

1 JOHN D. CLINE (CA State Bar No. 237759)
600 Stewart Street, Suite 400
2 Seattle, WA 98101
Telephone: (360) 320-6435
3 Email: cline@johndclinelaw.com

4 KEVIN M. DOWNEY (Admitted Pro Hac Vice)
5 LANCE A. WADE (Admitted Pro Hac Vice)
AMY MASON SAHARIA (Admitted Pro Hac Vice)
6 KATHERINE TREFZ (CA State Bar No. 262770)
WILLIAMS & CONNOLLY LLP
7 680 Maine Avenue, S.W.
8 Washington, DC 20024
Telephone: (202) 434-5000 | Facsimile: (202) 434-5029
9 Email: KDowney@wc.com; LWade@wc.com; ASaharia@wc.com; KTrefz@wc.com

10 Attorneys for Defendant ELIZABETH A. HOLMES

11
12
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’ RESPONSE TO UNITED**
20 ELIZABETH HOLMES and) **STATES’ SENTENCING MEMORANDUM**
RAMESH “SUNNY” BALWANI,) Hon. Edward J. Davila
21 Defendants.)
22)
23)
24)
25)

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION	1
I. THE GOVERNMENT URGES THE COURT TO ADOPT AN ERROR-LADEN LOSS CALCULATION.	2
A. The Government Must Prove the Fraud Was the But-For and Proximate Cause of Loss and Has Not Done So.	2
B. The Loss Should Not Be Measured by the Entirety of the Investment.	5
II. THE COURT SHOULD NOT SENTENCE MS. HOLMES BASED ON THE ACQUITTED PAYING PATIENT CONSPIRACY	7
A. Acquitted Conduct Should Not Be Used to Sentence Ms. Holmes.	7
B. The Government Continues to Present the Patient Testing Issues in an Incomplete and Misleading Way.	7
C. The PSR Does Not Recommend an Enhancement for Serious Risk of Injury and the Court Should Not Adopt that Enhancement	9
III. MS. HOLMES UNDERTOOK A GENUINE REFORM OF THERANOS.	10
IV. THE GOVERNMENT’S ASSESSMENT OF THE § 3553(A) FACTORS DOES NOT FAIRLY CAPTURE THE CONSIDERATIONS APPLICABLE HERE.	10
A. The Seriousness of the Offense Does Not Support a 15-Year Sentence.	10
B. A Lengthy Prison Sentence Does Not Serve Specific or General Deterrence.	11
C. The Comparator Cases the Government Identifies Do Not Support Its Arguments	12
V. THE PSR CORRECTLY CONCLUDES MS. HOLMES DOES NOT HAVE THE ASSETS TO PAY A FINE.	13
CONCLUSION	13

