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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

In re: Arizona THERANOS, INC., Litigation	Case No. 2:16-cv-2138-DGC (Consolidated with) No. 2:16-cv-2373-HRH No. 2:16-cv-2660-HRH No. 2:16-cv-2775-DGC -and- No. 2:16-cv-3599-DGC **DEFENDANTS WALGREENS BOOTS ALLIANCE, INC. AND WALGREEN ARIZONA DRUG CO.'S MOTION FOR AN ORDER CERTIFYING INTERLOCUTORY APPEAL**

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INTRODUCTION

Defendants Walgreens Boots Alliance, Inc. and Walgreen Arizona Drug Co. ("Walgreens") respectfully move this Court pursuant to 28 U.S.C. § 1292(b) for an order certifying the following question for immediate appellate review:

> Whether the subjective component of willful blindness, when applied to a corporation, can be proven with evidence of what was merely told to or shown to some officer or employee of the corporation, without any evidence indicating that any corporate officer or employee subjectively believed or reviewed what he or she was allegedly told or shown?

This question arises directly out of this Court's ruling denying in part Walgreens' motion for summary judgment. (Dkt. 565, the "Order".) As this Court acknowledged in its ruling, to succeed on any of their claims, "Plaintiffs must present sufficient evidence for a reasonable jury to find that Walgreens either knew of Theranos's fraud or willfully blinded itself to the fraud." (*Id.* at 10.) The legal standard to prove willful blindness is not in dispute. As relevant here, Walgreens is entitled to summary judgment on all claims unless there is evidence from which a jury could reasonably determine that Walgreens itself subjectively believed that there was a "high probability that the Theranos product was not legitimate and had not been shown to provide accurate results." (*Id.* at 11.) *See Glob.-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 769 (2011). Because Walgreens is a corporate entity, proof of its subjective understanding requires proof of the subjective understandings of those employees or officers with relevant authority to make decisions on its behalf.

In its ruling, this Court concluded that "Plaintiffs' evidence, if believed, could support a reasonable jury's finding that Walgreens knew there was a high probability that the Theranos blood testing method lacked reliable results . . . ." (Order at 23.) The evidence that primarily supported this conclusion consisted of (1) testimony from two consultants regarding what the consultants claim to have conveyed to Walgreens personnel regarding the consultants' subjective beliefs (*id.* at 12–19, 23–24), and (2) a single document which Theranos's CEO, Elizabeth Holmes, may have brought to a meeting and may have

presented to Walgreens personnel at that meeting (*id.* at 17). None of the evidence upon which this Court relied even purported to indicate what Walgreens personnel themselves actually believed or reviewed. As a result, this Court has allowed this case to proceed to trial based on the legal proposition that Walgreens' subjective beliefs can be inferred from evidence of the subjective beliefs of an outside consultant and based on a document presented to Walgreens, even though there is *no* evidence that any Walgreens personnel either subjectively agreed with the consultants or reviewed, much less understood, the relevant document. This Court's ruling thus squarely presents the above-described question for review. That question is one with respect to which reasonable jurists could disagree and is a controlling question that could materially advance the outcome of the litigation.

First, this legal question is controlling because, if a court were to conclude that some evidence of a relevant corporate officer or employees' subjective beliefs is required, then Walgreens would prevail as to all claims. Plaintiffs have produced no evidence that any Walgreens employee or officer agreed with the view that the outside consultants now claim to have conveyed to Walgreens. And they have likewise produced no evidence that any Walgreens employee or officer reviewed the document that Holmes may have brought with her to a meeting.

Second, reasonable jurists could disagree with this Court's ruling. Courts that have considered how to prove the subjective mental state of a corporation have required a plaintiff to present evidence of the subjective state of mind of an identified corporate officer or employee with decisionmaking authority. While the bulk of decisions have considered the issue in the context of securities fraud, reasonable jurists could conclude that the legal standard for determining subjective corporate beliefs should be consistent across claims. Most importantly, Walgreens is aware of no decision concluding that the subjective beliefs of third parties may be attributed to a corporation.

Third, interlocutory appeal will materially advance the outcome of this litigation by forestalling a costly and wasteful trial.

Because all the statutory criteria are met, the Court should certify its order for

immediate appeal under § 1292(b).

