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10
11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13 SAN JOSE DIVISION

14 UNITED STATES OF AMERICA,) Case No. CR-18-00258-EJD-SVK
15)
Plaintiff,)
16) **MS. HOLMES’ MOTION TO STRIKE RULE**
v.) **404(b) NOTICE OR, IN THE ALTERNATIVE,**
17) **COMPEL ADEQUATE RULE 404(b)**
ELIZABETH HOLMES and) **DISCLOSURE**
18 RAMESH “SUNNY” BALWANI,)
Date: July 20, 2020
19 Defendants.) Time: 1:30 p.m.
CTR: 4, 5th Floor
20)
21) Hon. Edward J. Davila
22)
_____)

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27 MS. HOLMES’ MOTION TO STRIKE RULE 404(b) NOTICE OR, IN THE ALTERANTIVE, COMPEL ADEQUATE
28 RULE 404(b) DISCLOSURE
CR-18-00258 EJD SVK

**MOTION TO STRIKE RULE 404(b) NOTICE OR, IN THE ALTERNATIVE,
COMPEL ADEQUATE RULE 404(b) DISCLOSURE**

PLEASE TAKE NOTICE that on July 20, 2020, at 1:30 p.m., or on such other date and time as the Court may order, in Courtroom 4 of the above-captioned Court, 280 South 1st Street, San Jose, CA 95113, before the Honorable Edward J. Davila, Defendant Elizabeth Holmes will and hereby does respectfully move the Court to strike the government’s Rule 404(b) notice or, in the alternative, to compel an adequate Rule 404(b) notice by August 10, 2020. Ms. Holmes makes this motion pursuant to Federal Rule of Criminal Procedure 16, Federal Rule of Evidence 404(b)(2)(A), and Rules 16-1(c)(3) and 16-2 of the Criminal Local Rules for the United States District Court for the Northern District of California. The Motion is based on the below Memorandum of Points and Authorities, the exhibits and declarations that accompany this motion, the record in this case, and any other matters that the Court deems appropriate.

DATED: June 30, 2020

/s/ Amy Mason Saharia
KEVIN DOWNEY
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MEMORANDUM OF POINTS AND AUTHORITIES

1
2 In its February 11, 2020 Order on Ms. Holmes' motions to dismiss, this Court limited the
3 government's theory of wire fraud to its allegations that Ms. Holmes and her co-defendant knowingly
4 engaged in a scheme to defraud two groups of people: (1) investors in Theranos and (2) patients who
5 paid out of pocket for the blood testing that Theranos provided. These allegations, which were already
6 sprawling, were at least confined to a three-year time period and two categories of putative victims.
7 However, the government has since served Ms. Holmes with a staggering notice under Federal Rule of
8 Evidence 404(b)(2), disclosing that the government intends to introduce twenty-two categories of
9 alleged other acts and threatening to expand the complexity and scope of this case exponentially.¹ The
10 government then supplemented that notice by directing the defense to more than 11,000 pages of
11 discovery and the statements and testimony of more than 100 of the 130 witnesses the government has
12 interviewed. In short, the government's notices increase the relevant time period in this case by many
13 years, increase the number of potential witnesses by many dozens, and shift the focus of the coming trial
14 from purported fraud on investors and patients to Theranos' interactions with other parties, Theranos'
15 corporate culture, and Theranos' lab standards and regulatory compliance.

16 Ms. Holmes intends to move in limine to exclude or limit the vast majority of the "evidence"
17 identified in these notices. The Federal Rules of Evidence and this Court's Local Rules enable this
18 Court to decide such motions by requiring the government to provide "a summary of any evidence of
19 other crimes, wrongs or acts which the government intends to offer . . . *supported by documentary*
20 *evidence or witness statements.*" Crim. L.R. 16-1(c)(3) (emphasis added). That summary also must
21 provide "sufficient detail that the Court may rule on the admissibility of the proffered evidence." *Id.*
22 Although these obligations are important—especially here, given the immense amount of discovery—
23 complying with them is relatively straightforward. For each act the government intends to offer via
24 Rule 404(b), it needed only to identify clearly: (1) the specific other act; (2) the documents and witness
25

26
27 ¹ These supposed bad acts include, among others, the very allegations that this Court dismissed in its
February 11, 2020 Order. See Ex. A, March 6, 2020 Letter to Defense re 404(b) Notice at 2-3.

1 statements that it claims prove that Ms. Holmes committed that act; and (3) the admissible Rule 404(b)
2 purpose for that act.

