

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

UNITED STATES OF AMERICA,
Plaintiff,
v.
ELIZABETH A. HOLMES,
Defendant.

Case No. [5:18-cr-00258-EJD-1](#)

**ORDER DENYING MOTION FOR
RELEASE PENDING APPEAL**

Re: Dkt. Nos. 1676, 1722

Following a three-month trial, the jury found Defendant Elizabeth A. Holmes guilty of three counts of wire fraud against Theranos investors, as well as one count of conspiracy to commit wire fraud. The Court subsequently sentenced Ms. Holmes to 135 months of imprisonment with a surrender date of April 27, 2023. Now before the Court is Ms. Holmes’s Motion for Release Pending Appeal (“Motion”), which has been fully briefed and heard. ECF Nos. 1676, 1721, 1740. Additionally, Ms. Holmes has moved to strike certain portions of the government’s opposition to her Motion. ECF No. 1722.

Having considered the record, the submitted briefing, and oral arguments, the Court DENIES Ms. Holmes’s Motion for Release Pending Appeal.

I. PROCEDURAL BACKGROUND

On January 3, 2022, a jury convicted Elizabeth A. Holmes on one count of conspiracy to commit wire fraud, 18 U.S.C. § 1349, and three counts of wire fraud, 18 U.S.C. § 1343, against Theranos investors. On November 18, 2022, the Court sentenced Ms. Holmes to 135 months of imprisonment to be served concurrently, followed by 3 years of supervised release to be served concurrently. The Court also set a self-surrender date for Ms. Holmes at 2:00 p.m. on April 27,

Case No.: [5:18-cr-00258-EJD-1](#)
ORDER DENYING RELEASE PENDING APPEAL

1 2023. Ms. Holmes filed her Notice of Appeal on December 2, 2022, and this Motion followed
2 shortly thereafter on December 5, 2023.

3 On January 19, 2023, the government filed its opposition to Ms. Holmes' Motion. ECF
4 No. 1721. Ms. Holmes claims that the opposition contains factual misrepresentations and
5 confidential information, and she has filed a motion to strike or seal those portions. ECF No.
6 1722. On March 17, 2023, the Court heard oral arguments on Ms. Holmes's Motion.

7 **II. LEGAL STANDARD**

8 Per 18 U.S.C. § 3143(b), a defendant who has been found guilty and sentenced to a term of
9 imprisonment must be detained, even if an appeal has been filed. However, a court may allow the
10 defendant to be released pending appeal if it makes the following four findings:

- 11 1. The defendant has demonstrated by clear and convincing evidence that he is
12 not likely to flee or pose a danger to the safety of any other person in the
13 community if released;
- 14 2. The appeal is not for purpose of delay;
- 15 3. The appeal raises a substantial question of law or fact; and
- 16 4. If that substantial question is determined favorably to defendant on appeal,
17 that decision is likely to result in reversal or an order for a new trial of all
18 counts on which imprisonment has been imposed.

19 *United States v. Handy*, 761 F.2d 1279, 1283 (9th Cir. 1985). On a motion for release pending
20 appeal, the burden of proof shifts from the government to the defendant to demonstrate entitlement
21 to release. *Id.*

22 **III. DISCUSSION**

23 **A. Flight Risk and Danger to Community¹**

24 As to the first element, the Court considers whether Ms. Holmes has presented clear and
25 convincing evidence that she is not likely to flee or pose a danger to the safety of the community.
26 The Court will first note that it does not consider Ms. Holmes to be a danger to the community if
27 released. Ms. Holmes was convicted of non-violent—though nonetheless serious—crimes that

28 ¹ The government does not argue, nor does the Court find, that the appeal is brought for delay.
Case No.: [5:18-cr-00258-EJD-1](#)
ORDER DENYING RELEASE PENDING APPEAL

1 primarily had the impact they did by virtue of her influence and position at Theranos. Today, Ms.
2 Holmes is in no position to inflict similar harms of fraud on the community, and the Court is
3 unaware of any evidence that she is likely to commit acts of deception or fraud in her everyday
4 life. *Cf. U.S.A. v. Wallace*, 2016 WL 9137630, at *2 (C.D. Cal. Jan. 19, 2016) (finding no “risk of
5 committing the same type of fraud” where defendant “is not in the ambulance transportation
6 business anymore”). The government’s recitation of the same events giving rise to Ms. Holmes’s
7 investor and patient fraud convictions provides limited insight into the risk she poses today to the
8 community, removed from the artifices that enabled her criminal activity.

