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6 UNITED STATES DISTRICT COURT
7 NORTHERN DISTRICT OF CALIFORNIA
8 SAN JOSE DIVISION

10 UNITED STATES OF AMERICA,) Case No. CR-18-00258-EJD
11 Plaintiff,)
12 v.) **DEFENDANT ELIZABETH HOLMES' REPLY**
13 ELIZABETH HOLMES and) **IN SUPPORT OF PARLOFF MOTION IN**
RAMESH "SUNNY" BALWANI,) **LIMINE AND OBJECTIONS TO ORDER**
14 Defendants.) **QUASHING PARLOFF SUBPOENA**
15)
16) Hon. Edward J. Davila
17)
18)
19)

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21 The parties¹ are in substantial agreement about the permissible scope of Roger Parloff's direct
22 testimony. He may authenticate his recordings of interviews with Ms. Holmes. He may authenticate his
23 June 2014 Fortune article. For interviews that were not recorded, he may recount otherwise admissible
24 statements Ms. Holmes made to him. He may not comment on her knowledge or intent, and he may not
25 opine on her truthfulness. Nor may the government introduce his January 2016 article in which he claimed

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27 ¹ Ms. Holmes' motion in limine is Dkt. 1103. The government's response is Dkt. 1115. Parloff
28 has also opined on the permissible scope of his testimony. Dkt. 1114. His views, to the extent they are
relevant, appear to coincide with Ms. Holmes' position.

1 that Theranos misled him, absent door-opening by Ms. Holmes.

2 But areas of significant disagreement remain. The government seeks to have Parloff offer
3 "context" for Ms. Holmes' statements. To the extent that means only that Parloff will testify that he
4 interviewed Ms. Holmes in the course of preparing an article, that he spoke with her on particular days or
5 by particular means (face-to-face, by telephone, etc.), and so forth, we have no objection. But the
6 government uses "context" far more broadly, to include Parloff's "purpose in asking certain questions,"
7 "how questions and answers fit into the overall series of conversations between him and Defendant," "what
8 he understood from Defendant's answers," and "[h]ow Defendant's statements influenced and supported
9 the content of the [June 2014] article." Dkt. 1114 at 3-4. These matters are irrelevant and unfairly
10 prejudicial. The Court should exclude the proposed testimony under Rules 401 and 403. If Parloff is
11 permitted to testify in these areas, over Ms. Holmes' objection, then it is essential that the Court reverse
12 Magistrate Judge Cousins' order quashing her subpoena duces tecum and order Parloff to produce the
13 requested materials.

14 ARGUMENT

15 I. THE MOTION IN LIMINE SHOULD BE GRANTED.

16 According to the indictment and the government's opening statement, Ms. Holmes used Parloff
17 and his June 2014 Fortune article as a conduit through which to convey false information to investors.
18 Dkt. 469 at 7, ¶ 12(I); T. 9/8/21 at 546. Under this "conduit" theory, all that is relevant within Parloff's
19 personal knowledge is what Ms. Holmes said to him and what his 2014 Fortune article states. It does not
20 matter what "purpose" Parloff had "in asking certain questions," how Parloff's questions and Ms. Holmes'
21 answers "fit into [their] overall series of conversations," how Ms. Holmes' statements "influenced and
22 supported the content" of the June 2014 article, or "what [Parloff] understood from [Ms. Holmes']
23 answers." That purported "context" is merely a means to smuggle into the case Parloff's well-documented
24 bitterness and resentment toward Ms. Holmes. It has no probative value and significant unfair prejudicial
25 impact.

26 The government asserts that the "context" it seeks to elicit is relevant because "it will aid the jury
27 in understanding [1] why Parloff asked certain questions and refrained from asking others, [2] why he

1 wrote what he did in June 2014 and, in turn, [3] how Defendant used that article in furtherance of her
2 scheme to defraud." Dkt. 1115 at 4 (bracketed numbers added). Points 1 and 2 are entirely irrelevant.
3 The jury does not need to understand *why* Parloff conducted the interviews as he did or *why* he wrote the
4 article in one way rather than another. Those facts are of no "consequence to the action" and are therefore
5 irrelevant. Fed. R. Evid. 401(b).