3 Yet the government's Rule 404(b) notices do none of those things. Instead of identifying the
4 who, what, where, when, and why for particular "other acts," the notices identify twenty-two broad
5 themes and brazenly assert that the government may seek to introduce "other acts" not specified in the
6 notices. And instead of identifying the particular witness statements or documents that prove a
7 particular "other act," the government's notices dump thousands of pages (some of which are entirely
8 irrelevant even to the government's vague themes) on Ms. Holmes "in support of" the government's
9 themes.²

10 In short, the government has failed to provide a satisfactory Rule 404(b) notice. Indeed, its
11 notices read as little more than a collection of the broad accusations made against Ms. Holmes and
12 Theranos in the media. Courts in this district require more. This Court should thus strike the
13 government's 404(b) notices, or, in the alternative, compel the government to provide a satisfactory
14 404(b) notice by August 10, 2020.

15 BACKGROUND

16 On September 6, 2018, a grand jury returned an eleven-count indictment alleging a scheme to
17 defraud investors, a scheme to defraud doctors and patients, and nine underlying counts of wire
18 fraud. On February 11, 2020, this Court dismissed those charges as they pertained to doctors and
19 nonpaying patients.

20 On March 6, 2020, the government served Defendants with a letter that purported to "provide
21 notice that the government may seek to introduce" certain alleged bad acts as "evidence in its case in
22 chief." Ex. A at 1. That letter identified twenty-two categories of alleged bad acts that the government
23 maintains it will seek to introduce at trial. *See id.* at 2-10.³ Upon receiving this letter, Ms. Holmes
24

25 ² To explain how these defects infect the various thematic categories disclosed in the government's Rule
26 404(b) notices, the defense has prepared the chart located at Exhibit B.

27 ³ These categories of purported bad acts include: making false and misleading representations to insured
28 patients, doctors, Theranos' Board of Directors, Walgreens, Safeway, journalists, and government
agencies, (Categories 1, 2, 3, 4, 5, 6, 13); fostering a secretive culture and forcing employees to sign
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1 informed the government that its notice had exponentially increased the size and complexity of the case
2 and “fail[ed] to comply with FRE 404(B) and Local Rule 16-1.” Ex. C, Mar. 11, 2020 Email from L.
3 Wade to Government. Ms. Holmes noted that “many of the allegations set forth in [the government’s]
4 letter are not ‘supported by documentary evidence or witness statements that have been produced to the
5 defense’” and that the notice failed to “identify the particular witness statements and evidence” for these
6 twenty-two categories. *Id.* (quoting Crim. L.R. 16-1(c)(3)). The government dismissed these concerns,
7 Ex. D, Mar. 11, 2020 Email from J. Bostic to L. Wade, even as Ms. Holmes reiterated her concerns, Ex.
8 E, Mar. 11, 2020 Email from L. Wade to Government.

9 On March 23, 2020, Ms. Holmes raised these issues once again with the government. She
10 pointed out that the government’s disclosure did “not identify the ‘documentary evidence or witness
11 statements’ on which it is based,” and that “many of the disclosed categories of allegations are so vague
12 that we cannot reasonably be expected to scour the government’s voluminous production to guess what
13 evidence may be at issue.” Ex. F, Mar. 23, 2020 Letter from L. Wade to Government at 1. Ms. Holmes
14 also laid out an itemized list of her concerns with twenty of the categories in the Rule 404(b) notice. *Id.*
15 at 2-7.

16 While the government has continued to dismiss these concerns, it provided a supplemental notice
17 on April 3, 2020. *See* Ex. G, Apr. 3, 2020 Letter to Defense re 404(b) Notice. That supplemental
18 notice, however, compounded the flaws in the government’s previous notice. It did not identify the
19 particular acts Ms. Holmes supposedly committed and continued to rely on vague themes. It did not
20 disclose what evidence the government would introduce outside its case in chief. And it did not provide
21 any explanation of which *particular acts* the hundreds of witness statements and the thousands of pages
22 of discovery it identified would support.

23
24 non-disclosure agreements (Category 7); restricting access to laboratory areas within Theranos
25 (Category 8); harassing, threatening, influencing, or vilifying various individuals or entities (Categories
26 9, 10, 11, 12); violating industry standards or government regulations (Category 14); engaging in poor
27 lab practices (Categories 14, 15, 16, 17, 18, 19); decommissioning the Theranos software database that
28 contained clinical test data (Category 20); obtaining personal benefits through Defendants’ positions at
Theranos (Category 21); and concealing the romantic relationship between Ms. Holmes and Mr.
Balwani (Category 22).

