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10
11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13 SAN JOSE DIVISION

14 UNITED STATES OF AMERICA,) Case No. CR-18-00258-EJD
15 Plaintiff,)
16 v.) **MS. HOLMES’ REPLY IN SUPPORT OF**
17) **REQUEST FOR EXPANDED SUMMONS AND**
ELIZABETH HOLMES and) **JURY QUESTIONNAIRE AS WELL AS**
18 RAMESH “SUNNY” BALWANI,) **INDIVIDUAL VOIR DIRE WITH COUNSEL**
19 Defendants.) Date: June 15, 2021
20) Time: 10:00 a.m.
21) CTRM: 4, 5th Floor
22)
23) Hon. Edward J. Davila
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1 Ms. Holmes and the government agree that certain procedures are appropriate for jury selection
 2 in this case. First, the parties agree that an expanded distribution of summons is necessary. Gov't
 3 Opp'n ("Opp'n"), Dkt. 813 at 11. Second, the parties agree to meet and confer on the excusal of jurors
 4 for cause. *Id.* at 11-12. Third, the government agrees "in principle" that individual *voir dire* with
 5 counsel may be appropriate, but asks that the Court defer resolving this question. *Id.* at 12. Ms. Holmes
 6 respectfully maintains that the question of individual *voir dire* needs to be resolved now because, among
 7 other reasons, its logistics may require planning, particularly in light of the precautions taken by the
 8 Court during the COVID-19 pandemic. Finally, the government and Ms. Holmes' questionnaires
 9 contain nearly 50 identical, near-identical, or at least partially overlapping questions. *See* Appendix A.¹
 10 Ms. Holmes hopes that the government will agree on the inclusion of some version of those questions
 11 prior to the pretrial conference.

12 Two categories of questions in Ms. Holmes' proposed questionnaire remain disputed: (1) those
 13 concerning media exposure and its effect; and (2) those concerning prospective jurors' life experience
 14 and perspectives, as they relate to core trial issues. Expanded questioning as to these two categories is
 15 necessary to screen for bias among prospective jurors, and to assure a fair trial.²

16 Where pretrial publicity is ample, *voir dire* should "inquire of the jury what information they
 17 [have] obtained relative to the case and their source of knowledge." *United States v. Silverthorne*, 400
 18 F.2d 627, 639 (9th Cir. 1968). There is no question that this is such a case, with publicity that, unlike in
 19 almost all other corporate cases, has uniquely focused on Ms. Holmes personally. This requires
 20 investigation of jurors' media exposure, the content of that exposure, and its effects on the prospective
 21 jurors.

22 Second, questions concerning life experience and perspectives are necessary in order "to test the
 23

24 ¹ The government has proposed questions that are identical, nearly identical, or fall within the
 25 scope of the following of Ms. Holmes' proposed questions: ¶¶ 1-2, 4-6, 11-13, 16-17, 19-30, 33, 37-39,
 26 41, 47, 49-50, 53-54, 69, 75-81, 83-85, 98-99, 103, 105, 110. The government has not proposed
 questions that materially overlap with the following of Ms. Holmes' proposed questions: ¶¶ 3, 7-10, 14-
 15, 18, 31-32, 34-36, 40, 42-46, 48, 51-52, 55-68, 70-74, 82, 86-97, 100-102, 104, 106-109, 111-112.

27 ² Ms. Holmes would be happy to discuss her reasoning for each question in her questionnaire
 with the Court at the pre-trial conference.

1 jury for bias or partiality.” *United States v. Jones*, 722 F.2d 528, 529 (9th Cir. 1983). The Ninth Circuit
 2 has held that bias arises “where the relationship between a prospective juror and some aspect of the
 3 litigation is such that it is highly unlikely that the average person could remain impartial in his
 4 deliberations under the circumstances.” *United States v. Gonzalez*, 214 F.3d 1109, 1112 (9th Cir. 2000)
 5 (citation omitted).³ Ms. Holmes is entitled to explore the many “aspect[s] of the litigation” that the
 6 government has put at issue with its sweeping charges. *Id.* In addition, questions relating to jurors’
 7 perspectives are necessary to address “matters concerning which either the local community or
 8 population at large is commonly known to harbor strong feelings that may stop short of presumptive bias
 9 in law yet significantly skew deliberations in fact.” *United States v. Burns*, 343 F. App’x 265, 2009 WL
 10 2610791, at *1 n.3 (9th Cir. 2009).

