

1 JOHN D. CLINE (CA State Bar No. 237759)
600 Stewart Street, Suite 400
2 Seattle, WA 98101
Telephone: (360) 320-6435
3 Email: cline@johndclinelaw.com

4 KEVIN M. DOWNEY (Admitted Pro Hac Vice)
5 LANCE A. WADE (Admitted Pro Hac Vice)
AMY MASON SAHARIA (Admitted Pro Hac Vice)
6 KATHERINE TREFZ (CA State Bar No. 262770)
WILLIAMS & CONNOLLY LLP
7 680 Maine Avenue, S.W.
8 Washington, DC 20024
Telephone: (202) 434-5000 | Facsimile: (202) 434-5029
9 Email: KDowney@wc.com; LWade@wc.com; ASaharia@wc.com; KTrefz@wc.com

10 Attorneys for Defendant ELIZABETH A. HOLMES
11
12

13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA
15 SAN JOSE DIVISION
16

17 UNITED STATES OF AMERICA,) Case No. CR-18-00258-EJD
18 Plaintiff,)
19 v.) **MS. HOLMES’ MOTION FOR A NEW TRIAL**
20 ELIZABETH HOLMES and) **BASED ON NEWLY DISCOVERED EVIDENCE**
RAMESH “SUNNY” BALWANI,) **REGARDING ADAM ROSENDORFF OR IN**
21 Defendants.) **THE ALTERNATIVE AN EVIDENTIARY**
22) **HEARING**
23) Date: October 3, 2022
24) Time: 1:30 PM
25) CTRM: 4, 5th Floor
26)
27) Hon. Edward J. Davila
28)

MS. HOLMES’ MOTION FOR A NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE
REGARDING ADAM ROSENDORFF OR IN THE ALTERNATIVE AN EVIDENTIARY HEARING
CR-18-00258 EJD

TABLE OF CONTENTS

Page

1

2

3 BACKGROUND 1

4 A. Dr. Rosendorff’s Trial Testimony..... 1

5 B. Dr. Rosendorff’s Encounter at Ms. Holmes’ Home 4

6 LEGAL STANDARD..... 5

7 ARGUMENT 6

8 I. The Newly Discovered Evidence Warrants a New Trial..... 6

9 II. At a Minimum, the Court Should Order an Evidentiary Hearing..... 11

10 CONCLUSION..... 12

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

TABLE OF AUTHORITIES

Page(s)