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ARGUMENT

In a criminal case, the government may introduce “[e]vidence of a crime, wrong, or other act” for only a limited set of purposes, and it must provide the defense with “reasonable notice of the general nature of any such evidence.” Fed. R. Evid. 404(b). This notice requirement “is designed to reduce surprise and promote early resolution of admissibility issues.” *United States v. Vega*, 188 F.3d 1150, 1153 (9th Cir. 1999). The notice must describe the bad acts the government intends to introduce in “its case-in-chief, for impeachment, or for possible rebuttal.” Fed. R. Evid. 404, advisory committee note to 1991 amendment. The notice must be reasonably timely and complete, and “what constitutes a reasonable request or disclosure will depend largely on the circumstances of each case.” *Id.* Notably, the greater the “volume of discovery,” the more specific the notice must be. *United States v. Mujahid*, 2011 WL 13250753, at *2 (D. Alaska Aug. 9, 2011). In cases with voluminous discovery, describing “broad categor[ies] of” acts will not suffice. *Id.*

On top of Rule 404(b)’s requirements, this Court’s Local Rules require the government to provide the defense with “[a] summary of any evidence of other crimes, wrongs or acts which the government intends to offer under F. R. Evid. 404(b), and which is supported by documentary evidence or witness statements in sufficient detail that the Court may rule on the admissibility of the proffered evidence.” Crim. L.R. 16-1(c)(3). This rule prohibits “overly broad” notices. *United States v. Dejarnette*, 2011 WL 2837420, at *7 (N.D. Cal. July 15, 2011). Again, broad thematic strokes are not enough; by its very terms, the rule contemplates that the government identify specific “acts.” The government also must note the “documentary evidence or witness statements” that support each act listed in the notice. Crim. L.R. 16-1(c)(3). When it fails to do so, courts have sustained objections to the Rule 404(b) notice under the Local Rules. *See Dejarnette*, 2011 WL 2837420, at *7.

I. The Government’s Notice Is Impermissibly Vague Because It Fails To Identify the Particular Other Acts It Seeks To Admit at Trial.

“[T]he discovery in this case is immense[,]” and totals over twenty million pages. Feb. 11, 2020 Order on Defendants’ Mot. to Dismiss 16, Feb. 11, 2020, ECF # 330. “These realities create a

1 substantial risk that Defendants may be unfairly surprised at trial.” *Id.* Despite this, the government has
2 provided the defense with notices that are unclear as to *what* specific acts the government will introduce,
3 *who* committed those acts, *when* those acts occurred, and *how many* acts the government intends to
4 introduce. Courts within this district demand such specificity. *See, e.g., Dejarnette*, 2011 WL 2837420,
5 at *7 (sustaining an objection per the local rules to the notice located at Ex. H because it was “overly
6 broad”); *United States v. Ahn The Duong*, 2010 WL 532513, at *11 (N.D. Cal. Feb. 9, 2010) (ordering
7 the government to “specifically identify each other crime, wrong, or act[,]” including “the nature of the
8 incident; the date, the time and place of the incident;” and “all persons who may testify regarding such
9 incident” or “having knowledge of such incident”).

10 Most troublingly, the government’s Rule 404(b) notice speaks in broad themes and, at best,
11 provides only illustrative examples of the evidence that the government may introduce via Rule 404(b).
12 In many of its twenty-two categories, the government does not identify a single particular act or
13 incident. *See* Ex. A (Categories 1, 3, 4, 5, 7, 16, 17, 19, 20, 22). In others, the government often uses
14 the phrase “for example” before identifying some alleged bad act that it claims is representative of other
15 unidentified bad acts, or it narrates one particular act while implying that other similar acts exist. *See*
16 Ex. A (Categories 2, 6, 8, 9, 10, 11, 12, 13, 14, 18, 21). Of course, by identifying such “examples,” the
17 government suggests that it has omitted other acts that it intends to use at trial. In fact, the government
18 states at the end of every category in its notice that it “may introduce these and *similar facts*” through
19 unidentified documents or witnesses. *Id.* (all Categories) (emphasis added). This notice thus
20 impermissibly speaks in “broad categor[ies] of” acts, *Mujahid*, 2011 WL 13250753, at *2, instead of
21 identifying the specific acts the government will introduce.