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

1

2

3

4 *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005)2

5 *United States v. Bell*, 808 F.3d 926 (D.C. Cir. 2015)7

6 *United States v. Berger*, 587 F.3d 1038 (9th Cir. 2009)2, 3

7 *United States v. Bryson*, 101 F. Supp. 3d 147 (D. Conn. 2015)5

8 *United States v. Byors*, 586 F.3d 222 (2d Cir. 2009)5

9 *United States v. Coleman*, 370 F. Supp. 2d 661 (S.D. Ohio 2005).....7

10 *United States v. Hussain*, 2019 WL 1995764 (N.D. Cal. May 6, 2019).....6

11 *United States v. Laurienti*, 611 F.3d 530 (9th Cir. 2010)4

12 *United States v. Lonich*, 23 F.4th 881 (9th Cir. 2022)2

13 *United States v. McClinton*, 23 F.4th 732 (7th Cir. 2022)7

14 *United States v. Petty*, 982 F.2d 1365 (9th Cir. 1993)4, 8

15 *United States v. Pimental*, 367 F. Supp. 2d 143 (D. Mass. 2005)7

16 *United States v. Ponce*, 51 F.3d 820 (9th Cir. 1995)8

17 *United States v. Skilling*, 4:04-cv-00025-2 (S.D. Tex. Oct. 23, 2006)12

18 *United States v. Turk*, 626 F.3d 743 (2d Cir. 2010).....5

19 *United States v. Zolp*, 479 F.3d 715 (9th Cir. 2007).....5, 6

20

OTHER AUTHORITIES

21

22 18 U.S.C. § 3553(a)10, 11, 14

23 Fed. R. Crim P. 459

24 Local Criminal Rule 32-5(b).....9

25 U.S.S.G. § 2B1.1(b)(16)9

26

27

INTRODUCTION

1
2 The government asks the Court to imprison Ms. Holmes on purportedly “relevant” conduct that
3 it has not proven and on constructions of the Guidelines and statutory factors that are inconsistent with
4 the law. If adopted, this request would lead to an erroneous and unjust Guidelines calculation. In order
5 to enhance Ms. Holmes’ Guidelines calculation on the total amount invested by any investors, the
6 government must prove by clear and convincing evidence that the fraud caused the loss of that entire
7 amount. This requires proof that the misrepresentations were the but-for cause of the investment and
8 proof that the identified amount of the loss occurred and was proximately caused by the fraud. The
9 government has not done so, whether by clear and convincing evidence or even a preponderance of the
10 evidence. Indeed, for many of the investors, the government presents no evidence at all regarding the
11 investment other than the fact there was an investment in Theranos and the amount. It has failed to
12 carry its burden on loss.

13 The statutory factors counsel a different sentence than the government recommends. This case
14 and this defendant are nothing like the frauds driven by greed the government cites in favor of a lengthy
15 incarceration. Ms. Holmes advanced health care accessibility through Theranos; she built a real
16 company with real value; she did not cash in her stock despite opportunities to do so; she acknowledged
17 and sought to address the many errors that she and others at the company made; and she has made
18 efforts outside Theranos to help others.

19 Ms. Holmes urges the Court to look skeptically at the government’s framing of the events and its
20 arguments, which rely on facts that the government chose not to test at trial. As the scores of letters
21 from people who know Ms. Holmes make clear, the government’s caricature of Ms. Holmes does not
22 reflect who she really is. Additional letters received since Ms. Holmes’ initial filing, attached as Exhibit
23 A-1, reiterate this point. Professor Channing Robertson explains:

24 Over the past twenty years I have spent hours upon hours with Elizabeth Holmes. Her
25 attributes of compassion for others, her hope to make this a better world, her empathy for
26 her teams at Theranos while expecting the best from them, her desire to give and not take,
27 all combine to imbue her with qualities that inspired many young scientists and engineers
28 to join with her in a crusade that could have, and would have improved the quality of life
for all.

1 Ex. A-1 at 3 (C. Robertson Ltr. at 3). The government fails to see Ms. Holmes’ humanity and refuses to
2 credit her positive qualities. The Court should not follow suit when it sentences her.

3 **I. THE GOVERNMENT URGES THE COURT TO ADOPT AN ERROR-LADEN LOSS**
4 **CALCULATION.**

5 The government asks the Court to add 26 to 30 levels to Ms. Holmes’ offense level based on an
6 incorrect standard that infects its entire approach and inserts error into the Guidelines calculation. The
7 Court should decline this invitation. The government’s approach to loss—which simply assumes that all
8 C-1 and C-2 investments constitute the relevant loss—suffers from two fundamental problems. First,
9 the government must prove that fraud caused each loss on an investment-by-investment basis. And,
10 second, the government cannot use the entire investment as the measure of loss because Theranos was a
11 legitimate company that retained substantial value even after any fraud was revealed.

12 **A. The Government Must Prove the Fraud Was the But-For and Proximate Cause of**
13 **Loss and Has Not Done So.**

14 Contrary to the government’s suggestion, *see* Gov. Sent’g Mem., Dkt. 1649 at 16, there is no
15 question that the government bears the burden of proving that the offense conduct caused the loss it
16 seeks to use to increase Ms. Holmes’ sentence. The Court can find loss only if the government proves
17 that the offense conduct (here the fraudulent misstatements) was both the but-for and proximate cause of
18 that loss. The Ninth Circuit reiterated this requirement just this year in *United States v. Lonich*, a wire
19 fraud case. 23 F.4th 881, 916-17 (9th Cir. 2022) (“Applying this principle, we have vacated sentences
20 when the government failed to produce sufficient evidence to show proximate or but-for cause for
21 asserted loss amounts.”). *United States v. Berger*, 587 F.3d 1038 (9th Cir. 2009), which the government
22 relies on to suggest that it does not have to prove that the fraud caused the loss, Gov. Sent’g Mem., Dkt.
23 1649 at 16, is not to the contrary. There, the Ninth Circuit declined to impose the civil securities
24 standard stated in *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 346-47 (2005). *Berger*, 587

1 F.3d at 1043-45.¹ But the Ninth Circuit reiterated that the court must find that the fraud was a but-for
2 and proximate cause of the loss. *Id.* at 1043.²

3 The government has not proven that the fraud was a but-for cause of loss—i.e., that investors
4 relied on a misstatement to make their investments. The government primarily relies on a spreadsheet
5 outlining purported C-1 and C-2 investments that provides no information as to the circumstances of the
6 investment. The government suggests that because, in its view, the investments are part of the same
7 conspiracy, it has proven that the fraud caused the loss for each investment.³ *See* Gov. Sent’g Mem.,
8 Dkt. 1649 at 17. This contention is faulty for at least two reasons.