11 That numerous such issues may arise at trial results from the government’s choices, not Ms.
 12 Holmes’. *See infra* pp. 5-8. Its list of purported victim witnesses includes some of the world’s
 13 wealthiest individuals, executives of large corporations, and venture capitalists. And the government
 14 has alleged a purported scheme involving a dizzying array of specialists: doctors, lawyers, accountants,
 15 journalists, military personnel, government workers, sophisticated investors, Ph.D’s in chemistry,
 16 computer science, engineering, and biology, and more. Its exhibits include newspaper articles. In such
 17 a case, bias cannot be determined with a few summary questions.

18 **I. The Ninth Circuit Requires Investigation into the Source, Content, and Effect of Media**
 19 **Exposure on Prospective Jurors in Cases of “Great Pretrial Publicity.”**

20 In cases where “pretrial publicity is great,” the Ninth Circuit requires inquiry into the sources,
 21 content, and effect of potential jurors’ media exposure. *Silverthorne*, 400 F.2d at 637-39. The Court’s
 22 examination during *voir dire* “must not be so general that it does not adequately probe the possibility of
 23 prejudice,” nor can it “simply call for the jurors’ subjective assessment of their own impartiality.”
 24 *United States v. Giese*, 597 F.2d 1170, 1183 (9th Cir. 1979) (citation omitted). The government does

25
 26 ³ In addition to implied bias based on a prospective juror’s relationship to the subject matter of
 27 the case, *voir dire* questioning may reveal “actual bias” based on a juror’s responses to specific
 28 questions. *Gonzalez*, 214 F.3d at 1112. “[P]ersonal experience” may be relevant to a determination of
 actual bias. *Id.*

1 not dispute that this case triggers the requirements of this Ninth Circuit precedent.⁴ See Ms. Holmes’
 2 Request for Expanded Summons and Jury Questionnaire as well as Individual Voir Dire with Counsel
 3 (“Request”), Dkt. 799 at 3-6, 8-11.

4 Consistent with the case law, Ms. Holmes proposes questions relating to prospective jurors’
 5 media habits and potential exposure to coverage of Ms. Holmes, Theranos, and this case, as well as the
 6 effects of that exposure. See Ms. Holmes’ Proposed Questionnaire, Dkt. 808 ¶¶ 49-58 (Part IV: Media
 7 Exposure), ¶¶ 66-71 (Part VI: Familiarity with the Case). The government concedes that some
 8 questioning about media habits, exposure, and effects is necessary. Opp’n at 1; Gov’t Proposed
 9 Questionnaire, Dkt. 802 ¶¶ 20-21; see also *id.* ¶¶ 42-43 (asking prospective jurors whether they have
 10 “heard or read anything about this case” and whether that “would affect how [they] judge the facts or the
 11 person accused”).

12 Although the government concedes the principle that such media-related questions are necessary,
 13 its proposed questions are demonstrably inadequate. First, they are substantially under-inclusive.
 14 Examples that leap from the page include:

- 15 • The government asks about “main sources of news,” but neglects to ask how frequently
 16 the prospective juror consumes those sources.
- 17 • The government does not ask about social media habits, despite the fact that many
 18 prospective jurors could rely on social media for their news (and the fact that social
 19 media are awash in negative content relating to Ms. Holmes). Cf. 9th Cir. Model Jury
 20

21 ⁴ In its responsive pleading, the government fails to address *Silverthorne* or its progeny, or even
 22 cite these cases. Instead, the government (at 7-11) cites the three-part test that is used to resolve motions
 23 to transfer venue on the basis of presumed prejudice in a particular community—it does *not* set out the
 24 legal standard for determining the sufficiency of jury selection procedures. Compare *United States v.*
 25 *Skilling*, 561 U.S. 358, 377-385 (2010) (applying three-factor test when reviewing the defendant’s
 26 motion to transfer venue), with *id.* at 386-395 (assessing the adequacy of *voir dire* under a different
 27 standard in a different section of the opinion). Although some facts may be relevant to the distinct
 28 questions whether an entire community is presumptively prejudiced (necessitating transfer) and whether
 particular jury selection procedures are adequate, these remain distinct legal questions. For this reason,
 the government’s test is inapplicable to the legal question at issue here and does not supersede or
 abrogate the long line of Ninth Circuit cases cited by Ms. Holmes. Indeed, *Seattle Times Co. v. U.S.*
Dist. Court for W. Dist of Wash., 845 F.2d 1513 (9th Cir. 1988), cited four times by the government,
 involved a claim under the First Amendment to the public right of access to pretrial filings, not a
 challenge to jury selection procedures.

