

1 JOHN D. CLINE (CA State Bar No. 237759)  
50 California Street, Suite 1500  
2 San Francisco, CA 94111  
Telephone: (415) 662-2260 | Facsimile: (415) 662-2263  
3 Email: cline@johndclinelaw.com

4 KEVIN M. DOWNEY (Admitted Pro Hac Vice)  
LANCE A. WADE (Admitted Pro Hac Vice)  
5 AMY MASON SAHARIA (Admitted Pro Hac Vice)  
KATHERINE TREFZ (CA State Bar No. 262770)  
6 WILLIAMS & CONNOLLY LLP  
725 Twelfth Street, NW  
7 Washington, DC 20005  
Telephone: (202) 434-5000 | Facsimile: (202) 434-5029  
8 Email: KDowney@wc.com; LWade@wc.com; ASaharia@wc.com; KTrefz@wc.com

9 Attorneys for Defendant ELIZABETH A. HOLMES

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-SVK  
15 )  
16 Plaintiff, ) **MS. HOLMES' MOTION FOR RELIEF**  
17 ) **NECESSARY TO MAINTAIN CURRENT**  
v. ) **TRIAL SCHEDULE**  
18 )  
ELIZABETH HOLMES and ) Date: April 20, 2020  
19 RAMESH "SUNNY" BALWANI, ) Time: 10:00 AM  
20 ) CTRM: 4, 5th Floor  
Defendants. )  
21 )  
22 )

Hon. Edward J. Davila

1 **MOTION FOR RELIEF NECESSARY**  
2 **TO MAINTAIN CURRENT TRIAL SCHEDULE**

3 PLEASE TAKE NOTICE that on April 20, 2020, at 10:00 a.m., or on such other date and time  
4 as the Court may order, in Courtroom 4 of the above-captioned Court, 280 South 1st Street, San Jose,  
5 CA 95113, before the Honorable Edward J. Davila, Defendant Elizabeth Holmes will and hereby does  
6 respectfully move the Court for entry of two orders necessary to maintain the current trial schedule  
7 during the COVID-19 pandemic.<sup>1</sup> Ms. Holmes makes this motion pursuant to Federal Rules of Criminal  
8 Procedure 2 and 16, Criminal Local Rule 17-2, this Court's General Order 73, and the Court's inherent  
9 authority to manage its docket. The Motion is based on the below Memorandum of Points and  
10 Authorities, the record in this case, and any other matters that the Court deems appropriate.

11  
12 DATED: March 30, 2020

13  
14 /s/ Lance Wade  
15 KEVIN DOWNEY  
16 LANCE WADE  
17 AMY MASON SAHARIA  
18 KATHERINE TREFZ  
19 Attorneys for Elizabeth Holmes  
20  
21  
22  
23  
24  
25

26 \_\_\_\_\_  
27 <sup>1</sup> Ms. Holmes recognizes that the Court is currently closed during to the COVID-19 crisis but has  
28 noticed the motion for this date and location in accordance with the rules. The defense would prefer to  
proceed on the earliest possible date available to the Court.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 The COVID-19 epidemic is challenging for all citizens—including the Court, the parties, and  
3 counsel. Our struggles pale by comparison to those experienced by the afflicted and those who are  
4 treating them, or those who have been displaced as a result of the crisis. The circumstances do however  
5 make preparing for a complex months-long trial such as this extremely difficult. Based on direction  
6 from public health experts, and consistent with an order from the Mayor of Washington, D.C., Williams  
7 and Connolly LLP has prohibited all but a handful of essential workers from working from our offices.  
8 That status is likely to continue to be the case through at least April 24, 2020, the date through which the  
9 District’s closure of non-essential businesses is currently set to last, if not beyond. *See* Mayor’s Order  
10 2020-053 (Mar. 24, 2020).<sup>2</sup> Of course, we continue to serve all of our clients and meet our professional  
11 obligations, including our obligations to this Court.

12 Trial in this case is set to begin on July 28, 2020. As set forth more fully in the defense portion  
13 of the Joint Status report filed today, the COVID-19 pandemic has combined with events in the case to  
14 make the already difficult task of preparing to try this complex case in the timeframe set by the Court all  
15 the more difficult. Ms. Holmes thus respectfully seeks the issuance of two Orders necessary to maintain  
16 the trial schedule. The first—discussed in Section I, *infra*—permits the defense to take necessary trial  
17 preparation steps that may be unlawful in areas severely affected by the COVID-19 pandemic and  
18 subject to emergency decrees. The second—discussed in Section II, *infra*—facilitates the process for  
19 obtaining issuance of Rule 17(c) subpoenas and addresses other discovery-related issues that have arisen  
20 in the case.