9 First, it rests on an incorrect factual assumption. The government suggests that all investors
10 were provided similar information and therefore the Court can treat them all together and assume that
11 they were all victims whose entire investments were caused by the fraud. That is incorrect. The
12 evidence at trial showed that investors were not all provided the same information and the circumstances
13 of their respective investments were different. For example, Alan Eisenman’s chief complaint was that
14 he was provided no information prior to his late 2013 investment. The Hall Group participated in a
15 conference call where it and other investors were able to ask questions. PFM received a detailed
16 financial model from Mr. Balwani, and then created its own financial model that was even more
17 optimistic based on its independent research. Walgreens was able to have outside experts at Johns
18 Hopkins review Theranos’ technology and data, and even received two Theranos TSPUs for its own
19 evaluation and use. *See* Holmes 11/29/21 Tr. 7781:25-7782:6; Ex. CC (Dr. Jay Rosan Dep. Tr.) at 234-
20 244. And there is no question that Theranos’ board members and lawyers (including Boies Schiller) had
21 information about the company that other investors did not have. Portraying Boies Schiller as an
22

23 ¹ The Ninth Circuit acknowledged that its approach created a circuit split. *See Berger*, 587 F.3d
24 at 1043.

25 ² In fact, it instructed the district court on remand “to redetermine, based on the principles
26 described herein, how much of the shareholders’ loss was actually caused by Berger’s fraud,” and noted
27 that it should use a method that “attempt[s] to gauge the difference between Craig’s share price—as
28 inflated through fraudulent representation—and what that price would have been absent the
misrepresentation.” *Id.* at 1046-47.

³ Because wire fraud does not require proof of causation, the fact of conviction on counts 1 and 6
through 8 do not satisfy this standard. *See* Holmes Sent’g Mem., Dkt. 1642 at 32-34.

1 investor victim runs contrary to the government's characterization of that firm as an instrument of the
2 conspiracy elsewhere in its memorandum. *See* Gov. Sent'g Mem., Dkt. 1649 at 13-14. The jury's split
3 verdict as between the C-1 and C-2 investors also supports a finding that different information was given
4 to different investors.

5 Second, *United States v. Laurienti*, 611 F.3d 530, 557 (9th Cir. 2010), does not counsel
6 otherwise here. In that case, there was evidence that the investors received the same information about
7 the public company stocks at issue, *see id.* at 535-36; here, the sophisticated investors in this private
8 company received and had access to different information. Further, unlike in this case, the government
9 in *Laurienti* proved through the trial that the misstatements were the but-for cause of the loss. *Id.* at 536.
10 In any event, the court conducted an individualized loss calculation and excluded loss where there was
11 evidence that two of the relevant clients were not victimized. *Id.* at 557. Here, the government has
12 presented little (and in many cases no) evidence of the circumstances surrounding most of the
13 investments it seeks to include in the loss calculation. The Court cannot rely on Ms. Holmes' conviction
14 for conspiracy to commit wire fraud to sweep in all of the investments without further proof.

15 The government asks the Court to find it has proven loss and the number of victims based on
16 additional efforts in its investigation, such as interviews. In assessing the substantive weight of the
17 information in the interview memoranda and deposition testimony supplied by the government, the
18 Court should be cautious. It is well-established that a defendant "has a due process right not to be
19 sentenced on the basis of materially incorrect information." *United States v. Petty*, 982 F.2d 1365, 1369
20 (9th Cir. 1993). In particular, the Court should look skeptically at the government's attempts to increase
21 a criminal sentence based on witnesses it interviewed and then chose not to call at trial and victim
22 impact statements that are inconsistent with the record. The same is true for witnesses whom the
23 government contacted and/or interviewed only *after* the government's case in Ms. Holmes' trial
24 concluded, such as Pat Mendenhall.

25 Indeed, the danger in the government's suggested approach is made clear in its treatment of the
26 investments of former Secretary of State and board member George Shultz. Mr. Shultz testified in a
27 2017 deposition that he believed Ms. Holmes was truthful with him with regard to Theranos matters:

28 MS. HOLMES' RESPONSE TO UNITED STATES' SENTENCING MEMORANDUM
CR-18-00258 EJD

1 Q. Do you have a high opinion of Ms. Holmes?

A. Yes.

2 Q. Do you believe that Ms. Holmes was truthful with you in all of your interactions with her?

3 A. Yes, I think so.

4 Q. In any of her interactions with you, did Ms. Holmes ever do anything to give you reason to believe that she was trying to deceive you?

