

1 STEPHANIE M. HINDS (CABN 154284)  
United States Attorney

2 THOMAS A. COLTHURST (CABN 99493)  
3 Chief, Criminal Division

4 JEFF SCHENK (CABN 234355)  
JOHN C. BOSTIC (CABN 264367)  
5 ROBERT S. LEACH (CABN 196191)  
KELLY I. VOLKAR (CABN 301377)  
6 Assistant United States Attorneys

7 150 Almaden Boulevard, Suite 900  
San Jose, California 95113  
8 Telephone: (408) 535-5061  
Fax: (408) 535-5066  
9 Kelly.Volkar@usdoj.gov

10 Attorneys for United States of America

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

14 UNITED STATES OF AMERICA,

15 Plaintiff,

16 v.

17 RAMESH "SUNNY" BALWANI,

18 Defendant.

) Case No. 18-CR-00258 EJD  
)  
) UNITED STATES' OPPOSITION TO  
) DEFENDANT'S MOTION TO RECONSIDER  
) ORDER DENYING MOTION TO STRIKE  
) PORTIONS OF SARAH BENNETT'S  
) TESTIMONY  
)  
) Date: June 13, 2022  
) Time: 10:00 a.m.  
) Court: Hon. Edward J. Davila

1 The government opposes Defendant Ramesh “Sunny” Balwani’s Motion for Leave to File  
 2 Motion for Reconsideration of Order at Dkt. 1483. ECF No. 1487.<sup>1</sup> Defendant seeks leave to file a  
 3 “Motion for Reconsideration of Order at Dkt. 1483” (“Motion to Reconsider”). ECF No. 1487-2. The  
 4 Court’s Order at ECF No. 1483 (“Order”) denied a motion to strike portions of testimony from Sarah  
 5 Bennett, who testified on May 3, 4, and 10, 2022. ECF No. 1483.<sup>2</sup> Because the Court correctly  
 6 overruled contemporaneous objections to Ms. Bennett’s testimony on the same bases raised in the  
 7 present motion and correctly denied the motion to strike that testimony, and because Defendant raises no  
 8 new factual or legal support, the Court should deny leave to file any motion for reconsideration or  
 9 simply deny the motion for reconsideration.

10 Typically, motions to reconsider are entertained in this District only when new material facts or a  
 11 change in law has occurred. *See, e.g.*, N.D. Cal. Civil L.R. 7-9; N.D. Cal. Crim. L.R. 2-1 (in criminal  
 12 cases courts look to civil rules so long as consistent). Indeed, the District’s Civil Local Rules, which  
 13 occasionally apply to criminal proceedings, expressly prohibit “repeat[ing] any oral or written argument  
 14 made by the applying party in support of or in opposition to the interlocutory order which the party now  
 15 seeks to have reconsidered.” N.D. Cal. Civil L.R. 7-9(c). Here, Defendant merely reiterates his prior  
 16 oral argument that there was an insufficient link for agency purposes to him based on testimony that  
 17 Dr. Kingshuk Das gave during the trial of his co-Defendant Elizabeth Holmes last fall (“*Holmes* trial”).  
 18 *Compare* Motion to Reconsider at 4–7, with 05/10/2022 Trial Transcript (“5/10 Tr.”) at 5095:12–  
 19 5107:1. The Court considered and rejected Defendant’s argument in issuing its Order, and no new or  
 20 materially different facts are presented in Defendant’s Motion to Reconsider, and thus—for that reason  
 21 alone—the Court should deny Defendant leave to file his Motion to Reconsider.

22  
 23  
 24 <sup>1</sup> Defendant filed the present motion for leave on Saturday, June 11, 2022, at 12:13 p.m., and requested a  
 25 hearing for Monday, June 13, 2022, at 10:00 a.m. ECF No. 1487-2 at 2. The government is unavailable  
 26 at the noticed time for hearing on this topic and submits that the Court can decide this issue on the  
 papers. If the Court is inclined to hold a hearing, the government respectfully requests the hearing be  
 scheduled for Monday afternoon (preferably by Zoom).