9 With respect to flight risk, although it is a closer determination, the Court also finds that
10 Ms. Holmes has demonstrated that she is not likely to flee if released. Ms. Holmes has presented
11 evidence that she has made no attempt to flee, the Court retains custody of her expired passport,
12 her appearance is secured by a \$500,000 bond on her parents’ home, and she has strong ties to the
13 community, including two very young children. Mot. 2; Reply 1–3. Furthermore, Ms. Holmes
14 does not have any family or assets abroad, Reply 2–3, and the significant media attention this case
15 has drawn further reduces the likelihood that Ms. Holmes could flee without being quickly
16 recognized. The government argues, however, that Ms. Holmes cannot satisfy this burden because
17 her partner booked an international one-way flight for them that was scheduled to depart a few
18 weeks after the jury had rendered the verdict.² Opp. 5–6. Booking international travel plans for a
19 criminal defendant in anticipation of a complete defense victory is a bold move, and the failure to
20 promptly cancel those plans after a guilty verdict is a perilously careless oversight. Certainly, this
21 incident has invited greater scrutiny of Ms. Holmes’s personal affairs and further speculation into
22 her motivations. However, after reviewing the counsels’ contemporary communications and
23 immediate subsequent remediation, the Court accepts Ms. Holmes’s representation that the one-
24 way flight ticket—while ill-advised—was not an attempt to flee the country.

25 Accordingly, the Court finds that Ms. Holmes has demonstrated by clear and convincing
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27 ² For the reasons indicated on the record, the Court DENIES Ms. Holmes’ Motion to Strike and to
28 Seal portions of the government’s opposition. ECF No. 1722.

1 evidence that she is not likely to flee or pose a danger to the safety of any other person in the
2 community if released.

3 **B. “Substantial Question” and “Likelihood of Reversal”**

4 Even though Ms. Holmes had presented clear and convincing evidence that she would not
5 flee, the Court does not find that she has raised a “substantial question of law or fact” that is
6 “likely to result in reversal or an order for a new trial of all counts.” *Handy*, 761 F.2d at 1283.

7 The “substantial question” requirement defines the level of merit required of the question
8 presented. *Handy*, 761 F.2d at 1280. The Ninth Circuit has held that a “substantial question” is
9 one that may be “fairly debatable” or “fairly doubtful.” *Id.* at 1283. It must present “something
10 more than the absence of frivolity” or issues “debatable among jurists of reason.” *Id.* at 1281–82
11 (citing *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)). The question, however, need not be a
12 “close” one. *Handy*, 761 F.2d at 1282 n.2.

13 On the other hand, the “likelihood of reversal or new trial” requirement defines the “*type* of
14 question that must be presented” for appeal. *Handy*, 761 F.2d at 1281 (emphasis added). The
15 analysis, therefore, “does not involve assessing the likelihood that a reversal will occur in the
16 particular case.” *United States v. Garcia*, 340 F.3d 1013, 1020 n.5 (9th Cir. 2003). Rather, the
17 Court must find the question presented to be “so integral to the merits of the conviction on which
18 defendant is to be imprisoned that a contrary appellate holding is likely to require reversal of the
19 conviction or a new trial.” *United States v. Miller*, 753 F.2d 19, 23 (3d Cir. 1985). Put differently,
20 the question cannot be one that would be considered harmless, would have no prejudicial effect, or
21 was insufficiently preserved. *Id.*

22 In other words, Ms. Holmes must present the correct *type* of question that has met the
23 necessary *level of merit*. For the several questions Ms. Holmes has raised in her Motion, the Court
24 will first review them to determine if they are the correct type (*i.e.*, likely to result in reversal on
25 all counts of conviction) before considering if they arise to the requisite level of merit (*i.e.*, fairly
26 debatable).