22 Even putting aside that overarching flaw, many of the government’s categories of alleged bad
23 acts impermissibly rest on vague allegations. For instance, the government accuses Defendants of
24 “discourag[ing] employees from sharing information regarding Theranos’s use of third-party analyzers
25 . . . [and] taking specific steps to conceal this fact from employees who did not already know.”
26 (Category 7). What those “specific steps” were, however, is unclear. Similarly, it is anyone’s guess
27

1 what the government means when it accuses Ms. Holmes of “foster[ing] a culture that strongly
 2 discouraged skepticism or dissent” or “enforcing that culture by reacting with hostility and intimidation
 3 to any questioning.” (Category 12). How did she foster this culture? How did she enforce it? What is a
 4 “culture” that discourages “skepticism or dissent”? What are the specific acts of “hostility” and
 5 “intimidation” on which the government intends to rely? Similarly, the phrase “Defendants disregarded
 6 and failed to conform to industry standards as well as government regulations or rules regarding
 7 research and development procedures, medical devices and clinical laboratory standards” (Category 14)
 8 raises countless questions. Which regulations? Which standards? How were those regulations or
 9 standards violated?⁴ Ms. Holmes objects to all such vague language in Categories 1, 3, 4, 5, 7, 8, 9, 10,
 10 11, 12, 14, 17, 18, 19, 21 (as reflected in Exhibits A and B), as they do not provide “sufficient detail.”

11 The government’s Rule 404(b) notice is equally ambiguous in describing who actually
 12 committed the bad acts it describes or when those acts occurred. Its notice attributes these bad acts to
 13 Defendants and “*their agents*” (Categories 10, 11, 12, 13); Defendants and “their representatives”
 14 (Category 6); “Theranos” (Categories 2, 13, 14, 15, 16, 17, 18, 19, 20); “Theranos representatives”
 15 (Category 6); and “others” (Category 13).⁵ Moreover, for almost all of the categories of alleged prior
 16 bad acts, the government simply uses the label “Defendants.” It does not explain which acts are Ms.
 17 Holmes’ or which acts belong to Mr. Balwani. Nor does it even provide Ms. Holmes notice of when
 18 particular acts occurred, which would have (through significant effort) allowed her perhaps to reverse
 19 engineer which incidents the government is referencing.

20 The government’s reference to 11,000 pages of discovery and one hundred witnesses’ statements
 21 in its April 3, 2020 letter cures none of these problems. At the outset, it is not Ms. Holmes’ burden to
 22 discern what other acts the government may seek to admit through a time-intensive review of the
 23 government’s document dump. The federal and local rules put the burden of providing adequate notice
 24

25 ⁴ Arguably, this allegation could implicate large swaths of the Clinical Laboratory Improvement
 26 Amendments (CLIA), their many implementing regulations, and analogous state laws and regulations
 27 concerning the operation of clinical labs.

28 ⁵ It is further unclear what the government means by “agents” or “representatives” of Ms. Holmes. To
 the extent it means Theranos employees, they were agents of Theranos, not of Ms. Holmes.

1 on the government, not Ms. Holmes. But even a cursory review of some of the documents in these
2 categories show that they do not clarify the government’s vague language. Take, for example, the
3 fourteen lengthy deposition transcripts—totaling over 1,800 pages—to which the government has
4 pointed. *See* Saharia Decl. ¶ 3a. Or consider the fact that the government has provided an Excel
5 spreadsheet detailing over 1500 Theranos patient visits, without identifying who these patients are or
6 providing any context for why those names are relevant to the Rule 404(b) allegations. *See* Saharia
7 Decl. ¶ 3b. It is nearly impossible for Ms. Holmes to guess what portions of those documents the
8 government thinks will prove its intended other act evidence at trial. If anything, the burdensomeness
9 and lack of context for these documents has only further obscured what other acts the government seeks
10 to admit against Ms. Holmes.

11 In sum, the Rule 404(b) notice lacks “sufficient detail,” as required under Criminal Local Rule
12 16-1(c)(3). This Court should strike the government’s notice or, at a minimum, compel the government
13 to disclose the missing details. *See, e.g.*, Ex. I (the second *Dejarnette* notice, which provided sufficient
14 details under this Court’s local rules).

15 **II. The Government’s 404(b) Notice Fails To Identify the Documents or Witness Statements**
16 **That Demonstrate the Alleged Other Acts.**

17 Given the scope of discovery and the risk of unfair surprise in this case, it is paramount that the
18 government identify the “documentary evidence or witness statements” that support each alleged bad act
19 it intends to use. Crim. L.R. 16-1(c)(3). Without the government’s identification of specific documents
20 and statements relating to each particular bad act, this Court cannot fairly rule on, among other things,
21 whether Ms. Holmes committed an alleged act, or whether evidence of that act would be relevant to this
22 case, admitted for a proper Rule 404(b) purpose, or inadmissible under Rule 403. The government has
23 failed to comply with this obligation in several respects.