21 **I. Order Permitting Trial Preparation During COVID-19 Pandemic.**

22 Ms. Holmes detailed in her portion of the Joint Status report the enormous number of tasks  
23 necessary to prepare for trial that typically are done in close proximity to others. *See* Dkt. No. 367, at 6-  
24 7 (Joint Status Mem. (Mar. 30, 2020)). Many of those tasks cannot effectively be done remotely.

25  
26 <sup>2</sup> <https://coronavirus.dc.gov/release/mayor-bowser-orders-closure-non-essential-businesses>.  
27 Indeed, just today the Mayor issued a further “stay-at-home” order proclaiming that D.C. residents—  
28 which includes many members of the defense team—may only leave their residences to engage in  
essential activities or work at essential businesses. *See* <https://coronavirus.dc.gov/stayhome>.

1 Moreover, many of the tasks (such as creation of trial materials, witness preparation, and service of  
2 subpoenas) and meetings would currently be prohibited by state or local law in the various jurisdictions  
3 in which they need to occur, including:

- 4 • **The District of Columbia**, which has ordered all non-essential business to cease  
5 operations through April 24, 2020, and all individuals living in Washington, DC to stay at  
6 their place of residence except to engage in certain essential activities. *See* Mayor’s  
7 Order 2020-053 (Mar. 24, 2020); Mayor’s Order 2020-054 (Mar. 30, 2020).
- 8 • **The State of New York**, which has implemented at 10-point New York State on PAUSE  
9 Plan, inducing ordering closure of all non-essential businesses, limitation on use of public  
10 transportation, and limiting congregation of individuals outside their home to workers  
11 providing essential services. *See* Executive Order 202.8 (Mar. 20, 2020).
- 12 • **The State of California**, which has ordered that its residents to stay at home or at their  
13 place of residence except as needed to maintain continuity of operations of the federal  
14 critical infrastructure sectors. *See* Executive Order N-22-30 (Mar. 19, 2020).
- 15 • **The State of Maryland**, which has ordered the closure of all non-essential businesses  
16 until further order and for all persons to stay in their homes or places of residence except  
17 to conduct certain essential activities. *See* Order of the Governor of the State of  
18 Maryland No. 20-03-23-01 (Mar. 23, 2020); Order of the Governor of the State of  
19 Maryland No. 20-03-20-01 (Mar. 30, 2020).
- 20 • **The State of Washington**, which has ordered that all people in Washington State shall  
21 immediately cease leaving their home or place of residence except: (1) to conduct or  
22 participate in essential activities, and/or (2) for employment in essential business  
23 services. *See* Proclamation 20-25 by the Governor Amending Proclamation 20-05 (Mar.  
24 23, 2020).
- 25 • **The Commonwealth of Virginia**, which has ordered that all individuals in Virginia shall  
26 remain at their place of residence, except to conduct certain essential activities or when  
27 travel is required by court order, through June 10, 2020. *See* Executive Order No. 55

1 (Mar. 30, 2020).

2 Trial-preparation tasks will require members of the defense team or agents we retain to undertake  
3 actions that public health officials have deemed to be inadvisable and/or unlawful under the above  
4 decrees and others. Travel for meetings may in some circumstances also be unlawful. Some of the  
5 recipients we need to serve with subpoenas or witnesses we need to interact with for trial preparation are  
6 health care professionals and institutions and laboratory and testing companies. Others are people who  
7 are sheltered in place and hesitant or unwilling to meet with us in person. We expect many subpoena  
8 recipients and/or witnesses to respond with hostility to receipt of subpoenas or other contacts during this  
9 time, and to question the lawfulness of our actions.