1 **1. Evidentiary Questions Relating to the Accuracy and Reliability of**
 2 **Theranos Technology**

3 Ms. Holmes has identified several of the Court’s evidentiary rulings for appeal that
 4 primarily relate to the issue of whether Theranos technology was accurate and reliable. These
 5 “accuracy and reliability” evidentiary decisions include (1) the purportedly improper admissions
 6 of Dr. Kingshuk Das’s testimony as improper lay testimony, Mot. 4–5; (2) the admission of CMS
 7 findings and sanctions, Mot. 5; (3) the admission of evidence that Theranos voided Edison test
 8 results in 2016, Mot. 6; and (4) rulings relating to the LIS database, Mot. 7. These disputes do not
 9 directly pertain to the conduct for which Ms. Holmes was convicted (*i.e.*, the investor fraud
 10 counts), but she argues that they would nonetheless result in a reversal of all her convictions
 11 because they touch upon the “central issue in the case” of accuracy and reliability. Mot. 5.

12 Each one of the questions cited above involved Ms. Holmes’s disagreement with the
 13 Court’s evidentiary rulings. On appeal, even if the Ninth Circuit were to agree that these
 14 evidentiary rulings were erroneous, “reversal is required only if the error affected a substantial
 15 right of the party, meaning [the Ninth Circuit] require[s] a finding of prejudice.” *United States v.*
 16 *Wells*, 879 F.3d 900, 923 (9th Cir. 2018) (internal quotation marks and brackets omitted).
 17 Although non-constitutional evidentiary errors begin with a presumption of prejudice, that
 18 presumption can be rebutted if it is more probable than not that the jury would have reached the
 19 same verdict if the evidence had been excluded. *Id.* at 923–24 (quoting *Jules Jordan Video, Inc. v.*
 20 *144942 Canada Inc.*, 617 F.3d 1146, 1159 (9th Cir. 2010)).

21 To the extent Ms. Holmes challenges rulings on evidence that only relate to the accuracy
 22 and reliability of Theranos’s technology, the Court finds that a contrary appellate decision is *not*
 23 likely to require reversal or new trials on all investor fraud convictions and the conspiracy
 24 conviction. Contrary to her suggestion that accuracy and reliability were central issues to her
 25 convictions, Ms. Holmes’s misrepresentations to Theranos investors involved more than just
 26 whether Theranos technology “work[ed] as promised.” Reply 4. To begin, the TSI had alleged
 27 that—in addition to misrepresenting the capabilities of Theranos’s technology, TSI ¶ 12(A)—Ms.

1 Holmes had also made several misrepresentations that do *not* turn on whether the technology
2 worked or not, such as those regarding the company’s financial status, reliance on third-party and
3 commercially available devices, partnership with Walgreens, and validation by pharmaceutical
4 companies. TSI ¶¶ 12(B)–(D), (H). The jury also heard evidence that multiple investors had
5 expressed shock upon learning that Theranos was using third-party machines instead of its own
6 proprietary devices to conduct blood tests as they were led to believe, which is a misrepresentation
7 unaffected by, for example, the exclusion of the CMS findings or purported expert testimony from
8 Dr. Das. *See* Opp. 12 (citing trial transcripts). And in reviewing the overall sufficiency of the
9 evidence for Ms. Holmes’s Rule 29 motion for acquittal, the Court cited evidence that Ms. Holmes
10 had misrepresented Theranos’s reliance on third-party devices and its expanding partnership with
11 Walgreens, neither of which involved the question of whether Theranos devices worked as
12 promised. ECF No. 1575, at 4–5. Whether the jury heard more or less evidence that tended to
13 show the accuracy and reliability of Theranos technology does not diminish the evidence the jury
14 heard of other misrepresentations Ms. Holmes had made to investors.