BACKGROUND

As this Court is aware, this case arises from the public revelations that Theranos—a company that promised reliable and accurate blood testing from a finger prick—was a brazen, massive, and intricate fraud. (Order at 2.) Theranos's executives, Elizabeth Holmes and Ramesh "Sunny" Balwani, promoted the promise of the Theranos innovation to consumers, investors, and potential partners alike, receiving worldwide attention and millions of dollars in investments. (*Id.*) Ultimately, the technology was exposed, initially by a series of articles in the WALL STREET JOURNAL and then by subsequent government investigations and findings, as unable to produce accurate and reliable test results, and Theranos voided the results of thousands of consumers' tests. (*Id.* at 5.) Theranos, Holmes, and Balwani were subsequently charged with fraud by the Securities and Exchange Commission and the U.S. Department of Justice. (*Id.* at 6.) The Arizona Attorney General entered into a Consent Decree with Theranos whereby Theranos paid full refunds to Arizona consumers who purchased any Theranos blood test, at Walgreens or elsewhere. (*Id.*) Separate juries convicted Holmes and Balwani of multiple counts of wire fraud and conspiracy to commit wire fraud, resulting in each being sentenced to more than a decade in federal prison. (*Id.*) And Holmes and Balwani have admitted that they concealed Theranos's fraud from Walgreens. (*See* Dkt. 520, Walgreens' Rule 56.1(a) Statement of Facts ("SOF") ¶¶ 78–86.) Indeed, just yesterday, the judge overseeing Holmes's and Balwani's criminal trials explicitly found that Walgreens was a "victim[] of [Holmes's and Balwani's] conspiracy to defraud investors" and was entitled to $40 million in restitution. Order on Restitution at 11–14, *United States v. Holmes*, No. 18-cr-00258-EJD (N.D. Cal. May 16, 2023), ECF No. 1760.

Theranos had presented Walgreens with substantial evidence of validation of its technology and third-party acceptance of the potential of its technology, which need not be repeated here. (*See* Order at 2–5.) What is relevant here is Plaintiffs' evidence (or lack thereof) that Walgreens subjectively believed, before *any* public revelations of Theranos's

deception, that there was a high likelihood that Theranos had perpetrated a massive fraud upon the government (which had certified Theranos labs) and a wide range of sophisticated investors. This Court primarily relied on the deposition testimony of an early consultant, Kevin Hunter, that he subjectively believed and purportedly told Walgreens he subjectively believed, that the Theranos technology did not work. (*Id.* at 12–16.) The Court also pointed to the testimony of a different consultant, Paul Rust, that he found it concerning that Theranos would not allow him to inspect its laboratory. (*Id.* at 17–18.) And the Court additionally relied on a document that may have been put before Walgreens personnel in a meeting that allegedly showed that Theranos used commercial machines for its proficiency testing when it sought CLIA certification. (*Id.* at 17.) The Court determined that this "evidence, if believed, could support a reasonable jury's finding that Walgreens ***knew*** there was a high probability the Theranos blood testing method lacked reliable results, was not market-ready, and had received only minimal regulatory scrutiny." (*Id.* at 23 (emphasis added).)

The Court never cited any evidence, because there is none, that any officer or employee at Walgreens subjectively believed that Theranos testing was not able to produce accurate and reliable results, or that its government laboratory approval was fraudulently obtained. To the contrary, in entering judgment in favor of Walgreens regarding punitive damages, the Court observed that there is "no evidence that Walgreens actually knew of and embraced the Theranos fraud." (Order at 24–25.) And neither this Court nor Plaintiffs have ever explained why Walgreens officers would have subjected their own blood to tests with Theranos's technology if they subjectively believed it was unreliable. (*See* SOF ¶ 42.)

LEGAL STANDARD

Interlocutory review under 28 U.S.C. § 1292(b) provides a "mechanism by which litigants can bring an immediate appeal of a non-final order upon the consent of both the district court and the court of appeals." *In re Cement Antitrust Litig.*, 673 F.2d 1020, 1025–26 (9th Cir. 1981). A district court must certify an interlocutory order for appellate review if the order involves (1) "a controlling question of law," (2) "as to which there is substantial

ground for difference of opinion," and (3) "an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b); *see also In re Cement*, 673 F.3d at 1026 (listing these three "certification requirements"); *Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681, 687–88 (9th Cir. 2011).

