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11 UNITED STATES DISTRICT COURT  
12 NORTHERN DISTRICT OF CALIFORNIA  
13 SAN JOSE DIVISION  
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15 UNITED STATES OF AMERICA, ) Case No. 18-CR-258 EJD  
16 Plaintiff, ) JOINT STATUS MEMORANDUM  
17 v. )  
18 ELIZABETH HOLMES and RAMESH )  
"SUNNY" BALWANI, )  
19 Defendants. )  
20 )  
21 )

22 The parties in the above-captioned matter hereby file this joint status memorandum in advance of  
23 the hearing set for April 1, 2020.

24 **I. Government’s Statement**

25 On March 20, 2020, the Court issued an Order re Severance of Trials. ECF No. 362. The Court  
26 found good cause to sever the trials of Ms. Holmes and Mr. Balwani. *Id.* The Court stated that Ms.  
27 Holmes’s trial will proceed as scheduled and directed all parties to meet and confer and file proposed  
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1 revised schedules no later than March 30, 2020. *Id.* On March 26, 2020, the parties met and conferred.

2 The government respectfully submits as follows:

3 On March 6, 2020, as provided in the Court’s scheduling order, the government served a  
4 summary under Rule 16 for each expert witness that it intends to call at trial in its-case in chief. On  
5 March 6, 2020, as provided in the Court’s scheduling order, the government also provided notice of any  
6 evidence of other crimes, wrongs or acts which the government intends to offer under Federal Rule of  
7 Evidence 404(b). The defendant has objected to the sufficiency of the government’s notice; the  
8 government maintains its notice was sufficient, but will nonetheless supplement its notice on or before  
9 April 3, 2020. On or before May 1, 2020, the government shall serve witness and exhibit lists for its  
10 case-chief and shall identify any statement the government intends to offer under Federal Rule of  
11 Evidence 801(d)(2)(E).

12 In light of the Court’s Order re Severance of Trials [ECF No. 362], the government intends to  
13 file a motion on or before April 1, 2020. Otherwise, the government seeks no adjustments to the current  
14 schedule.

15 The government disputes many of the factual averments in the defendant’s statement and the  
16 propriety of much of the relief sought. The government will respond to any noticed motion the  
17 defendant files.

18 **II. Ms. Holmes’ Statement**

19 Pursuant to the Court’s March 20 Order, the defense provides the below status update. Part A  
20 discusses the pretrial schedule. Part B addresses the challenges and legal impediments relating to the  
21 COVID-19 pandemic on Ms. Holmes’ trial preparation.

22 **A. Update on the Pretrial Schedule.**

23 When the Court first set the trial date, counsel for Ms. Holmes noted that there was little margin  
24 for error in the schedule given the voluminous discovery still outstanding at the time. *See* 6/28/19 Hr’g  
25 Tr. 8; *see also* 7/17/19 Hr’g Tr. 28 (stating desire to “keep on the schedule that is a tough schedule for  
26 the defense”). Ms. Holmes noted, and the government recognized, that the schedule was particularly  
27 challenging for her trial team, since it was new to the case post-indictment. *See* Dkt. No. 80 (Joint  
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1 Status Mem. (June 21, 2019)) (jointly requesting a September 2020 or later trial date in part because  
2 “counsel for defendant Holmes . . . did not represent Ms. Holmes during the investigation that led to the  
3 indictment”). The following unforeseen events within and outside the case have made the already  
4 difficult task of preparing to try this complex case in the timeframe set by the Court all the more  
5 difficult.

6 **1. The Government’s Delinquency in Discovery.**

7 Because of the case’s complexity and the massive amounts of discovery involved, the proposed  
8 schedule presumed strict compliance with discovery obligations and interim deadlines to make trial at  
9 the date set by the Court possible. *See* 7/17/19 Hr’g Tr. 14. The defense has heard the Court when it  
10 has expressed its desire to adhere to the trial date, and has taken all possible steps to keep the case on  
11 track even when encountering delays not of our making. *See* 11/4/19 Hr’g Tr. 86. The defense has  
12 missed no deadlines, and will continue to take all steps possible to meet deadlines.