CASES

Balestreri v. United States, 224 F.2d 915 (9th Cir. 1955) 10

Hayes v. Brown, 399 F.3d 972 (9th Cir. 2005) 2

Kyles v. Whitley, 514 U.S. 419 (1995) 8

Napue v. Illinois, 360 U.S. 264 (1959) 2

United States v. A. Lanoy Alston, D.M.D., P.C., 974 F.2d 1206 (9th Cir. 1992) 5

United States v. Butler, 567 F.2d 885 (9th Cir. 1978) 8

United States v. Davis, 960 F.2d 820 (9th Cir. 1992) 10

United States v. Fulcher, 250 F.3d 244 (4th Cir. 2001) 7, 11

United States v. Harrington, 410 F.3d 598 (9th Cir. 2005) 5, 10

United States v. Hernandez-Rodriguez, 443 F.3d 138 (1st Cir. 2006) 11

United States v. Howell, 231 F.3d 615 (9th Cir. 2000) 8

United States v. Krasny, 607 F.2d 840 (9th Cir. 1979) 10

United States v. McKinney, 952 F.2d 333 (9th Cir. 1991) 6

United States v. Mendez, 619 F. App'x 644 (9th Cir. 2015) 6, 10

United States v. Navarro-Garcia, 926 F.2d 818 (9th Cir. 1991) 11, 12

United States v. Vozzella, 124 F.3d 389 (2d Cir. 1997) 7

United States v. Walgren, 885 F.2d 1417 (9th Cir. 1989) 6, 10

United States v. Walker, 546 F. Supp. 805 (D. Haw. 1982) 7

United States v. Wallach, 935 F.2d 445 (2d Cir. 1991) 10

RULES

Cal. R. Prof'l Conduct 4.2(a) 5

Fed. R. Crim. P. 33 1, 5, 11

OTHER AUTHORITIES

1 Weinstein's Evidence ¶ 401[07] (1985) 9

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 On August 8, 2022, at 4:51pm PT, Dr. Adam Rosendorff left a voicemail for Ms. Holmes’
3 counsel asking if he could set up a meeting between Ms. Holmes and Dr. Rosendorff. An hour and 15
4 minutes later, without hearing back, Dr. Rosendorff appeared at Ms. Holmes’ residence. Ms. Holmes’
5 partner, William Evans, answered the door. In the course of two short conversations described in more
6 detail below, Dr. Rosendorff stated, among other things: (1) he tried to answer the questions honestly at
7 Ms. Holmes’ trial, but the government tried to make everyone look bad; (2) the government made things
8 seem worse than they were; (3) everyone at Theranos was working hard to do something good and
9 meaningful; (4) he felt that he had done something wrong, apparently in connection with Ms. Holmes’
10 trial; (5) he wanted to talk to Ms. Holmes; (6) he thought a conversation with Ms. Holmes would be
11 healing for both of them; (7) both she and he were young at the time of the events; and (8) these
12 concerns were weighing on him to the point where he had difficulty sleeping.

13 As the Court knows, Dr. Rosendorff was an important witness; indeed, the government viewed
14 him as a star witness. The government mentioned him more than any other government witness in both
15 opening and closing statements, and Dr. Rosendorff testified longer than any other government witness.

16 Due to the ethical restrictions on lawyers’ communications with represented parties, Ms.
17 Holmes’ counsel are unable to return Dr. Rosendorff’s call to probe the precise meaning of his
18 statements. Under any interpretation of his statements, the statements warrant a new trial under Rule 33.
19 But, at a minimum, and to the extent the Court has any doubt about whether a new trial is required, the
20 Court should order an evidentiary hearing and permit Ms. Holmes to subpoena Dr. Rosendorff to testify
21 about his concerns.

22 **BACKGROUND**

23 **A. Dr. Rosendorff’s Trial Testimony**

24 The Court is familiar with Dr. Rosendorff. He was Theranos’ laboratory director from April
25 2013 to November 2014. Holmes 9/24/21 Tr. 1702:19-1703:1. Even before Ms. Holmes’ trial
26 commenced, Dr. Rosendorff was a major focus of the government’s case. The government met with Dr.

1 Rosendorff at least eight times, and noticed him as an expert as early as March 2020. Holmes 9/28/21
2 Tr. 1963:20-1967:16; Dkt. 580-3 at 7-8 (Gov't 3/6/2020 Notice of Expert Disclosure).

3 During trial, the government featured Dr. Rosendorff repeatedly in its opening statement as a
4 witness who would testify as to issues related to technology, the state of the clinical laboratory, and
5 intent. Holmes 9/8/21 Tr. 547-556. The government mentioned Dr. Rosendorff more than any other
6 government witness during its opening statement.