5 A. No.

6 Leach Decl, Ex. L at 15:15-23. The government nevertheless asks the Court to increase Ms. Holmes’
7 sentence based on investments Mr. Shultz made because of the statements of Shultz family members
8 who were not involved in Mr. Shultz’s investment decision. *See* Gov. Sent’g Mem., Dkt. 1649 at 8.
9 The Court should disregard the government’s out-of-context, out-of-court “evidence.”

10 **B. The Loss Should Not Be Measured by the Entirety of the Investment.**

11 The government is incorrect that loss should be measured by the entirety of the investments. In
12 *United States v. Zolp*, 479 F.3d 715 (9th Cir. 2007), the Ninth Circuit distinguished between investments
13 in companies that were shams—i.e., the investment was worthless when made—and investments in
14 companies that were otherwise legitimate enterprises but had their investment price inflated by the
15 fraud. *See Zolp*, 479 F.3d at 719. All parties agree that Theranos was a legitimate enterprise. *E.g.*,
16 Holmes 9/8/21 Tr. 553:7-8 (gov’t opening). *Zolp* therefore requires that the Court “disentangle the
17 underlying value of the stock, inflation of that value due to the fraud, and either inflation or deflation of
18 that value due to unrelated causes.” *Id.*

19 The government suggests this case does not fall under the *Zolp* framework because *Zolp* applies
20 only with respect to public companies. Gov. Sent’g Mem., Dkt. 1649 at 17. The cases the government
21 cites—*United States v. Turk*, *United States v. Byors*, and *United States v. Bryson*—do not turn on the
22 company’s public or private status. Instead, in each case, the defendant lied about the *nature* of the
23 consideration the victim was receiving in exchange for the loan or investment, not its *value*. In *United*
24 *States v. Turk*, 626 F.3d 743, 748-49 (2d Cir. 2010), the defendant told the victims their loans were
25 secured but did not secure the loans; the remaining value of the supposed collateral was irrelevant
26 because there was no collateral at all. In *United States v. Byors*, 586 F.3d 222, 224 (2d Cir. 2009), the
27 defendant also lied about what assets were used to secure the loans at issue. In *United States v. Bryson*,

1 101 F. Supp. 3d 147, 155 (D. Conn. 2015), the defendant promised the victims securities with one set of
2 rights, but they received securities with another set of rights.⁴ Here, there is no argument that investors
3 did not receive the shares they were promised under the legal terms under which they were offered; the
4 issue is the value of those shares. There is also no question the value of those shares was substantially
5 greater than zero. *See* Holmes Sent’g Mem. at 36-38. This case therefore fits within the *Zolp*
6 framework as one “involving an otherwise legitimate company.” 479 F.3d at 719.

7 Ignoring Theranos’ substantial value undermines the fact-specific, economically rational
8 approach the Court should take when assessing loss. The government encourages the Court to look at
9 the fact that Theranos ultimately failed in September 2018, after the indictment, as proof that the fraud
10 caused a total loss. This approach fails to account for principles of proximate causation. In other words,
11 the government does not consider the many intervening causes that ultimately led to the company to
12 close nearly three years after the fraud was revealed.

13 The government proffers the Saba Report as an alternative measure of loss in the event the *Zolp*
14 framework applies. As Ms. Holmes explained in her sentencing memorandum, the report has numerous
15 flaws that make it unreliable (such as its failure to account for Theranos’ valuable intellectual property)
16 and the large range of potential loss it finds defies the definition of a reasonable estimate. *See* Holmes
17 Sent’g Mem., Dkt. 1642 at 38-39; *United States v. Hussain*, 2019 WL 1995764, at *5 (N.D. Cal. May 6,
18 2019) (rejecting government’s proposal of loss based on expert report because “a range is not an
19 amount” and the “staggeringly large range” did not meet the standard for a loss “reasonably . . .
20 determined”), *aff’d*, 818 F. App’x 765 (9th Cir. 2020). But the Saba Report represents an
21 acknowledgement by the government that Theranos had substantial value and shows how complex and
22 assumption-driven a counterfactual valuation of a private startup company is.

23
24
25
26
27 ⁴ These cases also reinforce the need to prove causation. In each case, the government proved the
28 loans or investments were made in reliance on particular representations by the defendants.

1 **II. THE COURT SHOULD NOT SENTENCE MS. HOLMES BASED ON THE**
 2 **ACQUITTED PAYING PATIENT CONSPIRACY.**

3 The PSR correctly declines to calculate the Guidelines sentence based on acquitted conduct, and
 4 the Court should do likewise.