ARGUMENT

I. THE COURT'S ORDER INVOLVES A CONTROLLING QUESTION OF LAW.

"[A]ll that must be shown in order for a question to be 'controlling' is that resolution of the issue on appeal could materially affect the outcome of litigation in the district court." *Facebook Inc. v. Namecheap Inc.*, No. CV-20-00470-PHX-GMS, 2021 WL 961771, at *1 (D. Ariz. Mar. 15, 2021) (quoting *In re Cement*, 673 F.2d at 1026). "The question should be a '"pure" question of law rather than merely [ ] an issue that might be free from a factual contest [and be] something the court of appeals could decide quickly and cleanly without having to study the record.'" *Id.* (quoting *Rieve v. Coventry Health Care, Inc.*, 870 F Supp. 2d 856, 879 (C.D. Cal. 2012)). Here, that controlling question of law is whether there must be evidence as to what an *officer or employee of the corporation* subjectively believed for a jury to find that the corporation itself "subjectively believed there was a high probability" of a fraud under the willful blindness standard. *See Glob.-Tech*, 563 U.S. at 771.

That question is a pure question of law. The willful blindness standard is just a way to "show[]" actual knowledge. (Order at 7.) The standard is clear and rigorous, requiring a *subjective* belief that "surpasses" the objective recklessness and negligence standards. *Glob.-Tech*, 563 U.S. at 769; *see also United States v. Horowitz*, 978 F.3d 80, 89 (4th Cir. 2020). A subjective standard like willful blindness "is peculiar to a particular [defendant] and based on the [defendant's] individual views and experience." Black's Law Dictionary, Standard (11th ed. 2019).[1] By contrast, an objective standard like recklessness is "based on

[1] *See also* Black's Law Dictionary, Subjective (11th ed. 2019) ("[b]ased on an individual's perceptions, feelings, or intentions, as opposed to externally verifiable phenomena"); Black's Law Dictionary, Belief (11th ed. 2019) ("[a] state of mind that regards the existence or truth of something as likely or relatively certain").

conduct and perceptions external to" the defendant and "does not require a determination of what the defendant was thinking." *Id.*[2]

Relying primarily on the testimony of third-party consultants and a single document that was purportedly used at a meeting where Walgreens was present, the Court held there was a genuine issue of material fact as to whether Walgreens was willfully blind. But the Court did not and could not offer any explanation for how its application of the willful blindness standard distinguishes willful blindness from recklessness. Accepting Plaintiffs' evidence as true, as this Court did (Order at 23), Plaintiffs' evidence *at most* could support an inference that Walgreens was reckless in not demanding more proof from Theranos that its technology was reliable given what it was being told by its consultants, or what it saw in the allegedly shared document. *See Glob.-Tech*, 563 U.S. at 770 ("a reckless defendant is one who merely knows of a substantial and unjustified risk of such wrongdoing"). That is, the Court's approach to the evidence, even crediting Plaintiffs' evidence entirely, collapses the *legal* distinction between willful blindness and recklessness.

There is no factual dispute here that might inhibit efficient appellate review. The issue is not whether a jury could credit Plaintiffs' evidence. That, as noted above, can be assumed for present purposes. Indeed, if the Ninth Circuit were to hear an interlocutory appeal on the narrow question Walgreens presents in this Motion, it would have no need to look at the summary judgment record at all. The facts as presented in this Court's ruling suffice to present the legal question cleanly.

II. SUBSTANTIAL GROUNDS EXIST FOR DIFFERENCE OF OPINION ON THIS ISSUE.

"[S]ubstantial ground for difference of opinion 'exists where reasonable jurists might disagree on an issue's resolution'" and "'the controlling law is unclear.'" *Facebook*, 2021 WL 961771, at *2 (first quoting *Reese*, 643 F.3d at 688, then quoting *Couch v. Telescope Inc.*, 611 F.3d 629, 633 (9th Cir. 2010)). This analysis "does not turn on a prior

[2] *See also* Black's Law Dictionary, Objective (11th ed. 2019) ("Of, relating to, or based on externally verifiable phenomena, as opposed to an individual's perceptions, feelings, or intentions.")

court's having reached a conclusion adverse to that from which appellants seek relief," nor is it necessary that jurists "have already disagreed." *Reese*, 643 F.3d at 688. Instead, "[c]ourts generally find a substantial ground for difference of opinion where 'the circuits are in dispute on the question and the court of appeals of the circuit has not spoken on the point, if complicated questions arise under foreign law, or if novel and difficult questions of first impression are presented.'" *Facebook*, 2021 WL 961771, at *2 (quoting *Couch*, 611 F.3d at 633).