7 After deciding not to produce its retained hematology expert for a *Daubert* hearing, and lacking
8 any statistically significant evidence concerning the accuracy and reliability of Theranos technology, the
9 government was forced to rely heavily on Dr. Rosendorff's testimony during Ms. Holmes' trial. The
10 government's examination of Dr. Rosendorff led to a host of misleading statements that Ms. Holmes'
11 counsel was forced to correct on cross-examination. *See, e.g.*, Holmes 9/28/21 Tr. 1974:15-1975:25,
12 1977:9-25 (Dr. Rosendorff's reasons for leaving the company); 2011:16-2014:16 (date and nature of
13 Theranos' launch); 1981:25-1983:8 (Dr. Rosendorff confirming that the government failed to show him
14 any policy documents or validation reports); 2256:18-2257:22 (correcting the government's implication
15 that proficiency testing was not performed); 2476:17-2477:7 (establishing that all of Dr. Rosendorff's
16 concerns regarding proficiency testing were addressed). Indeed, Ms. Holmes counsel alerted the Court
17 that "the breadth of the [cross-]examination" was driven in part by "substantial concerns about what was
18 [elicited] in direct under *Napue v. Illinois*" and its progeny, which compelled Ms. Holmes to "clarify
19 the record." Holmes 10/5/21 Tr. 2714:3-8¹ (citing *Napue v. Illinois*, 360 U.S. 264 (1959)).² Due to the
20 misleading nature of the government's presentation, throughout the cross-examination Ms. Holmes'

21
22
23
24 ¹ Ms. Holmes later informed the Court that the government's questioning of Dr. Rosendorff also
25 improperly implied facts not in the record concerning the propriety of Theranos' scientific data. Holmes
26 10/15/21 Tr. 3838:4-3839:2.

27 ² In *Napue*, the Supreme Court held "that a conviction obtained through use of false evidence,
28 known to be such by representatives of the State, must fall under the Fourteenth Amendment." 360 U.S.
at 269. "[I]f it is established that the government knowingly permitted the introduction of false
testimony reversal is 'virtually automatic.'" *Hayes v. Brown*, 399 F.3d 972, 978 (9th Cir. 2005).
MS. HOLMES' MOTION FOR A NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE
REGARDING ADAM ROSENDORFF OR IN THE ALTERNATIVE AN EVIDENTIARY HEARING
CR-18-00258 EJD

1 counsel asked Dr. Rosendorff to confirm that he was being truthful in his testimony. *See, e.g.,* Holmes
2 9/28/21 Tr. 1973:8-1974:7.

3 Significant issues also arose concerning Dr. Rosendorff's bias. Holmes 10/5/21 Tr. 2548:22-
4 2576:17, 2705:5-2720:25. Ms. Holmes informed the Court of the serious potential for Dr. Rosendorff to
5 provide biased testimony in favor of the government due to the pending government investigations into
6 the three positions that he held post-Theranos—Perkin Elmer, Invitae, and uBiome. *Id.* The post-
7 employment issues concerned Dr. Rosendorff's competence as a lab director, as well as his motivation
8 to shift the blame for any Theranos issues to others including Ms. Holmes.

9 The Court permitted limited questioning about Dr. Rosendorff's employment at PerkinElmer on
10 the ground that it was relevant "to potential issue[s] of bias." Holmes 10/5/21 Tr. 2709:14-2710:19,
11 2717:5-2720:25. The Court forbade questioning regarding "the nature of any investigation, the quality
12 of the investigation, [or] [Dr. Rosendorff's] specific role in it." *Id.* at 2710:11-22. The Court excluded
13 examination about Invitae as "inappropriate character evidence" under Rule 404(a)(1). *Id.* at 2709:5-13.
14 And it excluded examination about uBiome under Rule 403 because the Court understood that a federal
15 investigation into that lab "did not have anything to do with the operation of the lab per se." *Id.* at
16 2708:2-2709:4. Soon after the Court's ruling, the government opened the door by asking Dr. Rosendorff
17 to compare his experience at Theranos with his experience at other laboratories. *Id.* at 2866:8-23. Ms.
18 Holmes again requested to question Dr. Rosendorff about his post-employment issues as well as his
19 bias. *See id.* at 2867:15-2888:11. The Court declined and, recognizing that the government opened the
20 door to the issue, instructed the jury to disregard the government's questions and Dr. Rosendorff's
21 answer. *Id.* at 2889:23-2890:10.