1 Instructions §§ 1.8, 2.1, 7.2 (model instructions that address social media use).⁵

- 2 • The government singles out financial news, just one of the types of media to have
3 covered Ms. Holmes, Theranos, and this case in recent years, although other forms of
4 media coverage are overwhelmingly negative. *See* Request at 2 n. 2; *id.* at 3-5.

5 Second, although the government recognizes the need to “prompt” prospective jurors, *see, e.g.*,
6 Dkt. 802 ¶ 20 (listing forms of media), ¶ 21 (identifying particular type of news), its questions do not
7 identify with specificity the sources and outlets responsible for negative coverage of this case, or
8 journalists who have reported on this case for years. That information is essential for the Court and
9 counsel to assess prospective jurors’ past exposure (and potential exposure during trial) to prejudicial
10 information, and therefore ascertain the presence or absence of bias. Although “general” questions may
11 surface vague recollections on the part of prospective jurors, the case law deems such questions
12 insufficient in cases involving “prejudicial pretrial publicity.” *Giese*, 597 F.2d at 1183; *see also* Request
13 at 9-10 & n.8 (explaining danger in failing to ask specific questions).

14 Third, the government’s questions are poorly crafted. The government’s principal media-related
15 question merges three distinct inquiries into a single question—what type of media the prospective juror
16 relies upon for news; what sites and stations he or she uses; and, on those stations, what programs he or
17 she listens to or views. Having combined these three questions into one, the government demands a
18 narrative response by the prospective juror. This sort of question is likely to cause confusion. Some
19 jurors may respond generally about types of media, others may focus on sites or stations, while others
20 may describe particular programs. Still others, confused by the question, will give a meager answer, and
21 move on. These scattershot responses will not facilitate an informed meet-and-confer, or streamline *voir*
22 *dire*.

23 By contrast, Ms. Holmes’ questionnaire conducts the same basic inquiry into media habits and
24 exposure, but does so in a more complete and cogent way. First, Ms. Holmes identifies the core

25
26 ⁵ *See* Declaration of Richard S. Cleary, Jr. in Support of Ms. Holmes’ Reply in Support of
27 Request for Expanded Summons and Jury Questionnaire as well as Individual Voir Dire with Counsel
28 ¶ 2(a)-(e) (“2d Cleary Decl.”) (summarizing searches of social media relating to Ms. Holmes, Theranos,
and this case).

1 questions relating to media habits and exposure—where prospective jurors go for their news (and how
 2 often they do so), whether and how they use social media, their exposure to the particular journalists,
 3 sources, and publications that have covered the people and issues in this case, their general view on the
 4 veracity of media coverage, and any specific exposure to Ms. Holmes, Theranos, or her co-defendant,
 5 Mr. Ramesh “Sunny” Balwani, in the media. *See infra* p. 4.

6 Second, Ms. Holmes identifies particular journalists, sources, and publications in order to refresh
 7 the recollection of jurors, and focus their answers. *Id.* This is necessary in light of the vast but highly
 8 varied coverage of this case, and the fact that adverse coverage has been ongoing for nearly six years.
 9 But there are important, refined differences across these sources. Outlets have different readerships; the
 10 volume of pretrial coverage is higher in some than others; different outlets have focused on different
 11 features of the case; and some outlets are more inflammatory in tone, while others are prejudicial
 12 because they purport to provide “insider” accounts of the events at issue, much of which is contested
 13 and/or will be inadmissible at trial. Collecting this information will allow Ms. Holmes to ask, as
 14 necessary, informed follow-up questions at *voir dire* in order to assess how media coverage has affected
 15 the prospective jurors’ views.

16 Third, although Ms. Holmes’ questionnaire generally covers the same topics as the
 17 government’s, Ms. Holmes has carefully delineated her questions, and asked them one-by-one. *See id.*
 18 Ms. Holmes’ pinpointed questions will promote jurors’ comprehension of the questionnaire, and
 19 streamline the meet-and-confer process and *voir dire*.