15 In sum, even if the Ninth Circuit were to agree with Ms. Holmes that the Court had erred
16 on these evidentiary rulings, the mere fact that a purported error touched upon the accuracy or
17 reliability of Theranos technology is not likely to support a finding that the jury’s verdict was
18 materially affected, especially where the government had presented evidence of other
19 misrepresentations unrelated to Theranos’s accuracy and reliability. Of course, this is not to say
20 that the capabilities of Theranos technology were not relevant to Ms. Holmes’s misrepresentations
21 to investors. However, in light of the breadth of misrepresentations at issue, the Court cannot
22 conclude that there is any one category of misrepresentations “so integral to the merits” that any
23 potential error at all would be likely to result in reversal or new trial of all of Ms. Holmes’s
24 convictions. *Miller*, 753 F.2d at 23. Accordingly, the Court finds that these four questions
25 presented by Ms. Holmes are not the “type of question that must be presented” for appeal, *Handy*,
26 761 F.2d at 1281, and therefore, does not proceed to consider whether they have reached the
27 requisite level of merit to justify release pending appeal under § 1343(b).

1 **2. Exclusion of Balwani SEC Deposition Testimony**

2 Ms. Holmes also argues that the Court erred by excluding as hearsay Mr. Balwani’s prior
3 SEC deposition testimony that he had primary responsibility for the financial model and
4 projections shown to certain investors. She asserts that these prior statements fall under the
5 hearsay exception for statements against interest. As with other evidentiary errors, reversal is only
6 required if the error was more likely than not to affect the verdict. *United States v. Edwards*, 235
7 F.3d 1173, 1178 (9th Cir. 2000).

8 Unlike Ms. Holmes’s other evidentiary challenges that solely relate to the accuracy and
9 reliability of Theranos technology, Mr. Balwani’s prior SEC testimony may be more pertinent to
10 Ms. Holmes’s investor fraud convictions. However, like Ms. Holmes’s other evidentiary
11 challenges, the investors received more than just financial projections. As examples, investors
12 testified that they were induced to invest in Theranos based on misrepresentations that Theranos
13 was “vertically integrated” and making their own analyzers instead of relying on third party
14 devices, as well as misrepresentations regarding Theranos’s relationships (or lack thereof) with
15 pharmaceutical companies. *See* Opp. 12. Given the whole host of investor misrepresentations
16 substantiated by the government’s evidence, the issue of whether Ms. Holmes or Mr. Balwani was
17 involved with preparing financial models is not likely to result in reversal or a new trial.

18 Although Ms. Holmes also claims that the exclusion rose to the level of a due process
19 violation, Mot. 8, she has not demonstrated the primacy of this evidence. An evidentiary error
20 only violates a defendant’s due process rights when it excludes: “(1) the main piece of evidence,
21 (2) for the defendant’s main defense, to (3) a critical element of the government’s case.” *United*
22 *States v. Haischer*, 780 F.3d 1277, 1284 (9th Cir. 2015) (quoting *United States v. Evans*, 728 F.3d
23 953, 967 (9th Cir. 2013)). As discussed above, whether Ms. Holmes was involved in the financial
24 modeling presented to select investors was not a necessary element of the government’s case,
25 given the other misrepresentations she had made to investors. *See supra* Section III(B)(1).

26 The Court does not find that the admission of Balwani’s prior deposition testimony would
27 have affected the jury’s verdict, because it would not disturb evidence of Ms. Holmes’s clear

1 involvement in other misrepresentations made to investors. Accordingly, even if the Ninth Circuit
 2 finds error in this ruling, it is unlikely that it would result in a reversal or new trial on all of Ms.
 3 Holmes's convicted counts.