22 The government featured Dr. Rosendorff repeatedly in its closing arguments, again mentioning
23 Dr. Rosendorff more than any other witness. *See* Holmes 12/16/21 and 12/17/22 Tr. (collectively
24 referencing Dr. Rosendorff *over 50 times*). Recently, in the government's Opposition to Ms. Holmes'
25 Rule 29 motion, the government repeatedly emphasized Dr. Rosendorff's interactions with Ms. Holmes.
26
27

28 MS. HOLMES' MOTION FOR A NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE
REGARDING ADAM ROSENDORFF OR IN THE ALTERNATIVE AN EVIDENTIARY HEARING
CR-18-00258 EJD

1 Dkt. 1395 at 11. During the hearing on that motion, the government cited to Dr. Rosendorff's testimony
2 in support of its argument. 9/1/22 Hr'g Tr. 24:8-25:3.

3 **B. Dr. Rosendorff's Encounter at Ms. Holmes' Home**

4 On August 8, 2022, at approximately 6:05pm, Dr. Rosendorff arrived at Ms. Holmes' home.
5 Declaration of William B. Evans ("Evans Decl.") ¶ 1; *see also* Evans Decl., Ex. A. As Dr. Rosendorff
6 approached the home, her partner, William Evans, noticed Dr. Rosendorff walking towards the front
7 door and went to answer it. Evans Decl. ¶ 2. Mr. Evans did not immediately recognize Dr. Rosendorff,
8 but did so after Dr. Rosendorff introduced himself. *Id.* ¶ 3. Dr. Rosendorff seemed to be in distress and
9 his voice was trembling. Ex. A at 1. His cellphone was open to his camera, although it did not appear
10 that he was recording. *Id.* During this brief interaction outside the front door, Dr. Rosendorff repeatedly
11 stated that he needed to talk to Ms. Holmes. *Id.* Mr. Evans explained that Ms. Holmes could not talk to
12 anyone and that Dr. Rosendorff needed to leave. *Id.*

13 Dr. Rosendorff attempted to leave the property but was driving the wrong way. *Id.* Mr. Evans
14 approached Dr. Rosendorff in his vehicle at the top of the driveway in order to direct Dr. Rosendorff in
15 the right direction. *Id.* A second conversation then occurred at the top of the driveway, with Mr. Evans
16 outside the car at the window and Dr. Rosendorff in the driver's seat. Evans Decl. ¶ 4 Dr. Rosendorff
17 explained that he wanted to speak to Ms. Holmes because it would be "healing for both himself and
18 Elizabeth to talk." Ex. A at 1. He stated that "when he was called as a witness he tried to answer the
19 questions honestly but that the prosecutors tried to make everyone look bad" and that "the government
20 made things sound worse than they were when he was up on the stand during his testimony." *Id.* Dr.
21 Rosendorff stated that "Theranos was early in his and [Ms. Holmes'] career," that "everyone was just
22 doing the best they could," and "everyone was working so hard to do something good and meaningful."
23 *Id.* He stated that "he fe[lt] guilty" and that he "felt like he had done something wrong," apparently in
24 connection with his testimony in Ms. Holmes' case. *Id.* He stated that these issues were "weighing on
25 him" and that "he was having trouble sleeping." *Id.*

1 different if the evidence was available to the defense. *United States v. Walgren*, 885 F.2d 1417, 1427-28
 2 (9th Cir. 1989).

3 ARGUMENT

4 Dr. Rosendorff’s statements reflecting his concerns with the government’s presentation of his
 5 trial testimony, along with his comments that bear on Ms. Holmes’ intent, put the integrity of the jury
 6 verdict against Ms. Holmes in grave doubt. The Court should grant a new trial or, at the very least,
 7 order an evidentiary hearing.