5 **A. Acquitted Conduct Should Not Be Used to Sentence Ms. Holmes.**

6 Relying on acquitted conduct to enhance a defendant’s sentence, while currently not foreclosed
 7 by the Supreme Court, is fundamentally unfair. *See United States v. McClinton*, 23 F.4th 732, 735 (7th
 8 Cir. 2022) (noting that an increasing number of Circuit judges and Supreme Court justices “have
 9 questioned the fairness and constitutionality of allowing courts to factor acquitted conduct into
 10 sentencing calculations”). Ms. Holmes submits that a sentence that relies on acquitted conduct violates
 11 the Sixth Amendment’s right to trial by an impartial jury and the Fifth Amendment’s Due Process
 12 Clause. “[F]actoring acquitted conduct into sentencing decisions imposes almost insurmountable
 13 pressure on defendants to forgo their constitutional right to a trial by jury.” *United States v. Bell*, 808
 14 F.3d 926, 932 (D.C. Cir. 2015) (Millett, J., concurring in denial of rehearing en banc). It “skews the
 15 criminal justice system’s power differential too much in the prosecution’s favor.” *United States v.*
 16 *Coleman*, 370 F. Supp. 2d 661, 672 (S.D. Ohio 2005). Here, the Court should “neither marginalize [the
 17 jury’s] finding nor allow the government another opportunity to make a failed case.” *Id.* at 673; *see also*
 18 *United States v. Pimental*, 367 F. Supp. 2d 143, 152 (D. Mass. 2005).

19 **B. The Government Continues to Present the Patient Testing Issues in an Incomplete**
 20 **and Misleading Way.**

21 The evidence at trial established that Theranos had a laboratory structure with policies and
 22 procedures and qualified personnel on whom Ms. Holmes relied; that laboratory employees investigated
 23 questions and concerns pursuant to those policies; that when Ms. Holmes was notified of an issue, she
 24 was responsive; and that when more pervasive issues were brought to her attention, she provided the
 25 company resources to address those issues. Holmes 9/28/21 Tr. 2045:2-2046:11, 2079:9-2080:16,
 26 2091:21-2092:4; 10/5/21 Tr. 2729:21-2730:1; 11/10/21 Tr. 5932:4-24. Tests were only run on methods
 27 that had been validated by the laboratory director. Holmes 9/28/21 Tr. 1986:23-1987:1, 2009:14-16;
 28 Holmes 9/29/21 Tr. 2192:9-2193:5. Ms. Holmes had no authority to authorize testing and never

1 overruled the lab director, directed the lab director use an unreliable test method, directed him to release
2 a result, or authorized release of a result herself. *See* Holmes 10/6/21 Tr. 2916:4-6; Holmes 10/5/21 Tr.
3 2729:21-2730:1; Holmes 9/28/21 Tr. 2087:1-18. The evidence also established that Theranos ran the
4 majority of its millions of test results on FDA-approved technology, and that questions about lab results,
5 including errors, are expected in any laboratory. The Court should not credit the government’s
6 description of the paying patient conduct, which ignores the full record.

7 *First*, as at trial, the government repeats anecdotes about problems identified in the lab, while
8 disregarding the many subsequent steps taken to address them. *E.g.*, Gov. Sent’g Mem., Dkt. 1649 at 23
9 (bicarbonate). At trial, Ms. Holmes spent many hours ensuring the full record was presented for each of
10 those anecdotes. *See, e.g.*, Holmes 10/5/21 Tr. 2621:5-2657:25 (defense showing that government did
11 not review the full email chain showing bicarbonate issue was investigated and addressed within 24
12 hours); *see* Dkt. 1618 at 7. The PSR contains additional context for other examples used by the
13 government in its brief, including the steps taken to investigate concerns and Ms. Holmes’ lack of
14 knowledge of them. *See* PSR ¶¶ 52-57.

15 *Second*, the government relies on information it did not seek to introduce at trial that has serious
16 reliability concerns. *See Petty*, 982 F.2d at 1369 (defendant “has a due process right not to be sentenced
17 on the basis of materially incorrect information”); *United States v. Ponce*, 51 F.3d 820, 828 (9th Cir.
18 1995) (per curiam) (“While hearsay statements may be considered at sentencing, due process requires
19 that such statements be corroborated by extrinsic evidence.”). For example, there was no “dire warning”
20 from Kevin Hunter. Gov. Sent’g Mem., Dkt. 1649 at 22. No testimony regarding Mr. Hunter’s
21 purported concern was introduced at Ms. Holmes’ trial, and his out-of-court account has serious
22 credibility problems. Walgreens executive Wade Miquelon testified in other litigation that Mr. Hunter
23 never expressed the view that the Theranos technology did not work as claimed. Ex. EE (Deposition
24 Testimony of Wade Miquelon) at 197:14-18.