The question presented here reflects a new branch of an existing controversy regarding whether a corporation's state of mind requires evidence of the state of mind of relevant corporate officers or employees. Courts have long held that corporate liability is governed by *respondeat superior*—that "the corporation, which profits by the transaction, and can only act through its agents and officers, shall be held punishable by fine because of the knowledge and intent of its agents to whom it has intrusted authority to act." *N.Y. Cent. & Hudson River R.R. Co v. United States*, 212 U.S. 481, 495 (1909). Courts have expressed disagreement, however, over applicability of the "collective knowledge" doctrine as a supplement to *respondeat superior*—where corporations could be found liable based on "aggregating the states of mind of multiple individuals." *United States v. Sci. Applications Int'l Corp.*, 626 F.3d 1257, 1274 (D.C. Cir. 2010).

For example, in the criminal context, the First Circuit has permitted criminal liability on a theory of collective knowledge, while the D.C. Circuit has expressed doubt. *Compare United States v. Bank of New Eng., N.A.*, 821 F.2d 844, 856 (1st Cir. 1987) ("[a] collective knowledge instruction is entirely appropriate in the context of corporate criminal liability" and "the knowledge obtained by corporate employees acting within the scope of their employment is imputed to the corporation"), *with United States v. Philip Morris USA, Inc.*, 566 F.3d 1095, 1122 (D.C. Cir. 2009) ("[W]e are dubious of the legal soundness of the 'collective intent' theory.") Likewise, in the securities fraud context, there is well-developed jurisprudence, producing a circuit split, regarding the requirements of pleading corporate scienter under the Private Securities Litigation Reform Act and whether, to

sufficiently plead a corporation's state of mind, a plaintiff must cite evidence of the state of mind of relevant corporation officials. *Compare Southland Sec. Corp. v. INSpire Ins. Sols., Inc.*, 365 F.3d 353, 366 (5th Cir. 2004) (rejecting that corporate scienter could stem from "collective knowledge" of the corporation where no identified individual possessed the requisite state of mind); *Mizzaro v. Home Depot, Inc.*, 544 F.3d 1230, 1254 (11th Cir. 2008); *Tchrs.' Ret. Sys. of La. v. Hunter*, 477 F.3d 162, 184 (4th Cir. 2007); *In re Tyson Foods, Inc.*, 155 F. App'x 53, 57–58 (3d Cir. 2005), *with Teamsters Loc. 445 Freight Div. Pension Fund v. Dynex Cap., Inc.*, 531 F.3d 190, 195–96 (2d Cir. 2008) (adopting a theory of corporate scienter); *Makor Issues & Rights, Ltd. v. Tellabs Inc.*, 513 F.3d 702, 710 (7th Cir. 2008). The Sixth Circuit adopted a "middle ground." *In re Omnicare, Inc. Sec. Litig.*, 769 F.3d 455, 476–77 (6th Cir. 2014). And the Ninth Circuit has never applied the "corporate scienter" theory, but has acknowledged that there *could* be circumstances in which it applies. *See In re NVIDIA Corp. Sec. Litig.*, 768 F.3d 1046, 1063 (9th Cir. 2014) ("the collective scienter (or corporate scienter) doctrine recognizes that it is possible to raise the inference of scienter without doing so for a specific individual").

This case presents an issue that is conceptually one step beyond the controversial collective knowledge doctrine. That doctrine, as discussed above, allows courts to pool disparate knowledge of various corporate officials into a single, overall corporate state of mind that no individual within the corporation possesses. *See id.* Here, however, this Court has concluded that the subjective beliefs of those entirely *outside* the corporation may stand-in for the subjective beliefs *of* the corporation based merely on the alleged communication of the outside consultants' beliefs to individuals within the corporation. According to this Court, a jury may infer Walgreens believed what those consultants believed if the jury concludes that the consultants merely told Walgreens officials what the consultants believed. No Court of Appeals, to Walgreens' knowledge, has ever so ruled. And some courts have expressed doubt that juries could assign the requisite mental state to a corporation without evidence of some individual within the corporation possessing the requisite mental state. *See e.g.*, *In re Volkswagen "Clean Diesel" Mktg., Sales Pracs. &*