27 <sup>2</sup> Defendant does not seek reconsideration of the Court’s alternative holding that Ms. Bennett’s  
 28 testimony is relevant and thus the testimony could be admissible for the non-hearsay purpose of notice  
 to CMS. Motion to Reconsider at 4 n.1. Therefore, the government does not include its arguments in  
 support of that portion of the Court’s Order in this filing.

1 The Court should deny Defendant’s Motion to Reconsider because it ignores both key facts  
2 elicited during *this* trial that sufficiently demonstrate an evidentiary basis under Federal Rule of  
3 Evidence 801(d)(2) (“Rule 801(d)(2)”) and, even if the Court were to look to Dr. Das’ testimony from  
4 the *Holmes* trial, reviewing his testimony in full context also supports such a basis for the challenged  
5 statement, as does other available evidence.

6 **First**, the evidence admitted during this trial, before this jury, supports the Court’s finding of an  
7 agency relationship, or authorized or adopted admission, for purposes of Rule 801(d)(2). Several  
8 witnesses testified that Defendant was in charge of running the CLIA lab during the late 2013 to late  
9 2015 time period that Ms. Bennett was reviewing in the fall of 2015. *See, e.g.*, 03/22/2022 Trial  
10 Transcript at 1121:1–8; 03/23/2022 Trial Transcript at 1173:20–1174:13; 03/30/2022 Trial Transcript at  
11 1611:2–1613:7; 04/20/2022 Trial Transcript at 3249:7–3250:5. After Dr. Rosendorff resigned in  
12 November 2014, Defendant hired his dermatologist, Dr. Sunil Dhawan, as the CLIA lab director and  
13 Defendant also hired Dr. Lynette Sawyer as a temporary co-lab director—neither of whom spent much  
14 time overseeing Theranos’ CLIA lab. *See* 04/27/2022 Trial Transcript at 4080:23–4091:17; 05/11/2022  
15 Trial Transcript at 5531:23–5547:6.

16 In September 2015, Sarah Bennett, a surveyor from the Centers for Medicare and Medicaid  
17 Services’ (“CMS”), arrived at Theranos to do the two-year re-certification for its CLIA lab and to  
18 investigate complaints CMS had received. 05/03/2022 Trial Transcript (“5/3 Tr.”) at 4618:19–4623:23.  
19 Ms. Bennett testified that Defendant was not only present at the entrance conference between Theranos  
20 and CMS, but Defendant led the meeting from the Theranos side, took charge with the staff deferring to  
21 him, and presented a PowerPoint to CMS. *See* 5/3 Tr. at 4630:13–4632:4. Ms. Bennett also testified  
22 that, in that PowerPoint Defendant presented, Defendant was described to CMS as Theranos’ Chief  
23 Operating Officer (“COO”) and President, and “responsible for all CLIA lab business operations.”  
24 5/3 Tr. at 4631:18–4639:7; TX 5830. In the same PowerPoint, an organizational chart showed  
25 Defendant above Dr. Dhawan as lab director, Langley Gee as Quality Control Manager, and other lab  
26 personnel. *Id.* On cross examination, Ms. Bennett reviewed Theranos’ response to the 2013 statement  
27 of deficiencies the company had received and testified that she would expect the lab to follow their  
28 outlined response plan. 5/3 Tr. at 4718:22–4726:11. Similarly, Ms. Bennett testified that Theranos

1 provided to CMS on or before April 1, 2016, in response to its January 2016 statement of deficiencies, a  
2 patient impact summary, with notice to the Defendant in the letter. 5/10 Tr. at 5089:23–5094:6,  
3 5130:16–5134:4 (discussing TX 4943). Finally, the jury has also heard testimony that Defendant’s  
4 effective last day at Theranos was May 11, 2016. 04/05/2022 Trial Transcript at 2160:9–2162:8.

