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16 UNITED STATES DISTRICT COURT
17
18 NORTHERN DISTRICT OF CALIFORNIA
19
20 SAN JOSE DIVISION

21 UNITED STATES OF AMERICA,) Case No. CR-18-00258-EJD
22 Plaintiff,)
23 v.) **MS. HOLMES’ MOTION TO EXCLUDE**
24) **CERTAIN NEWS ARTICLES UNDER**
25) **FEDERAL RULES OF EVIDENCE 403 AND 802**
26) Date: January 22, 2021
27) Time: 10:00 AM
28) CTRM: 4, 5th Floor
29)
30) Hon. Edward J. Davila
31)
32)
33)

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 The government’s exhibit list contains over 50 news articles covering Theranos from 2013
3 through 2016. The government, however, apparently intends to call at trial just two journalists who
4 together authored just three of those articles. For all but those three articles, the government faces an
5 insurmountable hearsay hurdle at the threshold—without testimony from their authors, the articles are
6 wholesale inadmissible. *Larez v. City of Los Angeles*, 946 F.2d 630, 642 (9th Cir. 1991). Many of the
7 articles also contain additional layers of hearsay concerning some of the most critical aspects of the case
8 that qualify for no exception. And even if the government could overcome these hearsay challenges, the
9 articles’ often opinionated commentary still would render them inadmissible under Rule 403. The Court
10 should exclude all news articles by journalists who will not testify at trial.

11 **BACKGROUND**

12 The government’s June 26, 2020 witness list includes two journalists who interviewed Ms.
13 Holmes and others associated with Theranos: Roger Parloff and Dr. Eric Topol. *See* Saharia Decl. ¶ 2.
14 Mr. Parloff published several articles on Theranos in 2014 and 2015, two of which appear on the
15 government’s exhibit list: a June 2014 profile of Theranos and Ms. Holmes in *Fortune* magazine titled
16 “This CEO’s out for Blood,” and a December 2015 article for *Fortune*’s website titled “How Theranos
17 Mised Me.” *See id.*¹ Dr. Topol interviewed Ms. Holmes in November 2013 for the website
18 Medscape.com; the government has included as an anticipated trial exhibit what appears to be a
19 transcript of that interview posted to the website under Dr. Topol’s name. *See id.* The government has
20 disclosed no other journalists whom it may seek to call at trial.

21 The government’s exhibit list contains over 50 articles from journalists other than Mr. Parloff
22 and Dr. Topol, including: (1) four articles authored at least in part by John Carreyrou published in the
23 *Wall Street Journal* in 2015 and 2016; (2) a lengthy profile published in the *New Yorker* magazine in

24
25 ¹ While Ms. Holmes does not move at this time to exclude these two articles, both contain
26 hearsay statements subject to no exception. Ms. Holmes reserves the right to object should the
27 government offer the articles, or certain statements within them, for the truth of what they assert at trial.
28 Both articles, and the 2015 article in particular, pose acute Rule 403 concerns and Ms. Holmes reserves
the right to object to their admission on that basis as well.

1 December 2014 by Ken Auletta titled “Blood, Simpler”; (3) an October 2015 *New York Times* article by
2 Katie Benner and Andrew Pollack titled “Blood Lab that Boasts Breakthrough Goes on Defense Against
3 its Doubters”; (4) a December 2015 *Business Week* article by Sheelah Kolhatkar and Carolina Chen
4 titled “Can Elizabeth Holmes Save Her Unicorn?” Ex. 48 at 52 (compendium of exemplar articles).

5 These articles (and many others) contain statements from unnamed sources and commentary
6 from the journalists themselves that echo anticipated themes in the government’s case. For example, the
7 Bloomberg piece cites unnamed “[c]ritics and skeptics” as saying that “what the company says it’s
8 doing is impossible.” *Id.* at 53. In the *New Yorker*, Mr. Auletta wrote that “[s]ome” unnamed
9 “observers are troubled by Theranos’s secrecy,” and quoted a Quest Diagnostics executive denigrating
10 Theranos’ technology without knowledge of it. *Id.* at 34. In a May 2016 *Wall Street Journal* article,
11 Mr. Carreyrou and co-author Christopher Weaver source to an unquantified number of unnamed
12 Walgreens “officials” a self-serving, inflammatory narrative that they “considered walking away from
13 the partnership [with Theranos] but then hesitated because of worries that Theranos might sue for breach
14 of contract and claim billions of dollars in damages.” *Id.* at 2. In addition to parroting unfairly
15 prejudicial statements from others, many articles feature sensationalistic rhetoric and some deploy sexist
16 tropes. For example, Mses. Kolhatkar and Chen open their *Business Week* piece by saying that
17 “Elizabeth Holmes rarely slips out of character[,]” and then present a half-page of thumbnail images of
18 male Theranos investors and board members under the heading “Fanboys.” *Id.* at 54. The government
19 has offered no explanation why it believes any of these articles are relevant to or admissible in this
20 criminal case.