6 The jury will have before it Ms. Holmes' statements to Parloff and the June 2014 article. As
7 factfinder, aided by the parties' closing arguments, it can determine the connection between what Ms.
8 Holmes told Parloff and what he wrote. His subjective reasons for choosing particular portions of her
9 statements to emphasize, for paraphrasing her words in certain ways, and so on do not matter. Point 3--
10 how Ms. Holmes allegedly used the Fortune article to defraud investors--is relevant, but it is not within
11 Parloff's personal knowledge. As the government notes, Dkt. 1115 at 1-2, the parties have introduced
12 evidence touching on that allegation through other witnesses.

13 For these reasons, and the reasons in Ms. Holmes' initial motion, the Court should limit Parloff's
14 testimony to authenticating his tapes and his June 2014 article and, to the extent Ms. Holmes made relevant
15 statements to him that are not taped, to describing the content of those statements.

16 **II. THE SUBPOENA DUCES TECUM SHOULD BE ENFORCED, PARTICULARLY IF THE**
17 **MOTION IN LIMINE IS DENIED.**

18 If the Court limits Parloff's testimony as we request, then the relevance of the documents Ms.
19 Holmes seeks through her subpoena will be principally to demonstrate that she and Theranos encouraged
20 Parloff to speak with scientists, business executives, and others with knowledge of Theranos and its
21 technology in advance of the June 2014 article. Although the documents are also relevant to expose
22 Parloff's bias, that point will be less important if his testimony consists solely of authenticating tapes and
23 his June 2014 article and reciting the content of relevant statements Ms. Holmes made to him.

24 On the other hand, if the Court permits the government to elicit the "context" it describes, then the
25 subpoenaed documents are not merely relevant, but essential to Ms. Holmes' Fifth and Sixth Amendment
26 right to present a complete defense and to confront the witnesses against her. The information Parloff had
27 available from sources other than Ms. Holmes bears directly on his claims concerning his "purpose in
28 asking certain questions," "what he understood from Defendant's answers," and "[h]ow Defendant's

1 statements influenced and supported the content of the [June 2014] article." Dkt. 1114 at 3-4. If the Court
 2 were to permit that highly prejudicial and irrelevant testimony without affording Ms. Holmes the evidence
 3 she needs to counter it, the factfinding process would be irrevocably distorted.

4 Parloff asserts the First Amendment reporter's privilege in response to the subpoena duces tecum.
 5 Dkt. 1114 at 1, incorporating Dkt. 1063. For the reasons explained in Dkt. 1082 at 2-4, the privilege does
 6 not shield Parloff's documents from production. The privilege applies in criminal cases only when the
 7 reporter establishes bad faith or harassment. *See, e.g., In re Grand Jury Proceedings*, 5 F.3d 397, 400-03
 8 (9th Cir. 1993) (in rejecting claim of scholar's privilege, court finds no basis for not "insisting that
 9 reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury
 10 investigation or criminal trial"); *United States v. Schneider*, 2003 U.S. Dist. LEXIS 27324, at *4 (N.D.
 11 Cal. Nov. 18, 2003) (Illston, J.) (rejecting reporter's privilege in criminal case absent bad faith or
 12 harassment). Parloff has neither alleged nor proven bad faith or harassment. The Court should thus deny
 13 his demand to be exempted from "the fundamental principle that the public has a right to every man's
 14 evidence." *United States v. Sterling*, 724 F.3d 482, 502 (4th Cir. 2013) (rejecting assertion of reporter's
 15 privilege absent bad faith or harassment) (quoting *University of Pennsylvania v. EEOC*, 493 U.S. 182, 189
 16 (1990)).

17 CONCLUSION

18 For the foregoing reasons, Ms. Holmes respectfully requests that the Court limit Parloff's
 19 testimony as described above and order him to comply with Ms. Holmes' subpoena duces tecum.

20 DATED: November 1, 2021

21 /s/ John D. Cline
 22 JOHN D. CLINE
 23 Attorney for Elizabeth Holmes

CERTIFICATE OF SERVICE

I hereby certify that on November 1, 2021, I filed the foregoing pleading via ECF, which will serve all parties.

/s/ John D. Cline
JOHN D. CLINE
Attorney for Elizabeth Holmes

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