8 I. The Newly Discovered Evidence Warrants a New Trial

9 Dr. Rosendorff’s statements satisfy each requirement for a new trial:

10 **Newly Discovered.** Dr. Rosendorff’s statements on August 8, 2022 occurred seven months after
 11 the conclusion of Ms. Holmes’ trial. The information he revealed—including his belief that everyone at
 12 Theranos was “working so hard to do something good and meaningful” and his concern about how the
 13 government presented his testimony—is newly discovered evidence. *United States v. Mendez*, 619 F.
 14 App’x 644, 646 (9th Cir. 2015) (reversing and remanding after district court erroneously denied Rule 33
 15 motion and stating that police report was newly discovered when the defendant and his attorneys “did
 16 not have access to [the evidence] prior to trial”); *see also United States v. McKinney*, 952 F.2d 333, 335
 17 (9th Cir. 1991) (evidence is newly discovered under Rule 33 when discovered after the verdict was
 18 received).

19 **Diligence in Discovery.** Similarly, Ms. Holmes’ lack of access to this evidence was not the
 20 result of a failure to act with diligence. To the contrary, Ms. Holmes’ counsel tried to elicit this
 21 evidence when asking Dr. Rosendorff at trial whether he testified truthfully. Holmes 9/28/21
 22 Tr. 1973:8-1974:7. Despite this questioning, Dr. Rosendorff did not indicate while on the stand that “he
 23 tried to answer questions honestly” but that the government “made things sound worse than they were
 24 when he was up on the stand during his testimony.” *Compare* Evans Decl., Ex. A., *with* Holmes 9/28/21
 25 Tr. 1973:8-1974:7. Because this information was not revealed to Ms. Holmes despite her efforts at trial
 26 to probe what she viewed as the misleading nature of the government’s presentation, the due diligence
 27

28 MS. HOLMES’ MOTION FOR A NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE
 REGARDING ADAM ROSENDORFF OR IN THE ALTERNATIVE AN EVIDENTIARY HEARING
 CR-18-00258 EJD

1 prong is satisfied. *See United States v. Fulcher*, 250 F.3d 244, 250 (4th Cir. 2001) (diligence prong is
2 satisfied when “there is simply no indication from the record that a more probing cross-examination
3 would have elicited any of the facts that came to light following the trial”); *United States v. Walker*, 546
4 F. Supp. 805, 811 (D. Haw. 1982) (“Due diligence means ordinary, rather than extraordinary,
5 diligence.”).

6 ***Material to Issues at Trial.*** Dr. Rosendorff’s statements are material. To be sure, the exact
7 meaning of Dr. Rosendorff’s statements is unclear. Potential meanings include the following:

- 8 1. He “*tried* to answer the questions honestly,” Evans Decl., Ex. A at 1 (emphasis added), but
9 his attempt to be honest was not always successful, meaning that he provided untruthful
10 testimony to the jury. This interpretation would explain why he said he “felt like he had done
11 something wrong.” *Id.*
- 12 2. He answered the government’s questions honestly, but nonetheless the resulting presentation
13 of evidence was misleading, raising potential concerns under *Napue*, discussed above. *See,*
14 *e.g., United States v. Vozzella*, 124 F.3d 389, 390 (2d Cir. 1997) (recognizing that *Napue*
15 applied to “the use of evidence that was in part false and otherwise so misleading as to
16 amount to falsity”).
- 17 3. He answered the government’s inculpatory questions honestly, but the government did not
18 ask him about exculpatory information he had provided to the government (that the
19 government did not disclose to the defense).
- 20 4. He answered the questions honestly, but the government’s cherry-picked questioning and
21 exhibits and his resulting testimony presented an incomplete picture to the jury and made
22 things seem “worse than they were”—for example, by failing to present to the jury a
23 complete, accurate picture of his time at Theranos, his many positive interactions with Ms.
24 Holmes, and his view that “everyone was just doing the best they could” and was “working
25 so hard to do something good and meaningful.” Evans Decl., Ex. A at 1.

26 Under any interpretation of Dr. Rosendorff’s statements, the statements are material to the case.

1 Even assuming he meant version 4, which is the most conservative interpretation of his statements, that
2 statement would have fundamentally changed the jury’s perception of the case.