4 **3. Limits on Dr. Rosendorff's Cross-Examination**

5 Ms. Holmes also claims that permitting cross examination of Dr. Rosendorff's post-
 6 Theranos employment would have resulted in reversal of all counts because the evidence would
 7 have demonstrated the bias in Dr. Rosendorff's testimony. Mot. 9–10; Reply 10–11. Because Ms.
 8 Holmes asserts that this error violated her rights under the Confrontation Clause, the Court must
 9 consider whether an error arose to the level of a constitutional violation by considering whether
 10 the evidence was “(1) the main piece of evidence, (2) for the defendant's main defense, to (3) a
 11 critical element of the government's case.” *Haischer*, 780 F.3d at 1284.

12 Ms. Holmes's reliance on Dr. Rosendorff's testimony is misplaced. Although the
 13 government does rely significantly on Dr. Rosendorff's testimony in its closing arguments, the
 14 line of cross examination at issue here only pertains to Dr. Rosendorff's bias and competence as a
 15 lab director. Mot. 9; Reply 10–11. Testimony and evidence pertaining to Theranos's lab
 16 conditions, however, are substantially attenuated from Ms. Holmes's varied misrepresentations to
 17 Theranos investors, *e.g.*, regarding the companies' external relationships with pharmaceutical
 18 companies or Walgreens. *See supra* Section III(B)(1). In other words, it cannot be said that the
 19 conditions of Theranos's lab or Dr. Rosendorff's specific recollections were “critical element[s] of
 20 the government's case” on fraud to Theranos investors. *Haischer*, 780 F.3d at 1284. Any
 21 question relating to Dr. Rosendorff's bias, therefore, would not be the type likely to result in
 22 reversal or new trial on all convicted counts, especially where Dr. Rosendorff was subjected to
 23 extensive cross-examination over multiple days.

24 Furthermore, even if this question would be likely to result in reversal or a new trial on all
 25 convictions, the Court does not find that it is a “fairly debatable” substantial question. “[A]
 26 district court has discretion to limit cumulative cross-examination into a witness's motivations for
 27 testifying or potential bias, but it cannot prohibit a defendant from probing a witness's credibility

1 or motives altogether.” *United States v. Wilmore*, 381 F.3d 868, 872 (9th Cir. 2004). Here, Ms.
 2 Holmes has fully availed herself of the right to confront Dr. Rosendorff, who was cross examined
 3 over four days of trial. And even with respect to Dr. Rosendorff’s post-Theranos employment, the
 4 Court afforded Ms. Holmes a limited opportunity to inquire into a CMS investigation at one lab
 5 where Dr. Rosendorff worked after he had left Theranos. 10/05/21 Trial Tr. 2718:13–2720:25.
 6 On these facts, there is no substantial question that Ms. Holmes received her constitutional
 7 opportunity to effectively cross-examine Dr. Rosendorff, even with respect to certain aspects of
 8 his bias. Accordingly, the Court finds that Ms. Holmes has not raised a substantial question with
 9 regards to the limits the Court imposed on Dr. Rosendorff’s cross-examination.

10 **4. Admission of Department of Defense Misrepresentations**

11 Ms. Holmes also submits the Court erred by admitting evidence of misrepresentations that
 12 Theranos provided to the military, arguing that such evidence constituted inadmissible character
 13 evidence under Federal Rule of Evidence 404(b). Mot. 11–12.

14 As the Court has already highlighted, Ms. Holmes’s convictions for investor fraud
 15 involved many different misrepresentations made to investors, regarding Theranos’s testing
 16 capabilities, validation by pharmaceutical companies, Theranos’s relationship with Walgreens, and
 17 the company’s financial projections. *See* ECF No. 1575, at 4–5. The representations regarding
 18 the Department of Defense, therefore, constitute only one facet of the larger prism of
 19 misrepresentations made to investors. *See, e.g., United States v. Rossby*, 81 F. App’x 109, 111
 20 (9th Cir. 2003) (citing *United States v. Hernandez-Miranda*, 601 F.2d 1104, 1109 (9th Cir. 1979)
 21 (holding that error in admitting 404(b) evidence was harmless where the government had “a
 22 strong, if not overwhelming, case against” defendant)). Furthermore, in its closing arguments, the
 23 government took efforts to avoid a propensity inference from the Department of Defense
 24 misrepresentations, expressly clarifying that Ms. Holmes was not being charged with defrauding
 25 the Department of Defense nor that the Department was a victim the jury would be asked about.
 26 12/16/21 Hr’g Tr. 8919:13–17 (“The government has not charged Ms. Holmes with defrauding . . .
 27 the Department of Defense.”); 8921:22–24 (“You’re not going to be asked to, in your verdict

