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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’ OPPOSITION TO UNITED**
20 ELIZABETH HOLMES and) **STATES’ ADMINISTRATIVE MOTION TO**
RAMESH “SUNNY” BALWANI,) **CORRECT JUDGMENT**
21 Defendants.) Hon. Edward J. Davila
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23)
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28 MS. HOLMES’ OPPOSITION TO UNITED STATES’ ADMINISTRATIVE MOTION
TO CORRECT JUDGMENT
CR-18-00258 EJD

1 Ms. Holmes opposes the government’s Administrative Motion to Correct Judgment in part.
2 Federal Rule of Criminal Procedure 36 permits the correction of clerical errors in a judgment, but does
3 not permit substantive changes that find no support in the established record. Ms. Holmes agrees that it
4 is appropriate to correct the counts of conviction on page 1 of the amended judgment and the joint and
5 several liability portion on page 7 to conform to the Verdict Form and Restitution Order in this case.
6 *See* Dkt. 1235 (Verdict Form); Dkt. 1760 (Restitution Order). But Ms. Holmes opposes the
7 government’s request that the Court use Rule 36 to insert a government-crafted change to Ms. Holmes’
8 restitution payment schedule. Dkt. 1770 at 4.

9 “A change made under [Rule] 36 can do no more than conform the sentence to the term which
10 the record indicates was intended.” *United States v. Kaye*, 739 F.2d 488, 490 (9th Cir. 1984); *see also*
11 *United States v. Ettien*, 76 F.3d 389 (9th Cir. 1995) (unpublished) (“The district court had no power
12 under Rule 36 to change the order of restitution, because the record does not reflect the court’s intention
13 to have BOP determine the restitution payments.”). Ms. Holmes’ Amended Judgment already includes a
14 restitution schedule that begins while she is incarcerated. There is no indication in the record that the
15 absence of a change to the schedule after she is released was a clerical error. The government points to
16 none; indeed, it all but concedes the point. Dkt. 1770 at 2. No restitution payment schedule was
17 announced by the Court in any sentencing or restitution hearing or order, *see* Dkt. 1770 at 2; no specific
18 restitution schedule is required by the MVRA; no restitution schedule was recommended by probation
19 through the PSR; the Court had before it substantial evidence showing Ms. Holmes’ limited financial
20 resources and has appropriately treated Ms. Holmes and Mr. Balwani differently in sentencing; and the
21 Court issued the Holmes and Balwani Amended Judgments within twenty minutes of each other, which
22 suggests any differences between the two judgments were not inadvertent.

23 The government proffers a guess as to what “the Court intended,” crafting its own suggested
24 schedule from modifications to Mr. Balwani’s schedule and, purportedly, a practice of the Probation
25 Office that it does not explain. *Id.* at 4. This attempt to manufacture a record that does not exist is not
26 an appropriate use of Rule 36.

1 First, Mr. Balwani’s amended judgment says nothing about what the Court intended for Ms.
 2 Holmes’ restitution schedule. Ms. Holmes and Mr. Balwani have different financial resources and the
 3 Court has appropriately treated them differently. For example, while the Court imposed a \$25,000 fine
 4 on Mr. Balwani, it “reviewed [Ms. Holmes’] financial statements” and declined to impose a fine.
 5 11/18/2022 Tr. 133:10-11; Dkt. 1764 at 6. The government’s requested modification—which is
 6 different than what the Court imposed as to Mr. Balwani, *compare* Dkt. 1766 at 7 to Dkt. 1770 at 4—
 7 seems to acknowledge these differences and highlights that the government’s approach goes beyond the
 8 record.

9 Second, as to Probation Office practices, there is nothing in the record that shows what these
 10 practices are, whether the Court agrees with them, or if the Court would find any of these practices
 11 appropriate for Ms. Holmes’ case. The government’s pleading does not even put Ms. Holmes on notice
 12 as to the practices to which the government refers. The Probation Office made no recommendation
 13 regarding a restitution payment schedule in its PSR or at any of the relevant hearings.

14 Finally, the fact that the MVRA allows for a court to modify a restitution schedule upon a
 15 showing that there has been “a material change in the defendant’s economic circumstances that might
 16 affect the defendant’s ability to pay restitution” does not help the government here. Dkt. 1770 at 3
 17 (citing 18 U.S.C. § 3664(k)). Section 3664(k) does not provide a basis to modify the Amended
 18 Judgment pursuant to Rule 36. And the government has made no showing that there has been such a
 19 change such that a modification pursuant to § 3664(k) is separately warranted. If there is ever such a
 20 material change, the government can seek a modification of the restitution schedule at that time.¹

21 At bottom, there is no basis in the record for the payment structure in the government’s request.
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23 ¹ In a footnote, the government alternatively invokes Rule 35. The government provides no
 24 explanation as to why the restitution schedule that is currently in Ms. Holmes’ Amended Judgment
 25 amounts to a “clear error.” Dkt. 1770 at 2 n.1. The MVRA does not require a different restitution
 26 schedule than is in the Amended Judgment, much less the restitution schedule the government advances.
 27 Additionally, the time period for corrections under Rule 35 runs from the oral pronouncement of the
 sentence, which has long passed. Fed. R. Crim. P. 35(a), (c); *United States v. Aguirre*, 214 F.3d 1122,
 1125–26 (9th Cir. 2000); *United States v. Aguilar-Reyes*, 653 F.3d 1053, 1055–56 (9th Cir. 2011)
 (holding “the fourteen day provision in Rule 35(a) is jurisdictional”).

1 The Court should deny the government’s motion as to the modification to the restitution schedule, and
2 grant the government’s motion with respect to the counts of conviction and the joint and several liability
3 box.

4 DATED: June 12, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2023 a copy of this filing was delivered via ECF on all counsel
of record.

/s/ Kevin Downey
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Attorney for Elizabeth Holmes

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