25 *Third*, in seeking to imprison Ms. Holmes for the patient-related conduct, the government
26 suggests that it expected Ms. Holmes, an individual unqualified to run the laboratory or serve in most
27 positions in it, to ignore the laboratory policies and procedures and overrule the judgments of the

1 qualified personnel who ran the laboratory. That position highlights a fundamental flaw in the
 2 government’s narrative of the patient issues that was at the heart of Ms. Holmes’ successful defense of
 3 those counts.

4 *Fourth*, Ms. Holmes’ efforts to investigate and fix Theranos’ laboratories after CMS identified
 5 problems is indicative of her good intent with respect to patient testing. Until January 2016, Theranos’
 6 clinical laboratory fell under the operational purview of Sunny Balwani. In the wake of the CMS
 7 inspection, Ms. Holmes hired two new laboratory directors who reported to her for the first time,
 8 authorized them to fully investigate the CMS findings, and deferred to their decisions. Dr. Kingshuk
 9 Das testified about that work at trial and Dr. Donald Tschirhart wrote a letter in support of Ms. Holmes
 10 for sentencing. *See* Holmes Sent’g Mem., Dkt. 1642 at 43-46; Ex. A at 261-62 (D. Tschirhart Ltr.).

11 **C. The PSR Does Not Recommend an Enhancement for Serious Risk of Injury and the**
 12 **Court Should Not Adopt that Enhancement.**

13 In its corrected sentencing memorandum, the government objects to the PSR’s failure to include
 14 an enhancement for “conscious or reckless risk of death or serious bodily injury” pursuant to U.S.S.G.
 15 § 2B1.1(b)(16).⁵ The PSR correctly does not apply this enhancement. This enhancement should not be
 16 applied because the facts in support of this enhancement are based on acquitted conduct; the application
 17 of the enhancement assumes the truth of the government’s presentation, which the jury rejected; and the
 18 evidence at trial made clear that Ms. Holmes did not act with reckless or conscious risk of death or
 19 bodily harm because she reasonably relied on the policies, procedures, and qualified personnel in the
 20 laboratory. Additionally, the fact that Theranos was in the business of offering lab tests does not suggest
 21 that the enhancement is appropriate. As described in Ms. Holmes’ sentencing memorandum, laboratory
 22 testing is scientifically complex, inherently imprecise, and prone to potential error—even for FDA-

23
 24 ⁵ The parties’ sentencing memoranda and objections to the Final PSR were due on Thursday,
 25 November 10. *See* Local Criminal Rule 32-5(b) (sentencing memoranda due 7 days prior to
 26 sentencing); Fed. R. Crim P. 45(a)(1)(C), (a)(5), (a)(6) (when the due date falls on Veterans Day, the
 27 “next day” is measured by counting backward). For preservation, Ms. Holmes hereby notes that the
 28 government filed untimely (at midnight on November 11) and has forfeited any objections to the PSR.
 The objection in the government’s corrected sentencing memorandum, which was filed even more
 untimely (on November 15), has been forfeited.

1 approved tests. Holmes Sent’g Mem., Dkt. 1642 at 57-58; Exs. R & S. Whether and why any
2 particular laboratory test result is incorrect is a deeply technical scientific issue.

3 **III. MS. HOLMES UNDERTOOK A GENUINE REFORM OF THERANOS.**

4 While the public narrative of Theranos casts it as an entirely fraudulent enterprise, at trial Ms.
5 Holmes championed the work of the hundreds of people at Theranos who believed that they had made
6 meaningful advancements in medical technology that would better people’s lives. Many who are
7 familiar with Theranos’ work have written to the Court and sounded similar themes. *E.g.*, Ex. A at 97-
8 98 (T. Cooper Ltr. at 2-3), 109 (C. Dillon Ltr.); Ex. A-1 at 1 (N. Gharaati Ltr. at 1).

9 But Ms. Holmes acknowledged mistakes and regrets. She was asked on cross examination: “Q.
10 And you take responsibility for the company; is that your testimony? A. I do.” Holmes 11/30/21 Tr.
11 8005:13-15. She did not deny facts, but she did explain, provide context, and correct erroneous
12 characterizations. The government reacts to all of this by claiming that Ms. Holmes “blamed others.”