20 **II. The Government’s Decision to Pursue a Sprawling Case Requires Broader Inquiry into the**
 21 **Background, Life Experiences, and Perspectives of Jurors.**

22 The government has charged a sweeping case. As a consequence, the Court and counsel must
 23 investigate a broader swathe of jurors’ backgrounds, life experiences, and perspectives than would
 24 otherwise be necessary. *See* Ms. Holmes’ Proposed Questionnaire, Dkt. 808 ¶¶ 11-36 (Part II:
 25 Background), ¶¶ 37-48 (Part III: Life Experience), ¶¶ 59-65 (Part V: Nature of the Charges), ¶¶ 66-79
 26 (Part VI: Familiarity with the Case), ¶¶ 80-112 (Part VII: Experience with Legal System).⁶

27
 28 ⁶ Ms. Holmes also proposes standard and COVID-related questions in her questionnaire. Dkt.
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1 Two lines of Ninth Circuit case law guarantee Ms. Holmes' right to ask questions of this kind.
 2 First, the Ninth Circuit has held that the questions propounded during *voir dire* must be "reasonably
 3 sufficient to test the jury for bias or partiality." *United States v. Baldwin*, 607 F.2d 1295, 1297 (9th Cir.
 4 1979). Because bias may arise from prospective jurors' relationship to issues at trial, *see Gonzalez*, 214
 5 F.3d at 1112, a broadly charged case requires more extensive *voir dire*.⁷ Second, when a case implicates
 6 "matters concerning which either the local community or the population at large is commonly known to
 7 harbor strong feelings" and which "may significantly skew deliberations," the Ninth Circuit has held
 8 that defendants are entitled to ask specific questions about those issues. *Burns*, 2009 WL 2610791, at *1
 9 n.3; *see infra* pp. 7-8.

10 The breadth of the government's case is extraordinary. Start with the operative indictment,
 11 which discusses blood testing methods and technology, Dkt. 469 ¶¶ 12(A), 16; laboratories, *id.* ¶¶ 14,
 12 17; financial modeling, *id.* ¶ 12(B); investing, *id.* ¶ 12(B)-(C), (G); solicitation of investments, *id.*;
 13 pharmacies, ¶ 12(D); various governmental agencies, *id.* ¶ 12(E)-(F); the federal regulatory approval
 14 processes, *id.* ¶ 12(F); pharmaceutical companies and research institutions in the United States and
 15 abroad, *id.* ¶ 12(H); public relations and media, *id.* ¶ 12(I); and medical practice and healthcare, *id.* ¶ 15.

16 The indictment is, of course, just the beginning. The government has subsequently produced
 17 three letters describing its anticipated evidence pursuant to Fed. R. Evid. 404(b), including one
 18 numbering 85 pages. *See* Dkt. 580 (Mar. 6, 2020 Ltr.); Dkt. 580-1 (Apr. 3, 2020 Ltr.), Dkt. 580-2 (Sept.
 19 28, 2020 Ltr.). The most recent letter touches on, among others, the following topics not identified in
 20 the indictment: corporate governance, *id.* at 16-24; trade secrets, *id.* at 51-57; regulatory compliance, *id.*
 21 at 63-65; "industry standards and government rules regarding research and development procedures,
 22 medical devices and clinical laboratory practices," *id.* at 65-68; and computer science, information

23 _____
 24 808, ¶¶ 1-10.

25 ⁷ The Ninth Circuit has found bias based on prospective jurors' relatives' relationship to the
 26 subject matter at issue. *See Gonzalez*, 214 F.3d at 1113-14 (finding actual and implied bias in cocaine
 27 distribution case because juror's husband had engaged in drug dealing, and the juror admitted the
 28 experience was painful and was one reason for a subsequent divorce); *United States v. Eubanks*, 591
 F.2d 513, 517 (9th Cir. 1979) (implied bias in heroin distribution case when juror's sons were serving
 prison terms for heroin-related offenses). In a number of proposed questions, the government asks only
 about the experience of the prospective juror, implicitly excluding that juror's family and friends.

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1 technology, and data storage, *see id.* at 79-81. And the government has noticed more than 175 witnesses
2 and more than 4,500 exhibits for trial.

3 The government has proposed certain questions relating to a subset of subjects likely to arise at
4 trial. But (again) having conceded the principle that such questions are necessary, the government's
5 proposal is under-inclusive, and therefore deficient. For example:

- 6 • The government does not ask about jurors' training or professional experience with
7 pharmacies, health insurance, corporate governance, regulatory compliance, or scientific
8 research, despite asking about training in law, "business, finance, investing, medicine,
9 medical devices, or blood or lab testing." Gov't Proposed Questionnaire, Dkt. 802 ¶ 12.
- 10 • The government does not ask whether prospective jurors have ever worked for or applied
11 to work for Theranos, despite asking whether they have invested in Theranos and used its
12 blood-testing services.
- 13 • The government does not ask about specific funds, entities, or law firms that will appear
14 in the case, despite asking whether prospective jurors know specific witnesses.⁸

15 The government also makes no effort to engage with matters about which prospective jurors may
16 have strong opinions that could skew deliberations.⁹ *Burns*, 2009 WL 2610791, at *1 n. 3. Those