13 The same cannot be said of the government. The government has produced substantial discovery  
14 subsequent to the September 16, 2019 government Rule 16 production deadline. *See* Dkt No. 121 (Joint  
15 Status Mem. (Sept. 30, 2019)) (noting that delays in production of FDA and CMS documents at that  
16 time already violated government’s agreement to complete its Rule 16 productions by September 16,  
17 2019). The government has ignored or defied orders of the Court.<sup>1</sup> It delayed for almost six weeks in  
18 providing the defense with the Bill of Particulars that the Court ordered on February 11, 2020.<sup>2</sup>

19 The burdens of the government’s failure to meet deadlines have not harmed its preparation, but  
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21 <sup>1</sup> Although the Court ordered the production of FDA documents by December 31, 2019, the  
22 government on the eve of that deadline proposed instead completing its productions sometime in May  
23 2020. *See* Dkt. No. 215, at 5 (Gov’t Mot. to Extend Deadline); Dkt. No. 216, at 1 (Balwani Opp’n  
24 to Gov’t Mot. to Extend Deadline). The government produced over 170,000 pages of FDA discovery on  
25 the December 31 deadline, and since then has produced over 800,000 pages. The government recently  
26 confirmed that it is only about half-way complete with its FDA productions, meaning that the defense  
27 may receive upwards of a million pages of discovery between now and trial. *That outstanding discovery*  
28 *includes documents from at least six key custodians identified by the defense that the government*  
*represented it would prioritize, but has not.*

<sup>2</sup> On February 13, the defense requested the government provide the Bill of Particulars by  
February 21. The government instead proposed March 12, a full month after the Court’s Order. The  
defense at that time did not to seek a Court Order requiring prompt compliance because, under the  
standard briefing schedule, that could only have marginally advanced the date. On March 12, however,  
the government gave itself an extension of time until March 23 “in light of the need to incorporate  
recently collected evidence.” The Bill the government finally provided on March 23 relies heavily on  
evidence collected *after* the Court’s February 11 Order.

1 have delayed and impeded preparation of the defense. Indeed, instead of focusing on past due deadlines,  
2 the government has instead continued its investigation,<sup>3</sup> continued to expand the case,<sup>4</sup> and thereby  
3 exacerbated the difficulties of an already challenging schedule and circumstances. The government as  
4 recently as March 26 expressed the view that it needs a modification of the schedule to address one or  
5 two expert witnesses, yet takes the view that the defense needs no additional time to deal with the  
6 million-plus pages of discovery that have not yet been produced, the twenty-two new broad categories of  
7 factual allegations it indiscriminately dumped into its Rule 404(b) notice, or the new evidence in the Bill  
8 of Particulars.

## 9 **2. The Government's Expansive Rule 404(b) Disclosures.**

10 On March 6, 2020, the government disclosed twenty-two broad categories of evidence reaching  
11 far afield from the two charged wire fraud schemes that it purports will be admissible under Rule 404(b).  
12 *See Ex. A.* While the defense disagrees that most (if not all) of the disclosed categories are proper Rule  
13 404(b) evidence or have any relevance to the case,<sup>5</sup> the government's notice carries significant risk of  
14 expanding the scope of the trial beyond manageable bounds and impairing the defense's efforts to  
15 prepare for trial even if the bulk of the evidence were excluded.

16 The Rule 404(b) notice unreasonably burdens the defense and the Court in many ways. It  
17 explodes the time period for relevant statements and documents from three years to upwards of ten by  
18 implicating statements made throughout Theranos' 15-year existence. It involves completely new  
19 categories of statements and conduct directed at new audiences, including Walgreens and Safeway—  
20 entities with which Theranos had multi-year relationships involving scores of witnesses and many  
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22 <sup>3</sup> The government has conducted at least 16 witness interviews since the December 31 deadline  
instead of facilitating production of documents from the remaining priority FDA custodians.

23 <sup>4</sup> The government's March 6 disclosure of evidence it may seek to admit under Federal Rule of  
24 Evidence 404(b) included twenty-two categories of evidence that threatens to expand vastly the scope of  
the case. *See Part II.A.2, infra.* The government's belated Bill of Particulars is chock full of newly  
25 acquired evidence and statements from recently conducted interviews.

26 <sup>5</sup> While it is broad, the Rule 404(b) notice lacks the detail and evidentiary support required by the  
Criminal Local Rule 16-1(c)(3) and Federal Rule of Evidence 404(b)(2). At the March 26 meet and  
27 confer, the government stated that it would address Ms. Holmes' concerns about the sufficiency of its  
disclosures today (March 30), as the defense had requested. Ms. Holmes was prepared to file a motion  
28 today to address remaining deficiencies, if any. But again, the government in its portion of this Status  
Report extended its own response deadline to this Friday, further delaying our ability to address these  
404(B) issues.