1 form, decide if . . . the Department of Defense [is a] victim[.]”). Considered alongside all other
 2 misrepresentations Ms. Holmes made to investors, the Court cannot find that—had Ms. Holmes’s
 3 misrepresentations to the Department of Defense been suppressed—the jury’s verdict would have
 4 been any different. This supposed character evidence would not warrant reversal of any count,
 5 much less all counts.

6 **5. Denial of Motions for New Trial**

7 Finally, Ms. Holmes argues that the Court had erred in denying all three of her motions for
 8 new trial based on newly discovered evidence. Mot. 10-13; ECF No. 1636.

9 Even assuming that errors in denying Ms. Holmes’s new trial motions would be the type of
 10 issue on appeal that would result in a new trial, the Court does not find that Ms. Holmes has raised
 11 a fairly debatable or substantial question. To start, the Court’s denials of Ms. Holmes’s new trial
 12 motions were based on multiple grounds, any of which would have supported denial of the
 13 respective motion. Ms. Holmes’s current Motion, however, takes issue with only some remarks
 14 and points the Court relied on in its order but does not respond to *all* bases for the Court’s denials.
 15 For instance, with respect to a new trial based on Dr. Rosendorff’s post-trial conduct, Ms. Holmes
 16 does not respond to the Court’s conclusion that Dr. Rosendorff’s statements were “too vague and
 17 general to imply that any specific testimony [presented by the government] was actually false or
 18 misleading” under *Napue v. Illinois*, 360 U.S. 264 (1959). ECF No. 1636, at 7. Nor does she
 19 address why the government’s belief as to the relationship between Ms. Holmes and Mr. Balwani
 20 would be likely to result in acquittal, when the government has no personal knowledge of their
 21 relationship and Ms. Holmes herself has admitted to having control over decisions at Theranos.
 22 ECF No. 1636, at 10. And finally, contrary to Ms. Holmes’s insistence otherwise, the revelation
 23 that specific prosecutors had received emails discussing LIS database preservation does not rise to
 24 the level of prejudice that could have changed the result of the trial. ECF No. 1636, at 14. The
 25 Court cannot conclude that reasonable jurists would fairly debate these remaining issues when Ms.
 26 Holmes’s Motion does not address all bases for the Court’s denials.

27 Accordingly, because Ms. Holmes’s Motion largely re-emphasizes points she had made in

United States District Court
Northern District of California

1 her motions for new trial and does not address all independent bases for the Court’s denials, the
2 Court cannot find that there is a “fairly debatable” question as to whether the Court erred in
3 denying Ms. Holmes’s motions for new trial based on newly discovered evidence.

4 **IV. CONCLUSION**

5 Although the Court finds that Ms. Holmes is not a flight risk or a danger to the safety of
6 the community, it is unable to find that she has raised a “substantial question of law or fact” that if
7 “determined favorably to [her] on appeal, [would be] likely to result in reversal or an order for a
8 new trial of all counts on which imprisonment has been imposed.” *Handy*, 761 F.2d at 1283; 18
9 U.S.C. § 3143(b).

10 Based on the foregoing, Ms. Holmes’s Motion for Release Pending Appeal is DENIED.

11 **IT IS SO ORDERED.**

12 Dated: April 10, 2023

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15 EDWARD J. DAVILA
16 United States District Judge

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