3 For starters, testimony from a government star witness that the government cherry-picked
4 evidence and/or testimony to make things seem worse than they were would have gravely damaged the
5 reliability of the government’s investigation and presentation of evidence and bolstered Ms. Holmes’
6 defense. Evidence undermining the reliability of the government’s investigation is necessarily material.
7 *See Kyles v. Whitley*, 514 U.S. 419, 446 (1995) (evidence was material because it could have been used
8 to attack the reliability of the government’s investigation); *United States v. Howell*, 231 F.3d 615, 625
9 (9th Cir. 2000) (“[I]nformation which might ‘have raised opportunities to attack . . . the thoroughness
10 and even good faith of the investigation . . .’ constitutes exculpatory, material evidence.”). And this
11 testimony almost certainly would have diminished the weight the jury would have ascribed to Dr.
12 Rosendorff’s testimony, which the government used to support key elements of its case. *See United*
13 *States v. Butler*, 567 F.2d 885, 890–91 (9th Cir. 1978) (“Both by casting doubt on the prosecution case
14 and by increasing the scope of the closing defense arguments, disclosure of the exact nature of the
15 prosecution’s dealings with its key witness would certainly have affected the weight given his testimony
16 by the jury.”).

17 Ms. Holmes specifically argued to the jury that the government’s cherry-picked evidence
18 “obscured the full picture” and that the government was incorrectly viewing the evidence through a
19 “dirty lens.” *See Holmes* 12/16/21 Tr. 9031:19-9041:10. Notably, Ms. Holmes attempted to
20 demonstrate the government’s cherry-picking of evidence through Dr. Rosendorff’s cross-examination.
21 *See Holmes* 9/29/21 Tr. 2139:15-2146:22 (showing government did not introduce on direct examination
22 full email chain related to inspection of CLIA lab that showed transparency in dealing with inspectors);
23 *Holmes* 10/5/21 Tr. at 2651:5-2657:25 (showing government raised issues with bicarbonate assay on
24 direct examination, but did not introduce emails that showed the issue was investigated and addressed
25 within 24 hours). This argument was central to Ms. Holmes’ defense: it was the very first argument
26 that defense counsel made in closing argument. Dr. Rosendorff’s statements would have powerfully
27

28 MS. HOLMES’ MOTION FOR A NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE
REGARDING ADAM ROSENDORFF OR IN THE ALTERNATIVE AN EVIDENTIARY HEARING
CR-18-00258 EJD

1 corroborated this defense.

2 Dr. Rosendorff's statements also are material to Ms. Holmes' alleged intent to defraud. To
 3 secure a conviction on the investor counts the government had to show, *inter alia*, that Ms. Holmes
 4 knowingly made material misrepresentations with intent to deceive. The government relied on Dr.
 5 Rosendorff in its closing argument when discussing the requisite knowledge and falsity elements of wire
 6 fraud. *See, e.g.*, Holmes 12/16/21 Tr. 8975:6-10 ("Dr. Rosendorff said that in the middle of 2014 he had
 7 conversations with Ms. Holmes about QC control . . . again, more knowledge evidence."). Dr.
 8 Rosendorff's statements that "everyone at Theranos" was doing their "best" and "working so hard to do
 9 something good and meaningful" would have directly undermined the government's intent arguments.
 10 No doubt exists that Ms. Holmes would have featured these statements prominently in her closing.
 11 Especially coming from a star government witness, these statements would have been material to intent.

12 ***Not Cumulative or Merely Impeaching.*** The evidence is not cumulative. "Evidence is
 13 cumulative if repetitive, *and* if the small increment of probability it adds may not warrant the time spent
 14 in introducing it." 1 Weinstein's Evidence ¶ 401[07] (1985). Dr. Rosendorff did not testify at trial that
 15 the government's questioning obscured an accurate depiction of his tenure at Theranos, despite Ms.
 16 Holmes' counsel's repeated questioning about the government's tactics.