1 thousands of communications. It raises significant privilege concerns that are likely to spawn ancillary  
2 litigation in this and other courts by placing statements to lawyers and journalists front-and-center.  
3 Finally, its breadth will require extensive motion practice that will be difficult to address within the  
4 current schedule.

5 The government’s proposed Rule 404(b) evidence, if admitted, would overwhelm this already  
6 broad case. Preparing to combat these new allegations will require substantial effort and time that is  
7 incompatible with the current schedule.

### 8 3. The Government’s Treatment of Theranos-Privileged Documents.

9 The government’s treatment of Theranos-privileged material in a tranche of over 2.6 million  
10 pages of documents recently transferred from the taint team to the trial team further hinders the  
11 defense’s ability efficiently to prepare for trial on the current schedule. In October 2018, the  
12 government agreed to establish a taint team to review certain potentially privileged documents produced  
13 by Theranos. Dkt. No. 60. The taint team’s year-long privilege review was not completed until  
14 December 18, 2019, however, and even then it did not include identification of documents in which  
15 *Theranos* holds privilege or work-product protections. The defense understands that the Theranos  
16 Assignee has not and is not waiving any privileges, yet the tranche recently transferred to the trial team  
17 appears to include tens of thousands of privileged documents that the taint team was specifically  
18 instructed not to filter out. To adhere with their ethical obligations, however, both the government and  
19 the defense will need to set aside any privileged documents they discover in this set and meet and confer  
20 with the Theranos Assignee or seek relief from the Court permitting the use of the documents. An  
21 agreement between Theranos and the government confirms that the government is ethically obligated to  
22 exclude these privileged documents and return them to the assignee, yet the government disclosed the  
23 existence of this agreement to the defense for the first time this month—and has not yet filtered out the  
24 privileged documents, notwithstanding the defense’s request that its taint team do so. Ltr. from C.  
25 Davies to J. Bostic (Mar. 29, 2018) (“If the Department [of Justice] discovers Privileged materials  
26 disclosed by Theranos, it shall promptly notify Theranos in writing. This Agreement does not alter any  
27 ethical obligations an attorney may have with respect to discovery of inadvertent disclosure of  
28 information or documents by another party.”). Accordingly, Ms. Holmes does not know which

1 documents in this set—which is part of the government’s Rule 16—are actually appropriate for use in  
2 the case. The government’s unorthodox approach of producing to the defense tens of thousands of  
3 documents under Rule 16 that it may lack the power to use with witnesses or at trial—while at the same  
4 time putting interactions with attorneys front and center in its 404(B) notice—only adds unnecessary  
5 uncertainty and complexity into the trial preparation process and may spawn privilege-related litigation  
6 as trial approaches.

7 **4. Severance.**

8 The fact that the case has now been severed for trial inevitably affects trial-preparation. Contrary  
9 to the expectations of the Court and the defense, the government made clear last week that its case  
10 against Ms. Holmes remains approximately the same size as it would have been for the joint trial.  
11 Accordingly, counsel for Ms. Holmes now must prepare to examine completely all witnesses at trial, and  
12 handle all legal motions.

13 **B. COVID-19 Challenges and Legal Impediments.**

14 The COVID-19 epidemic is challenging for all citizens—including the Court, the parties, and  
15 counsel. Our struggles pale by comparison to those experienced by the afflicted and those who are  
16 treating them, or those who have been displaced as a result of the crisis. The circumstances do however  
17 make preparing for a complex months-long trial such as this extremely difficult. Based on direction  
18 from public health experts, and consistent with an order from the Mayor of Washington, D.C., Williams  
19 and Connolly LLP has prohibited all but a handful of essential workers from working from our offices.  
20 That status is likely to continue to be the case through at least April 24, 2020, the date through which the  
21 District’s closure of non-essential businesses is currently set to last, if not beyond. *See* Mayor’s Order  
22 2020-053 (Mar. 24, 2020).<sup>6</sup> Of course, we continue to serve all of our clients and meet our professional  
23 obligations, including our obligations to this Court.