5 In sum, the evidence admitted during *this* trial supports finding an evidentiary basis for  
6 Rule 801(d)(2) between Defendant and Theranos’ response in April 2016 to CMS’s findings of  
7 deficiencies in the CLIA lab.

8 **Second**, Defendant points to testimony from Dr. Das in the *Holmes* trial in an attempt to create  
9 some ambiguity about his role in preparing TX 4943 (Motion to Reconsider at 4–7), but Dr. Das’  
10 testimony in full context shows the very involvement Defendant is trying to extinguish. Dr. Das  
11 testified in the *Holmes* trial that he was hired by Theranos in December 2015, but he was unable to work  
12 at Theranos full-time until mid-March 2016 because of obligations to his prior place of employment.  
13 *United States v. Holmes*, 11/09/2021 Trial Transcript (“11/9 Tr.”) at 5784:7–5785:10. Dr. Das testified  
14 that Defendant left Theranos “not too long” after Dr. Das joined in March—which is true given  
15 Defendant’s last day was May 11, 2016, as shown during this trial—and he understood that prior lab  
16 directors had reported to Defendant. *See* 11/9 Tr. at 5794:14–22; *United States v. Holmes*, 11/10/2021  
17 Trial Transcript (“11/10 Tr.”) at 5913:19–5915:16. Nevertheless, shortly after Dr. Das began full-time  
18 at Theranos in mid-March 2016, he participated in a meeting with co-Defendant Holmes, Defendant  
19 Balwani, Daniel Young, and several lawyers from Boies Schiller Flexner LLP (“BSF”), where Dr. Das  
20 insisted that Theranos needed to void all tests run on the Edison 3.5 device. *See* 11/9 Tr. at 5824:15–  
21 5835:14 (discussing TX 4943); 11/10 Tr. at 5947:19–5948:6 (mentioning co-Defendant Holmes,  
22 Dr. Young, BSF attorneys, and “others”); *see also* ECF No. 893-2 at 3 (stating in February 2021  
23 interview with federal agents that Defendant was present at the same meeting). Co-Defendant Holmes  
24 also elicited from Dr. Das on cross examination that, around that same time, Defendant Balwani was  
25 working with BSF lawyers in responding to questions from the *Wall Street Journal* regarding the  
26 deficiencies found in the January 2016 CMS report. *See* 11/10 Tr. at 5991:20–5992:23 (discussing  
27 TX 10628). Thus, the Court has a sufficient basis to conclude that Defendant was present at the  
28 meeting, and thus part of Theranos’ internal decision-making, where potential patient impact was

1 discussed by Dr. Das with Theranos' senior management—including Defendant—and Theranos' outside  
2 lawyers.

3 Furthermore, Defendant has repeatedly—and incorrectly—labeled TX 4943 regarding patient  
4 impact assessment as “authored” by Dr. Das. *See, e.g.*, 5/10 Tr. at 5095:21–23. But testimony and  
5 colloquy during the *Holmes* trial demonstrates the patient impact assessment was contributed to by many  
6 individuals at Theranos. For example, in objecting to its admission under Federal Rule of Evidence 702,  
7 co-Defendant Holmes' counsel noted that TX 4943 is “a compilation of patient impact assessments that  
8 are compiled *by Theranos* with Dr. Das's involvement[.]” 11/9 Tr. at 5714:13–21. When the  
9 government described the April 1, 2016 letter response to CMS as “from you[.]” Dr. Das corrected in his  
10 answer that it was “from Theranos.” 11/9 Tr. at 5799:8–5800:23. Defendant's motion, itself, makes a  
11 point of describing the letter and its analysis as from Theranos (rather than himself). *See* ECF No. 1487-  
12 2 at 6–7 n.3. Thus, the patient impact summary was *Theranos'* response, as a company, to CMS's  
13 January 2016 statement of deficiencies, at a time when Defendant was still the company's COO and  
14 fielding questions from the media about the same CMS deficiency findings, which could render it an  
15 adopted or authorized statement by Defendant under Rule 801(d)(2) or statements by an agent.

