do so can only lead to bizarre
 18 results.” *United States v. Gupta*, 904 F. Supp. 2d 349, 350 (S.D.N.Y. 2012).

19 **F. Section 3553(a)(7) Does Not Counsel In Favor of Incarceration.**

20 The potential need for restitution in this case should not weigh in favor of incarceration, for at
 21 least three reasons. First, this is not a case where restitution would be required to return vulnerable
 22 victims to their proper status. Theranos did not solicit investments from members of the general
 23 investing public or from vulnerable and unsophisticated parties. To the contrary, Theranos’ investors
 24 were required to represent that they were sophisticated, that they understood the limited operating
 25 history and uncertain future of the company, and that they could afford to lose their entire investment
 26 without suffering financial harm. Second, although she did not personally benefit from the investments,
 27 Ms. Holmes took dramatic and meaningful steps to give value to her investors following the *Wall Street*
 28

MS. HOLMES’ SENTENCING MEMORANDUM
 CR-18-00258 EJD

1 *Journal's* investigation—including several at her own personal expense and risk. Those included
 2 offering to give up ownership, actually giving some of her shares to investors, and settling with those
 3 who sought to bring civil claims; transferring her liability insurance coverage proceeds back to Theranos
 4 in order to conserve company assets, rather than saving that policy for her own future legal fees; and
 5 involving investors (including RDV) in decisions such as whether to agree to the Fortress loan and
 6 whether to allow additional investments in the company to support its work or instead force bankruptcy.
 7 Ex. A at 74 (F. Bonanni Ltr. at 3). Third, Ms. Holmes does not have the assets to pay restitution to any
 8 investors, [REDACTED], and, despite her sincere desire to do so, *see* Ex. A at 203-04 (J. Moalli
 9 Ltr. at 1-2), faces likely insurmountable hurdles in acquiring sufficient wealth to do so in light of her
 10 conviction and notoriety.²⁷

11 **G. Ms. Holmes' Capacity to Do Good Supports a Sentence That, In Part, Orders Ms.**
Holmes to Engage in Significant Community Service.

12 Despite her mistakes, Ms. Holmes' personal characteristics—including her deeply held desire to
 13 make the world a better place, her self-reflection, her determination and work ethic, and her visionary
 14 and creative mind—leave her with capacity and potential to positively contribute to the world. While
 15 the over 130 letters attached to this memorandum are consistent in believing that “society is better off
 16 with her in it,” Ex. A at 95 (A. & S. Kiessig Ltr.), it is noteworthy how many different opportunities
 17 there are for Ms. Holmes to be a force for good. Whether it is working with individual survivors of
 18 sexual assault, teaching the lessons of her own errors, inventing new technologies, developing projects
 19 that have the potential to help solve social health problems, or something else entirely, the chorus of
 20 letters emphasize a belief among those who know her that society’s best use of Ms. Holmes is “out in
 21 the world working on the next thing to improve the lives of others.” Ex. A at 111 (M. Downes Ltr.); *see*
 22 *id.* at 74-75 (F. Bonanni Ltr. at 3-4) (“Her lessons learned through success and failure are precious.
 23 They will be invaluable if shared with the broader community of young entrepreneurs.”), 50 (I. Aboyeji
 24 Ltr. at 3 (“I believe America and indeed the world has a lot to lose by keeping an entrepreneur like
 25

26 ²⁷ The Court cannot use Ms. Holmes’ inability to pay to support a longer sentence. *See United*
 27 *States v. Burgum*, 633 F.3d 810, 814 (9th Cir. 2011) (“[I]t is well established that the Constitution
 28 forbids imposing a longer term of imprisonment based on a defendant’s inability to pay restitution.”).