Prods. Liab. Litig., MDL No. 2672 CRB (JSC), 2017 WL 6041723, at *11–12 (N.D. Cal. Dec. 6, 2017) (suggesting that "collective scienter is only a pleading doctrine"); *cf. Nordstrom, Inc. v. Chubb & Son, Inc.*, 54 F.3d 1424, 1436 (9th Cir. 1995) (noting that "corporate scienter relies heavily on the awareness of the directors and officers" and that based on the facts at issue, there was "no way [to] show that the corporation, but not any individual defendants, had the requisite intent to defraud"); *Tsantes v. BioMarin Pharm. Inc.*, No. 20-cv-06719-WHO, 2022 WL 17974486, at *1 (N.D. Cal. Nov. 18, 2022) ("For the plaintiffs' underlying fraud claims, corporate scienter is established by showing individual directors or officers had the requisite scienter.").[3] Likewise, no Court of Appeals, to Walgreens' knowledge, has concluded that the beliefs of a *third-party* (even if communicated to employees or officers of the corporation) could be used to prove a corporation's beliefs. *See McGee v. Sentinel Offender Servs., LLC*, 719 F.3d 1236, 1243–45 (11th Cir. 2013) (rejecting a "collective intent" theory of corporate liability at summary judgment, refusing to impute a corporation's attorney's knowledge to prove a corporation's intent, and affirming summary judgment on a state-law RICO claim).

Even if the question is deemed novel, it is worthy of immediate appellate review. This Court's first-of-its-kind ruling attributing the subjective beliefs of outside consultants to a corporation would, if it stands, be a significant development in the law. The use of outside consultants is pervasive in the corporate world, and to attribute the subjective beliefs of such consultants to corporations would significantly expand the potential for corporate liability of all sorts. At a minimum, reasonable jurists could disagree about such an expansion.

This Court's summary judgment Order necessarily supports such an expansion. As

[3] In fact, the case the Court cited addressing subjective belief, *United States v. Yi*, 704 F.3d 800, 805 (9th Cir. 2013), involved evidence of the *defendant's* own beliefs. *Yi* involved a claim that the defendant was aware of a high probability that ceilings in a building contained asbestos and engaged in a deliberate pattern conduct to avoid clarifying the fact. *Id.* In finding that there was sufficient evidence of *subjective belief*, the court pointed to evidence—supported by testimony from two third parties and the defendant—that the *defendant himself* commented on the likelihood that the ceilings contained asbestos. *Id.* In other words, there was evidence of the *defendant's* actual mental state.

discussed above, the Court primarily relied on evidence of third-party consultants' beliefs, possibly conveyed to Walgreens, to find that there was a triable issue as to *Walgreens'* subjective belief. The Court relied most heavily on the testimony of one third-party consultant in particular, Kevin Hunter, the CEO and Managing Partner of a laboratory management consulting firm that Walgreens engaged to assist in early evaluation of a potential relationship with Theranos, and who left the project nearly two years before testing was offered in Walgreens stores. (*See* Order at 3.) Hunter testified that he expressed concerns about Theranos to Walgreens—that he told Walgreens that it "needed to know more" and "get proof"; that Walgreens needed to "be allowed to inspect the Theranos lab"; that he "didn't believe the technology"; that he "never was convinced that [Theranos] was legitimate"; and that he "he grew to disbelieve what Theranos was saying and . . . conveyed this disbelief to Walgreens." (*Id.* at 12–16, 23–24.) The Court also pointed to the testimony of a different consultant, Paul Rust, who testified that it was "unusual not to do closer inspections of the laboratory" and he told Walgreens of this concern. (*Id.* at 17–18, 24.) Notably, *all* of this testimony describes the communication of the consultants' subjective views to Walgreens officials. *None* of this testimony concerns any Walgreens official conveying their subjective views to Hunter or Rust. And *none* of this testimony reflects whether anyone inside Walgreens subjectively agreed with Hunter's or Rust's assessments.