17 Nor is this evidence merely impeaching. Dr. Rosendorff's statement that everyone at Theranos
 18 "was just doing the best they could" that "everyone was working so hard to do something good and
 19 meaningful" is affirmative evidence of Ms. Holmes' intent. Evans Decl., Ex. A. And his statement that
 20 the government's presentation was an attempt "to make everybody look bad" and that the government
 21 "made things sound worse than they were" is affirmative evidence negating the quality of the
 22 government's investigation and trial presentation. *Id.*

23 Even if the evidence could be considered impeachment in part, that fact does not defeat the
 24 motion. Although "[o]rdinarily, evidence impeaching a witness will not be material . . . [i]n some
 25 situations, however, the newly-discovered impeachment evidence may be so powerful that, if it were to
 26 be believed by the trier of fact, it could render the witness's testimony totally incredible." *United States*
 27

28 MS. HOLMES' MOTION FOR A NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE
 REGARDING ADAM ROSENDORFF OR IN THE ALTERNATIVE AN EVIDENTIARY HEARING
 CR-18-00258 EJD

1 *v. Davis*, 960 F.2d 820, 825 (9th Cir. 1992); *see also United States v. Wallach*, 935 F.2d 445, 458 (2d
 2 Cir. 1991) (concluding that new evidence impeaching the government’s central witness was sufficiently
 3 powerful to require a new trial); *Balestreri v. United States*, 224 F.2d 915, 917 (9th Cir. 1955) (“To deny
 4 in every case a motion for a new trial on the ground of newly discovered evidence for the sole reason
 5 that the evidence was ‘merely impeachment’ might often lead to injustice.”). Dr. Rosendorff was an
 6 important witness and his new statements materially undermine his testimony.

7 ***Likelihood of Acquittal.*** The final element overlaps considerably with the materiality element
 8 discussed above. *See United States v. Krasny*, 607 F.2d 840, 845 n.3 (9th Cir. 1979) (citing favorably
 9 the reasoning that “two of the traditional prerequisites for prevailing on a motion for a new trial based
 10 upon newly discovered evidence, *i.e.*, that the newly discovered evidence be material and that it
 11 probably would produce an acquittal on retrial, are really two means of measuring the same thing”).

12 As an initial matter, Dr. Rosendorff’s statements raise the possibility that the government may
 13 have engaged in misconduct. Dr. Rosendorff’s statements to Mr. Evans are not sufficiently precise for
 14 Ms. Holmes to accuse the government of misconduct at this time. But if misconduct occurred, Ms.
 15 Holmes need not demonstrate that the evidence would probably lead to an acquittal. *Walgren*, 885 F.2d
 16 at 1428. Rather, the applicable standard would be whether there is a reasonable probability that the
 17 result would have been different if the evidence had been available at trial. *Id.* At a minimum, the
 18 Court should order an evidentiary hearing to determine whether misconduct occurred.

19 Even under the more stringent standard, the last factor is met because the new evidence indicates
 20 that “a new trial would probably result in acquittal.” *Harrington*, 410 F.3d at 601. For all the reasons
 21 already stated, and even ascribing the most conservative meaning to Dr. Rosendorff’s statements, if the
 22 jury had heard from Dr. Rosendorff that the government cherry-picked evidence to make things seem
 23 worse than they were and that everyone was doing their best and working hard to do something good
 24 and meaningful, the jury would have viewed this case very differently. Dr. Rosendorff’s statements
 25 would have “significantly bolstered [Ms. Holmes’] defense and directly rebutted the government’s
 26 primary response.” *Mendez*, 619 F. App’x at 646 (reversing denial of new trial motion after holding that
 27

28 MS. HOLMES’ MOTION FOR A NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE
 REGARDING ADAM ROSENDORFF OR IN THE ALTERNATIVE AN EVIDENTIARY HEARING
 CR-18-00258 EJD

1 “[a] new trial, with the benefit of [newly discovered records], would probably result in acquittal”); *see*
2 *also Fulcher*, 250 F.3d at 251, 255 (affirming district court findings that new evidence “would paint a
3 ‘significantly more persuasive picture than the one presented to the jury at trial,’” and would “certainly
4 create a record more favorable for [the defendants]”); *United States v. Hernandez-Rodriguez*, 443 F.3d
5 138, 146 (1st Cir. 2006) (reversing denial of new trial motion where “district judge failed to consider the
6 full import of the defendant’s new evidence”). Even without this new testimony, this was a close case,
7 as evidenced by the split verdict. Had Dr. Rosendorff provided these statements to the jury, Ms. Holmes
8 probably would have been acquitted.