13 As Ms. Holmes outlined in her sentencing memorandum, this case is unusual in terms of Ms.
14 Holmes’ substantial efforts to identify and correct problems and acknowledge errors. *See* Holmes
15 Sent’g Mem., Dkt. 1642 at pp. 43-47. The government ignores those efforts. The letters submitted in
16 support of Ms. Holmes are legion on the topic of Ms. Holmes’ genuine efforts to right the ship.

17 **IV. THE GOVERNMENT’S ASSESSMENT OF THE § 3553(A) FACTORS DOES NOT** 18 **FAIRLY CAPTURE THE CONSIDERATIONS APPLICABLE HERE.**

19 The government’s analysis of the statutory sentencing factors is also flawed. The government
20 shows no interest in coming to the sentence that is “not greater than necessary” to serve the purposes of
21 sentencing, 18 U.S.C. § 3553(a), choosing instead to distort even indisputably mitigating factors into
22 aggravating factors and refusing to see Ms. Holmes with any nuance or depth.

23 **A. The Seriousness of the Offense Does Not Support a 15-Year Sentence.**

24 The government urges the Court to use Ms. Holmes’ sentencing to send a clear message to the
25 community that white collar crime is serious.⁶ But Ms. Holmes was not convicted of “white collar
26

27 ⁶ In support, it purports to cite statements received from victims. None of the individuals cited
28 testified in the case and Ms. Holmes was not convicted of defrauding any of them.

1 crime” in the abstract. She was convicted of defrauding certain sophisticated investors on a particular
2 set of facts. The Court must look to the nature and circumstances of the proven offense—both
3 mitigating and aggravating—in determining how much punishment will reflect the seriousness of the
4 crime, and balance it with the other considerations in section 3553(a) to find the minimum sentence
5 necessary. The high profile or “white collar” nature of the case does not aid in that analysis of the
6 seriousness of the offense.

7 **B. A Lengthy Prison Sentence Does Not Serve Specific or General Deterrence.**

8 Ms. Holmes is punished every day for the offense conduct, has been for years, and will be for the
9 rest of her life. Anyone who has been witness to the proceedings in this matter can sense the limitations
10 that this imposes on her. The government doesn’t really dispute this. Its argument with respect to
11 specific deterrence is different but extraordinary: it argues that prison is required for Ms. Holmes
12 because she has ideas for how technology could be used to help individuals in the future, and is working
13 on those ideas in the privacy of her own home. Our Nation does not imprison individuals to keep them
14 from inventing and thinking. Ms. Holmes has not been convicted of having bad ideas; to the contrary,
15 her ideas had substantial value, are being pursued by others, and, as many of the letters have suggested,
16 had the potential to make health care more accessible. *E.g.*, Ex. A at 82-84 (T. Carroll Ltr.), 128 (Dr.
17 Evans Ltr. at 1), 262 (D. Tschirhart Ltr. at 2); Ex. A-1 at 2-3 (C. Robertson Ltr. at 2-3). In any event,
18 given her public notoriety, substantial scrutiny would undoubtedly attend any inventions or
19 contributions by Ms. Holmes in the future. For the same reason, the government’s professed concern
20 that the SEC order barring Ms. Holmes from acting as an officer or director of an issuer of registered
21 securities is time-limited is silly. As a practical matter, there is no reasonable possibility that Ms.
22 Holmes will serve as an officer of a public company in the future.

23 With respect to general deterrence, the cases and empirical research do not support the
24 government’s position. The fact of a punishment, not the length of the punishment, serves general
25 deterrence. Additionally, the public airing of her post-fall travails—including “extreme public
26 ignominy” and “financial bankruptcy,” Ex. A at 243 (D. Sokol Ltr. at 6), as well as her lack of personal
27

1 safety—will have sufficiently served the goal of general deterrence. *See* Ex. A at 153 (C. Gualy Ltr. at
2 2) (“Anyone would shudder to think” of enduring the negative publicity she has).

3 **C. The Comparator Cases the Government Identifies Do Not Support Its Arguments.**

4 The government identifies several cases as examples of why the Court should impose the
5 government’s requested sentence. Scrutiny of those cases demonstrates instead how unhelpful loss is in
6 determining a sentence in a case such as this.