1 Elizabeth Holmes behind bars instead of out in the world helping other young entrepreneurs learn from
 2 her painful experience at Theranos.”), 163 (Christian Holmes Ltr. at 2) (“While she is brutally self-
 3 aware of her situation and the uncertainty of her future, she focuses on how she can possibly find a path
 4 in her coming years to bring some good to others from all she’s learned and weathered.”), 113 (T.
 5 Draper Ltr. at 2) (“Her vision for healthcare was only partially portrayed in her efforts at Theranos, and
 6 her ideas could save millions of lives over the course of the next few decades. Restraining her would be
 7 a travesty.”), 203 (J. Moalli Ltr. at 1) (“I am unequivocally certain that, given the space and opportunity,
 8 she is such a prolific inventor that she will continue to create technology that will greatly benefit
 9 humankind.”). Dr. Foege, the Presidential Medal of Freedom-winning former Director of the CDC,
 10 expresses his hope that the Court is “able to develop a creative approach that permits her to use her
 11 abilities to provide public benefits. She could not make those contributions while incarcerated.” Ex. A
 12 at 137 (W. Foege Ltr. at 3). The letters are replete with friends and former colleagues who would
 13 support her efforts. “Elizabeth Holmes has so much more to give.” Ex. A at 58 (R. & A. Bergeron Ltr.
 14 at 1). Whatever combination of opportunities to make a difference Ms. Holmes takes up (pursuant to
 15 Court order or her own initiative), Ms. Holmes’ personal history makes clear she will approach them
 16 with total dedication.

17 One meaningful approach would permit Ms. Holmes to continue the work she has done over the
 18 past several months volunteering in support of sexual assault survivors. [REDACTED] welcomes Ms.
 19 Holmes’ continued services helping “the ever-increasing number of callers on the statewide sexual
 20 assault helpline” and “research[ing] gaps in services and resources for victims, while working to
 21 increase access to services throughout the state.” *Id.* at 47 ([REDACTED] Ltr. at 2). Requiring Ms. Holmes to
 22 continue these efforts as part of her sentence would be a better use of society’s resources than
 23 incarcerating her. Such an approach would allow her to fulfill the promise Senator Booker, a champion
 24 of criminal justice reform and restorative justice, sees: “I believe that Ms. Holmes has within her a
 25 sincere desire to help others, to be of meaningful service, and possesses the capacity to redeem herself. . .
 26 . . I pray that in the coming years she is able to fulfill her desires and more humble hopes to be of
 27 meaningful service to the world.” Ex. A at 77 (C. Booker Ltr. at 2).

28 MS. HOLMES’ SENTENCING MEMORANDUM
 CR-18-00258 EJD

CONCLUSION

2 “In the end we have an intelligent, fearless woman who took on a huge project that should have
3 changed the world and nearly succeeded.” Ex. A at 262 (D. Tschirhart Ltr. at 2). “[N]o public good
4 will be served by incarcerating Ms. Holmes. She poses no danger to anyone. She openly acknowledges
5 her business mistakes and she did not benefit in any material way notwithstanding the opportunity to do
6 so. Her suffering, including among other things extreme public ignominy, financial bankruptcy and the
7 terrifying prospect of incarceration while the mother of a new baby, provides more than ample
8 deterrence to others.” Ex. A at 243 (D. Sokol Ltr. at 6). “We need more people like Elizabeth whose
9 unique combination of intelligence, grit and compassion makes this world a better place.” Ex. A at 124
10 (G. Evans Ltr. at 2). The Court’s charge is to fashion a sentence that is “sufficient, but not greater than
11 necessary,” to serve the purposes of sentencing in this case. 18 U.S.C. § 3553(a). Although the defense
12 views incarceration as unnecessary to meet that directive, if incarceration is deemed necessary, a period
13 of incarceration of eighteen months or less followed by supervised release that includes a community
14 service condition will more than capture the retributive and deterrent goals of sentencing while ensuring
15 that our society’s resources are not wasted incarcerating someone who poses no danger to it, who in the
16 eyes of the public will never be truly free of even the counts on which she has been exonerated, and who
17 will devote her life to meaningfully serving her fellow human beings. As one friend says: “I am
18 confident that on the other side of this Elizabeth will do amazing things for society with her talents and
19 boundless passion for changing the world for the better, and I can’t wait to see how she rewards your
20 possible leniency.” Ex. A at 144 (K. Gavrieli Ltr. at 2).

21 | DATED: November 10, 2022

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28 MS. HOLMES' SENTENCING MEMORANDUM
CR-18-00258 EJD

CERTIFICATE OF SERVICE

I hereby certify that on November 10, 2022, this under seal filing was delivered to the Court via ECF and by email and secure file transfer on government counsel of record.

/s/ Kevin Downey
Kevin Downey
Attorney for Elizabeth Holmes