18 ⁸ The government also does not ask certain routine questions about language proficiency, jurors'
19 views on defendants' assertion of their Fifth Amendment rights, the presumption of innocence, the
20 reasonable doubt standard, or whether prospective jurors would grant more credibility to the testimony
21 of a law enforcement witness than to the testimony of others. *See Baldwin*, 607 F.2d at 1297 (reversing
22 conviction in part because district court refused to ask whether jurors would give greater or lesser weight
23 to law enforcement witness); *Gonzalez*, 214 F.3d at 1111 (noting that defense counsel asked prospective
24 jurors "whether anyone would have a problem following the reasonable doubt . . . instruction[?]"); *United*
25 *States v. Hougen*, 20-cr-00432-EJD, 4/2/2021 Hr'g Tr. 72:21-73:7 (N.D. Cal.) (Court: "In our courts an
26 accused has the right to remain silent and not testify. A defendant may choose to rely on the state of the
27 evidence at the conclusion of the government's case and to present no evidence. Do each of you accept
28 the defendant's right under the constitution to remain silent and thus choose not to testify? . . . Do you
29 accept the defendant's right under the constitution to remain silent and not testify? Anyone who does
30 not? . . . If Mr. Hougen relies on his right not to testify[,] will anyone hold that against him?"); *id.* at
31 157:19-160:3 (Court excusing juror for cause because of lack of language proficiency); *cf.* Ninth Circuit
32 Model Instructions §§ 1.2, 3.2, 3.3 (rev. March 2021) (presumption of innocence and Fifth Amendment
33 right not to testify).

⁹ In recent pleadings, the government has referenced matters currently under seal. *See* Gov't
Opp'n at 2 n.1, 7, 12; *see also* Gov't Proposed Jury Instructions, Dkt. 804 at 1. Ms. Holmes looks
forward to discussing those issues with the Court in the appropriate forum.

1 subjects include the “tech” community,¹⁰ start-up companies,¹¹ investing and finance,¹² lobbying,¹³
 2 corporate executives,¹⁴ and blood testing.¹⁵ *See* Ms. Holmes’ Proposed Questionnaire, Dkt. 808 ¶¶ 23,
 3 37, 41-46, 59-64, 89-90.

4 For its part, Ms. Holmes’ questionnaire inquires into jurors’ experiences with and perspectives
 5 on the principal subject matters that the government has put at issue at trial, and asks direct questions
 6 about prospective jurors’ opinions on particularly sensitive topics. *See supra* p. 5.¹⁶ Absent expanded
 7 questioning on these subjects, the Court will lack “any reasonable assurances that prejudice would be
 8 discovered if present.” *Baldwin*, 607 F.2d at 1298.

9 A more circumscribed questionnaire would be appropriate if a more reasonably circumscribed
 10 case had been charged. As it is, bias cannot be determined with a few summary questions based on a
 11 brief summary of some of allegations of the case and a few (seemingly randomly selected) of the dozens
 12 of topics that will arise at trial. Only Ms. Holmes’s proposed questionnaire will help to ensure a fair
 13 jury with reasonable protection against later discovery of bias.

14 CONCLUSION

15 For the foregoing reasons, and the reasons stated in Ms. Holmes’ Request for Expanded
 16 Summons and Jury Questionnaire as well as Individual *Voir Dire* with Counsel, Dkt. 799, this Court
 17 should grant Ms. Holmes’ request.

22 ¹⁰ *E.g.*, 2d Cleary Decl., Ex. 54-55.

23 ¹¹ *E.g.*, *id.* Ex. 55.

24 ¹² *E.g.*, *id.* Ex. 57.

25 ¹³ *E.g.*, *id.* Ex. 59.

26 ¹⁴ *E.g.*, *id.* Ex. 59-61.

27 ¹⁵ *E.g.*, *id.* Ex. 58.

28 ¹⁶ Although Ms. Holmes believes that the possibility of bias on these and other subjects at trial is sufficiently high to entitle her to specific questioning, she would happily explain her reasoning for each question, and its purpose in identifying bias, at the pretrial conference. *See Jones*, 722 F.2d at 530.

1 DATED: June 7, 2021

Respectfully submitted,

2 /s/ Amy Mason Saharia

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CERTIFICATE OF SERVICE

I hereby certify that on June 7, 2021 a copy of this filing was delivered via ECF on all counsel of record.

/s/ Amy Mason Saharia
AMY MASON SAHARIA
Attorney for Elizabeth Holmes

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