7 First, nine of the twelve examples involve a custodial sentence *below* the custodial sentence the
8 government recommends in this case, 15 years. Those defendants who received less than a 15-year
9 sentence include Jeff Skilling, the former CEO of Enron, a public company the collapse of which was
10 one of the biggest bankruptcies in history and caused tens of thousands of investors, including Enron
11 employees (such as Ms. Holmes’ father), to lose their investments, retirement, and/or other savings. Mr.
12 Skilling realized at least \$42 million in ill-gotten gains from the conduct, including, after immediately
13 stepping down, taking “advantage of his insider knowledge” by selling “over 500,000 shares of his
14 Enron stock” and making “more than \$15.5 million from it.” *United States v. Skilling*, 4:04-cv-00025-2
15 (S.D. Tex.), Dkt. 1339 (Sent. Tr.) at 18, 19. Those facts present a stark contrast with Ms. Holmes, who
16 took her salary but no bonus and never cashed in on her stock holdings despite the opportunity to do so.
17 The government also suggests it thinks that Ms. Holmes should be incarcerated for five more years than
18 the defendant in a case in which the loss was \$8.6 billion. *See* Gov. Sent’g Mem., Dkt. 1649 at 39
19 (citing *McCall*).

20 Second, a review of the government’s chart makes clear how little consistency there is between
21 the loss amount and the amount of incarceration courts impose. For example, a defendant whose crime
22 caused \$677 million in loss received a sentence of 97 months, while a defendant who caused 95% *less*
23 loss (approximately \$31 million) received more than 2.5 times that length (264 months). *See* Gov.
24 Sent’g Mem., Dkt. 1649 at 40 (citations to *Shabudin* and *Cohen*). These kinds of inconsistencies show
25 how the Sentencing Guidelines are particularly unhelpful in financial fraud cases like this one. *See*
26 Holmes Sent’g Mem., Dkt. 1642 at 60-62. Ms. Holmes urges the Court to look to the cases that have
27

1 acknowledged the weaknesses in the loss provision of the Guidelines as appropriate for comparative
2 consideration here. *See* Holmes Sent’g Mem., Dkt. 1642 at 69-71.

3 **V. THE PSR CORRECTLY CONCLUDES MS. HOLMES DOES NOT HAVE THE ASSETS**
4 **TO PAY A FINE.**

5 The PSR correctly concludes that Ms. Holmes does not have the assets to pay a fine. Not having
6 any basis to contest this conclusion, the government engages in complete speculation to suggest that the
7 Court should be suspicious.

8 The PSR concludes that sufficient supporting information was provided. PSR ¶ 166. There are
9 no guarantors of Ms. Holmes’ debt. Her financial circumstances have not improved since she submitted
10 her materials to Probation.

11 Ms. Holmes’ financial condition should not come as a surprise. The reason Ms. Holmes has
12 essentially no assets is that she was barely an adult when she left Stanford to start the company, she
13 received a regular salary and did not cash out her shares, she has been unable to work since 2018, she
14 was unable to invest what assets she did have because her trading accounts were repeatedly closed by
15 financial institutions due to the indictment, and she has incurred substantial expenses, including legal
16 fees, over the course of this ordeal.

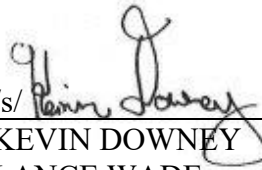
17 The government cannot dispute any of this, but nonetheless suggests that Ms. Holmes’ sentence
18 should be imposed based on the assumption that a private citizen uninvolved in the offense conduct (Ms.
19 Holmes’ partner) should marry her and have his extended family pay her debts. That is an unfounded
20 suggestion.

21 **CONCLUSION**

22 The government’s sentencing arguments go beyond the case it has proven or the record it
23 otherwise can establish, and are deserving of serious doubt. Ms. Holmes built Theranos for indisputably
24 good reasons, invested resources and effort to correct errors, and did not cash out. She works every day
25 to be a good friend, partner, mother, and citizen who contributes to the positive well-being of those
26 around her. Ms. Holmes was not driven by greed, as the government apparently cannot help but persist
27 in suggesting despite the overwhelming evidence to the contrary. *See* Gov. Sent’g Mem., Dkt. 1649 at

1 7. Ms. Holmes asks the Court to see beyond the government’s oversimplified presentation of the
2 offense and through the eyes of the scores of people who know her. A sentence based on the
3 government’s proffered loss amount would lead to an unjust sentence that does not meet the charge in §
4 3553(a). As the Court considers what sentence is “sufficient, but not greater than necessary,” to serve
5 the purposes of sentencing, we again ask for leniency for this person who tried to make health care more
6 accessible and will never truly escape the consequences of her failures at Theranos.

7
8 DATED: November 15, 2022

9 
10 /s/ Kevin Downey
11 KEVIN DOWNEY
12 LANCE WADE
13 AMY MASON SAHARIA
14 KATHERINE TREFZ
15 Attorneys for Elizabeth Holmes
16
17
18
19
20
21
22
23
24
25
26
27

CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2022 a copy of this filing was delivered via ECF on all
counsel of record.

/s/ Kevin Downey
KEVIN DOWNEY
Attorney for Elizabeth Holmes

1
2
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