Similarly, the Court relied on circumstantial evidence that Walgreens was shown a printed copy of proficiency test results that indicated that Theranos obtained its CLIA certification using commercial equipment and not its proprietary technology. (*Id.* at 17.) But again, a reasonable jurist could conclude that such evidence says nothing about what *Walgreens believed* about the accuracy and reliability of testing. At most it suggests that a couple Walgreens employees saw a document that one could interpret to mean that Theranos received its CLIA Certification using commercial machines, and failed to ask any questions about it. It is not evidence that any Walgreens officer or employee pieced together the significance of language in the reports, specifically that testing was performed with "Siemens" machines. And it is not evidence that any Walgreens officer or employee

subjectively believed, based on the document, that Theranos's CLIA certification—or Theranos more broadly—was fraudulent. There is no evidence that anyone *from Walgreens* ever suspected Theranos used commercial machines to obtain CLIA certification.

The only evidence of Walgreens' subjective beliefs to which this Court pointed is entirely unrelated to Walgreens' beliefs regarding the reliability of Theranos's technology. The Court pointed to evidence that Walgreens officers or employees believed that Theranos had operational issues, and that Walgreens had a "profit and growth motive[]" to move forward with Theranos. (*Id.* at 21—22.) But at least one Court of Appeals has held that even "a strong incentive to ignore any warnings of impropriety in order to preserve [a] new and profitable arrangement . . . is insufficient to demonstrate knowledge of a high probability of illegal conduct," *i.e.*, willful blindness. *Williams v. Obstfeld*, 314 F.3d 1270, 1278 (11th Cir. 2002). And Walgreens' concerns about Theranos's operational issues—*i.e.*, Theranos's blood collection devices sometimes malfunctioned, requiring the use of a different device, and Theranos struggled to scale (Order at 21)—is unrelated to the actual accuracy and reliability of testing.

Simply put, there is no evidence that anyone *from Walgreens* suspected that Theranos testing could not produce accurate and reliable results. That Walgreens arguably chose to not give enough weight to the third parties' opinions, or should have, in hindsight, studied a document closer or asked more questions, might arguably support a finding of recklessness—evidence that Walgreens disregarded a substantial risk, *Glob.-Tech*, 563 U.S. at 770—but not a finding of Walgreens' subjective belief, *i.e.*, what Walgreens was thinking.

III. IMMEDIATE APPEAL WILL MATERIALLY ADVANCE THE ULTIMATE TERMINATION OF THE LITIGATION.

Finally, interlocutory appeal will "materially advance" the litigation as it "may appreciably shorten the time, effort, or expense of conducting" the district court proceedings. *In re Cement*, 673 F.2d at 1027. "Certification is appropriate if immediate appeal 'facilitate[s] disposition of the action by getting a final decision on a controlling

legal issue sooner, rather than later in order to save the courts and the litigants unnecessary trouble and expense.'" *Facebook*, 2021 WL 961771, at *2 (quoting *United States v. Adam Bros. Farming, Inc.*, 369 F. Supp. 2d 1180, 1182 (C.D. Cal. 2004)). For example, certification is appropriate if "reversal would . . . eliminate trial time[] and conserve judicial resources." *Id.* (citing *Ass'n of Irritated Residents v. Fred Schakel Dairy*, 634 F. Supp. 2d 1081, 1092 (E.D. Cal. 2008)).

Certification here will materially advance this litigation because reversal would result in summary judgment in favor of Walgreens on remand. Again, the Court already held that the standard applicable for all of Plaintiffs' claims is willful blindness, and already recognized that this standard requires a finding that Walgreens subjectively believed there was a high probability that Theranos had been engaging in widespread deception. (Order at 11.) If the Ninth Circuit agrees with Walgreens that evidence of what a third-party tells or shows a corporation—without any evidence as to how the corporation's employees or officers reacted to what they were told or shown or whether they agreed with or believed the third-party—cannot prove a corporation's *subjective* belief, then there is no genuine dispute of material fact that requires a trial.

CONCLUSION

For the foregoing reasons, Walgreens respectfully requests that the court certify an interlocutory appeal on the question of what evidence is necessary to show a corporation's "subjective belief" of a high probability of fraud for purposes of proving a corporation's willful blindness.

DATED: May 17, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on May 17, 2023, I caused to be electronically transmitted the foregoing document by e-mail to Defendant Elizabeth Holmes, who is not a registered participant of the CM/ECF System.

/s/ *Kristen R. Seeger*