21 ARGUMENT

22 “It is axiomatic to state that newspaper articles are by their very nature hearsay evidence and are
23 thus inadmissible if offered to prove the truth of the matter asserted.” *Johnson v. Cate*, 2015 WL
24 5321784, at *9 (E.D. Cal. Sept. 10, 2015) (internal quotation marks and alteration omitted). As the
25 Ninth Circuit explained in *Larez v. City of Los Angeles*, newspaper articles will often present at least two
26 levels of hearsay: statements from out-of-court declarants who are the journalist’s sources and, when

27 MS. HOLMES’ MOTION TO EXCLUDE CERTAIN NEWS ARTICLES UNDER FEDERAL RULES
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1 the journalist does not testify at trial, a threshold out-of-court assertion by the journalist that the source
2 in fact made the statement as transcribed. 946 F.2d 630, 642 (9th Cir. 1991) (“By attributing quotations
3 to [a source], the reporters necessarily made the implicit statement, ‘[the source] said this!’ As the
4 reporters’ statements were made in newspapers, they were, *a fortiori*, statements made out-of-court
5 where they were not subject to the rigors of cross-examination.”). That threshold hearsay problem exists
6 regardless of the purpose for which statements within the article are offered because the reporter’s
7 assertion inherently is “offered for the truth of the matter asserted: that [the source] did in fact make the
8 quoted statement.” *Id.*; *see also McMahon v. Valenzuela*, 2015 WL 7573620, at *11 (C.D. Cal. Nov. 25,
9 2015) (“Even when the actual statements quoted in a newspaper article constitute nonhearsay, or fall
10 within a hearsay exception, their repetition in the newspaper creates a hearsay problem.” (internal
11 quotation marks and alteration omitted)); *ACLU of Nevada v. City of Las Vegas*, 13 F. Supp. 2d 1064,
12 1070 (D. Nev. 1998) (“Although the statements by Mayor Jones and Mr. Paris are not hearsay because
13 they are admissions of party opponents in their official capacities, the repetition of those statements in
14 newspaper articles and a published letter to the editor does constitute hearsay.”). Courts also exclude
15 news articles bearing on disputed matters under Rule 403 because of their propensity to confuse the
16 issues and unfairly sway the jury. *See, e.g., Go-Video, Inc. v. Motion Picture Ass’n of Am.*, 977 F.2d
17 588 (9th Cir. 1992) (table case) (affirming exclusion of newspaper “articles as inadmissible hearsay and
18 as unfairly prejudicial under Rule 403”).

19 The government’s proffered news-article exhibits fail on each rung of this admissibility ladder.

20 1. Because none of the journalists other than Mr. Parloff or Dr. Topol is expected to testify,
21 all statements reflected in the articles not authored by these two individuals are categorically
22 inadmissible. *See Larez*, 946 F.2d at 642. For any such statements to be relevant, the implicit assertion
23 from the journalist that the source is accurately quoted must be accepted as truth—a forbidden hearsay
24 purpose. *See id.* The Court should exclude the articles for this reason alone.

25 2. The articles are replete with quotations or paraphrased statements from people whose
26 identities the articles do not reveal or who are not expected to testify at trial, *see pp. 1-2, supra*,

1 imposing a second-level hearsay problem. It should go without saying that if the government wishes to
 2 sponsor testimony from, for example, a Walgreens “official” about Walgreens’ relationship with
 3 Theranos—a critical issue in the case—the Federal Rules require the government to put on a live witness
 4 and not smuggle in prejudicial “testimony” printed in the Wall Street Journal or some other newspaper.
 5 *See* Fed. R. Evid. 802.

6 3. Even putting these dispositive hearsay concerns aside, the articles are inadmissible under
 7 Rule 403. As set forth above, *see* pp. 1-2, *supra*, many of the articles take a skeptical authorial tone and
 8 provide voice to Theranos’ (often unnamed) critics and competitors. This is especially true of the 2015-
 9 2016 Wall Street Journal stories, no matter the purpose for which they are offered. These articles cover
 10 much of the same ground as the government’s allegations in this case. As with all journalism, the stories
 11 reflect their authors’ points of view and their individual judgment about which facts to include, which to
 12 credit, and which to undermine. It would be unfairly prejudicial to Ms. Holmes to provide the jury with
 13 multiple feature-length narratives of the Theranos story from absent journalists whose recollections,
 14 opinions, and biases cannot be tested through cross-examination.

15 CONCLUSION

16 For the foregoing reasons, Ms. Holmes respectfully requests an order excluding all news articles
 17 other than those written by Mr. Parloff and Dr. Topol.

18
 19
 20 DATED: November 20, 2020

Respectfully submitted,

21
 22
 23 /s/ Amy Mason Saharia

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CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2020 a copy of this filing was delivered via ECF on all
counsel of record.

/s/ Amy Mason Saharia
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