16 ***Third***, to the extent the Court considers evidence beyond that presented in this trial, such  
17 evidence overwhelmingly supports a finding that Defendant was involved in the company's response to  
18 CMS's January 2016 findings and his responsibility for engaging with CMS did not diminish prior to  
19 May 2016. To list just a few examples:

- 20 • Immediately upon receiving the January 26, 2016 CMS report, Defendant convened a meeting to  
21 discuss “CMS Audit Responses,” assigned employees to tasks for the company's response, and  
22 shared a working copy of a Word document containing the company's draft response. Exhibit  
23 1.<sup>3</sup> He continued over time to supervise the response, including being directed in mid-February  
24 2016 to the file folder where Theranos patient impact assessments were stored. Exhibit 2 at 4.
- 25 • In February 2016, when advised about patient impact for redraws, Defendant demanded a  
26 meeting and said he was “really irritated that these critical bugs are not escalating to me so I can  
27 put more resources and focus on this.” Exhibit 3.
- On March 2, 2016, when advised about plans for patient impact summaries, Defendant directed:  
“we should also put this in the context of other labs[;] you should have someone do a quick

28 <sup>3</sup> All references to exhibits are those accompanying the Declaration of Kelly I. Volkar in Support of  
United States' Opposition to Defendant's Motion to Reconsider, filed concurrently.

1 search in the literature or consultants may know what % of lab results are corrected after the final  
2 results are sent out.” Exhibit 4.

- 3 • On March 18, 2016, Defendant was among four Theranos senior officers to receive a letter from  
4 CMS indicating CMS’ dissatisfaction with Theranos’ response to the Form 2567. Exhibit 5.
- 5 • Throughout March 2016, Defendant Balwani received working draft responses from the BSF  
6 attorneys. See Exhibit 6 (March 7, 2016); Exhibit 7 (March 25, 2016).
- 7 • On March 25, 2016, Dr. Das discussed patient assessments within Theranos, CC’ing Defendant,  
8 and indicated an intention to “VOID every run that fails Theranos-established QC rules.” Exh. 8.
- 9 • On March 30, 2016, Defendant and Dr. Das (but not Holmes) participated in a quality committee  
10 whose agenda was to respond to “[i]tems from the inspection.” Exhibit 9 at 1. The agenda  
11 included “TPS 3.5 shutdown.” Exhibit 9 at 2.
- 12 • On March 31, 2016, Ms. Bennett confirmed receipt of Theranos’ response and discussed options  
13 for obtaining the corrected and voided reports, which Dr. Das forwarded to Defendant and others  
14 outlining a planned response. Defendant approved the plan for transmission. Exhibit 10.

15 In sum, as the Court found in its Order, Defendant was COO of Theranos in April 2016 and he  
16 held himself out to Ms. Bennett as the person responsible for the CLIA lab. ECF No. 1483. From the  
17 evidence introduced in this trial, alone, the Court may conclude there was a sufficient agency  
18 relationship for purposes of Rule 801(d)(2), or that Defendant adopted or authorized the admission, and  
19 nothing from Dr. Das’ testimony in the *Holmes* trial undercuts that ruling, as the Court previously held.  
20 Indeed, additional available evidence overwhelmingly demonstrates a sufficient evidentiary basis for  
21 purposes of Rule 801(d)(2). For the foregoing reasons, the government respectfully requests the Court  
22 deny Defendant’s Motion to Reconsider the Court’s order denying Defendant’s motion to strike portions  
23 of Sarah Bennett’s testimony.

24 DATED: June 12, 2022

Respectfully submitted,

STEPHANIE M. HINDS  
United States Attorney

/s/ Kelly I. Volkar  
ROBERT S. LEACH  
JEFF SCHENK  
JOHN C. BOSTIC  
KELLY I. VOLKAR  
Assistant United States Attorneys