10 In the face of these obstacles, we will continue our preparation and undertake all necessary trial  
11 preparation tasks, consistent with the current schedule. While we are hesitant to encourage any person  
12 to undertake actions that are contrary to advice and directions from public health officials or impose any  
13 burdens on health care professionals or institutions, we must adhere to the direction provided by this  
14 Court regarding the time and manner in which it wishes to proceed with this case. As officers of the  
15 Court, we are duty bound to do our best to meet any judicial requirements that are imposed. We  
16 recognize and are respectful of the many competing demands that the Court needs to balance, how  
17 difficult the balancing of those demands may be in present circumstances, and we will continue to do  
18 our best to meet the timelines the Court has deemed appropriate in these circumstances.<sup>3</sup>

19 Given that the Court has determined that it is necessary to proceed as scheduled, we would  
20 respectfully request that the Court issue an Order that directs us to do so and makes plain that our trial  
21 preparation actions are essential activities, so that we stay in compliance with all state and local laws,  
22 and so we may use that Order with state and local authorities and in dealings with witnesses and other  
23 third parties who may object to the manner in which we are proceeding.<sup>4</sup> A form of proposed order is  
24

---

25 <sup>3</sup> We are similarly duty bound to our client, and in the event that adequate trial preparation  
26 becomes simply impossible, we will be obligated to advise the Court and seek appropriate relief.

27 <sup>4</sup> The defense understands that the United States Attorney General has been working towards  
28 providing similar protections for federal prosecutors. *See* Sadie Gurman, *Barr Strives to Keep Justice  
Moving Amid Coronavirus Crisis*, Wall St. J. (Mar. 23, 2020) (“[Mr. Barr] instructed U.S. attorneys on  
MS. HOLMES’ MOTION FOR RELIEF NECESSARY TO MAINTAIN CURRENT TRIAL SCHEDULE  
CR-18-00258 EJD SVK

1 attached hereto as Exhibit A.

2 **II. Order Governing Rule 17(c) Subpoenas and Setting Discovery Deadlines During COVID-**  
3 **19 Pandemic.**

4 In her portion of the Joint Status Report filed today, Ms. Holmes detailed actions by the  
5 government that have further complicated trial-preparation, including the government’s expansion of its  
6 case through an unreasonably broad Rule 404(b) disclosure and inclusion in its Bill of Particulars of a  
7 substantial quantity of newly discovered evidence. *See* Dkt. No. 367, at 3-4. We anticipate the need to  
8 come forward with 50-100 trial and document subpoenas, including many to gather documents to rebut  
9 the new allegations in the government’s Rule 404(b) disclosures and Bill of Particulars. Many of those  
10 will have to be filed on an *ex parte* basis to protect defense strategy, as is permitted under this Court’s  
11 Criminal Local Rules. *See* Criminal Local Rule 17-2(a)(1). Under those rules, however, the process of  
12 seeking issuance of subpoenas—and the return of documents to the Court—would require contact  
13 between our agents and those of the recipients with court staff.

14 In light of current circumstances and conditions, we respectfully request that the Court issue an  
15 Order granting the defense the authority to issue early return subpoenas under Federal Rule of Criminal  
16 Procedure 17(c) and the Court’s Local Rules without further order of the Court. Rather than burden the  
17 Court and increase the risk on our agents and court staff through numerous manual filings and document  
18 returns at the San Jose Courthouse, the Order would permit service of subpoenas returnable to counsel  
19 for Ms. Holmes. Third-parties of course still could move to quash subpoenas they believe to be  
20 objectionable.

21 Moreover, because time is of the essence, the requested Order would set firm deadlines for the  
22 government’s outstanding discovery responses to prevent further government delays like those detailed  
23 in the defense portion of the Joint Status Report. *See* Dkt. No. 367, at 3 & nn. 1, 2. In particular, the  
24 requested Order sets deadlines for the government (1) to produce all discovery referenced in its Rule  
25 404(b) notice, Bill of Particulars, and expert witness disclosures that has not yet been produced; (2) to

26  
27 \_\_\_\_\_  
28 commute for law enforcement work even in places with restrictions.”).

1 produce documents from the FDA, including those from the remaining priority custodians; and (3) to  
2 identify documents within the taint materials that are Theranos privileged and not usable in the case. A  
3 form of proposed order is attached hereto as Exhibit B.

4  
5 DATED: March 30, 2020

Respectfully submitted,

6  
7 /s/ Lance Wade

8 KEVIN DOWNEY

9 LANCE WADE

AMY MASON SAHARIA

KATHERINE TREFZ

10 Attorneys for Elizabeth Holmes

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on March 30, 2020 a copy of this filing was delivered via ECF on all counsel  
3 of record.

4  
5 /s/ Lance Wade  
6 Lance Wade  
7 Attorney for Elizabeth Holmes  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27