24 In effort to be prepared for trial on the current schedule, we will need to do an enormous number  
25 of tasks, nearly all of which are typically done in close proximity to our client, other attorneys,

26  
27 <sup>6</sup> <https://coronavirus.dc.gov/release/mayor-bowser-orders-closure-non-essential-businesses>.  
28 Indeed, just today the Mayor issued a further “stay-at-home” order requiring that D.C. residents—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 paralegals, support staff, testifying experts, consulting experts, and fact witnesses. Those tasks include  
2 serving early return document subpoenas, trial subpoenas, lengthy in person meetings with our client,  
3 team meetings involving extensive use of documents, meeting with witnesses that involve the extensive  
4 use of documents, review of potential trial exhibits, preparation of examinations, preparation of trial  
5 demonstratives with litigation support staff, preparation of numerous extensive motions, meeting with  
6 expert witnesses to prepare for testimony, working with consulting experts to prepare for cross  
7 examination of government witnesses. Nearly all of the tasks are proceeding on multiple tracks to meet  
8 the demands of the schedule—particularly given the increased size and complexity of the case that has  
9 resulted from the recent government disclosures referenced above. Many of the tasks we currently need  
10 to do can be done remotely; others cannot effectively be done that way (particularly those involving  
11 large numbers of documents or potential exhibits, nearly all of which physically reside in our offices), or  
12 are slower and more cumbersome.

13         Many of our tasks (such as creation of trial materials, witness preparation, and service of  
14 subpoenas) and meetings would currently be prohibited by state or local law in the various jurisdictions  
15 in which they need to occur, including, among other places, in California, the District of Columbia, the  
16 State of Maryland, the State and City of New York, the Commonwealth of Virginia, the State of Illinois,  
17 and the State of Michigan. Some of these tasks also will require members of this team or agents we  
18 retain to undertake actions that public health officials have deemed to be inadvisable and/or unlawful.  
19 Travel for meetings may in some circumstances also be unlawful. Some of the recipients we need to  
20 serve with subpoenas or witnesses we need to interact with for trial preparation are health care  
21 professionals and institutions and laboratory and testing companies. Others are people who are sheltered  
22 in place and hesitant or unwilling to meet with us in person. We expect many subpoena recipients  
23 and/or witnesses to respond with hostility to receipt of subpoenas or other contacts during this time, and  
24 to question the lawfulness of our actions.

25         In the face of these obstacles, we will continue our preparation and undertake all necessary trial  
26 preparation tasks, consistent with the current schedule. While we are hesitant to encourage any person  
27 to undertake actions that are contrary to advice and directions from public health officials or impose any  
28 burdens on health care professionals or institutions, we must adhere to the direction provided by this

1 Court regarding the time and manner in which it wishes to proceed with this case. As officers of the  
2 Court, we are duty bound to do our best to meet any judicial requirements that are imposed. We  
3 recognize and are respectful of the many competing demands that the Court needs to balance, how  
4 difficult the balancing of those demands may be in present circumstances, and we will continue to do  
5 our best to meet the timelines the Court has deemed appropriate in these circumstances.<sup>7</sup>

6 Given that the Court has determined that it is necessary to proceed as scheduled, we intend to file  
7 a noticed motion today seeking Orders to facilitate timely trial preparation going forward.<sup>8</sup> We propose  
8 that we discuss an appropriate hearing date for that motion at the upcoming status conference.

9 DATED: March 30, 2020

Respectfully submitted,

10 ADAM A. REEVES  
11 Attorney for the United States  
12 Acting Under Authority Conferred  
13 by 28 U.S.C. § 515

*/s/ Robert S. Leach*

14 \_\_\_\_\_  
15 ROBERT S. LEACH  
16 JOHN C. BOSTIC  
17 VANESSA BAEHR-JONES  
18 JEFF SCHENK  
19 Assistant United States Attorneys

20 DATED: March 30, 2020

Respectfully submitted,

21 WILLIAMS & CONNOLLY LLP

*/s/*

22 \_\_\_\_\_  
23 LANCE WADE  
24 Attorneys for Defendant Elizabeth Holmes

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26  
27 <sup>7</sup> We are similarly duty bound to our client, and in the event that adequate trial preparation  
becomes simply impossible, we will be obligated to advise the Court and seek appropriate relief.

28 <sup>8</sup> The government objected to attaching the proposed orders to a Joint Status Report.  
Accordingly, Ms. Holmes will be filing today a noticed motion seeking these Orders.