9 **II. At a Minimum, the Court Should Order an Evidentiary Hearing**

10 At a minimum, the Court should hold an evidentiary hearing both to determine the meaning of
11 Dr. Rosendorff’s statements and to determine whether any government misconduct occurred. As
12 discussed above, Ms. Holmes’ counsel are unable to return Dr. Rosendorff’s phone call to ascertain the
13 meaning of his statements. If the Court has any doubts about whether Dr. Rosendorff’s statements
14 warrant a new trial, an evidentiary hearing will provide the Court the facts necessary to decide the
15 motion.

16 An evidentiary hearing must be held on a motion for a new trial “[u]less the court is able to
17 determine without a hearing that the allegations are without credibility or that the allegations if true
18 would not warrant a new trial.” *United States v. Navarro-Garcia*, 926 F.2d 818, 822 (9th Cir. 1991). In
19 determining whether to grant a hearing, “the district court must be guided ‘by the content of the
20 allegations, including the seriousness of the alleged misconduct or bias, and the credibility of the
21 source.’” *Id.*

22 The “content of the allegations” here weighs in favor of a granting a hearing. Dr. Rosendorff’s
23 statements suggest that the government’s presentation of evidence may have misled the jury, whether
24 intentionally or not. His statements suggest that there is strong reason to doubt the credibility of a key
25 government witness. And his statements at least raise the possibility of government misconduct. As
26 already discussed, if government misconduct occurred, that would alter the applicable standard for
27

28 MS. HOLMES’ MOTION FOR A NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE
REGARDING ADAM ROSENDORFF OR IN THE ALTERNATIVE AN EVIDENTIARY HEARING
CR-18-00258 EJD

1 obtaining a new trial. Thus, to the extent the Court has any doubt that a new trial is required under the
2 normal Rule 33 standard, at a minimum, it should conduct a hearing to determine whether misconduct
3 occurred.

4 Second, there is no reason to doubt the credibility of Dr. Rosendorff's statements or that Mr.
5 Evans has accurately conveyed those statements. Dr. Rosendorff's recorded voicemail for Ms. Holmes'
6 counsel is consistent with Mr. Evans' account of his interactions with Dr. Rosendorff and Dr.
7 Rosendorff's statements. *Compare* Evans Decl., Ex. A at 1; *with* Wade Decl. ¶ 5. Nothing in the
8 current record refutes Dr. Rosendorff's recent statements. *See Navarro-Garcia*, 926 F.2d at 823 ("The
9 district court made no finding that the affidavit lacked credibility. Moreover, there is nothing in the
10 record that would support such a conclusion.").

11 The Court should hear directly from Dr. Rosendorff at an evidentiary hearing.

12 **CONCLUSION**

13 For the foregoing reasons, the Court should grant Ms. Holmes' motion for a new trial or, at a
14 minimum, order an evidentiary hearing.

15
16 DATED: September 6, 2022

17 /s/ Amy Mason Saharia
18 KEVIN DOWNEY
19 LANCE WADE
20 AMY MASON SAHARIA
21 KATHERINE TREFZ
22 Attorneys for Elizabeth Holmes
23
24
25
26
27

CERTIFICATE OF SERVICE

I hereby certify that on September 6, 2022 a copy of this filing was delivered via ECF on all
counsel of record.

/s/ Amy Mason Saharia
AMY MASON SAHARIA
Attorney for Elizabeth Holmes