24 First, in its supplemental notice, the government skirts this obligation by identifying multitudes
25 of documents and witness statements supporting broad categories of evidence, as opposed to linking
26 *particular* documents and witness statements to *particular acts*. Of course, the task of linking specific
27

1 evidence to specific acts is understandably complicated by the government’s failure to identify specific
 2 acts whatsoever. *See supra*, Part I. But regardless of that defect, the government cannot satisfy its
 3 notice obligations by pointing to thousands of pages and over a hundred witness statements and
 4 asserting that “the government may elicit testimony from” those witnesses “or “offer[] as exhibits
 5 [those] documents.” *See, e.g.*, Ex. G at 2.

6 Second, the government fails even to identify any documents for entire “categories” of other
 7 acts, even though it represents that it will use such documents at trial. *See* Ex. G at 11 (Categories 8, 9).
 8 Specifically, the government states that it “may offer as exhibits . . . records produced in discovery
 9 memorializing or relating to” the government’s broad themes, *id.*, but does not specify what those
 10 documents are. Similarly, for the category where the government purports to rely solely on witness
 11 testimony, Ms. Holmes has not received any witness statements from the government relating to those
 12 allegations (Category 20).

13 In short, the notice’s failure to identify particular documents or statements—from the twenty
 14 million pages of discovery in this case—that will support each particular act the government intends to
 15 introduce at trial means that its notice is insufficient under Criminal Local Rule 16-1(c)(3). *See*
 16 *Dejarnette*, 2011 WL 2837420, at *7 (striking a Rule 404(b) notice that failed to comport with this
 17 requirement); Ex. I (revised *Dejarnette* statement specifying the witnesses from which the bad acts
 18 evidence comes). Moreover, given the volume of discovery in this case, these omissions also mean that
 19 the notice fails to comply with Rule 404(b)(2). *See Mujahid*, 2011 WL 13250753, at *2.⁶

24 ⁶ Adding to this uncertainty, the government at a March 26 meet and confer stated (yet again) that its
 25 five-year investigation has continued and will continue, including with respect to the Rule 404(b)
 26 categories. For example, the government indicated that it may seek to interview additional journalists as
 27 it relates to Category 6, raising the question of whether its vague disclosure is in part a product of an
 incomplete investigation that is now over three years in duration. What is more, the government has
 recently indicated its intention to file a Second Superseding Indictment, and Ms. Holmes thus anticipates
 further Rule 404(b) disclosures from the government.

1 **III. The Government’s Notice Also Fails To Notify Ms. Holmes of the Full Universe of Acts the**
2 **Government Seeks To Introduce at Trial or the Purposes of That Evidence.**

3 The government’s Rule 404(b) notice suffers from two further defects. First, it purports to
4 discuss only the acts the government intends to introduce during its “case in chief.” Ex. A at 1. But
5 Rule 404(b)(2) “mandates that the government provide notice even if the government intends to
6 introduce [] evidence for impeachment or for *possible* rebuttal.” *Vega*, 188 F.3d at 1154; *accord* Fed. R.
7 Evid. 404 advisory committee’s note to 1991 amendment. Second, the notice does not explain, for each
8 act the government seeks to introduce, the permissible Rule 404(b) purpose of that act. Pursuant to
9 approved amendments to Rule 404(b), which will be in effect on December 1, 2020 (and thus for parts
10 of Ms. Holmes’ trial and all of Mr. Balwani’s trial), the government must provide such information for
11 each other act. *See* April 27, 2020 amendment to Fed. R. Evid. 404(b). Those approved amendments
12 reflect the commonsense notion that the defense and courts are entitled to a pre-trial disclosure of the
13 claimed purpose for each alleged other act in order to determine whether the act is relevant to that
14 purpose. In light of the breadth and complexity of the government’s Rule 404(b) notice, requiring such
15 a disclosure here is essential to facilitate orderly determination of the admissibility of the government’s
16 Rule 404(b) evidence.

17 **CONCLUSION**

18 For these reasons, this Court should strike the government’s Rule 404(b) notice, or, in the
19 alternative, compel the government to supplement its disclosure by clearly specifying the precise other
20 acts it seeks to use during its case in chief, impeachment, or possible rebuttal, the documents or
21 statements supporting each act, and the claimed purpose for each other act. This Court should preclude
22 the government from introducing any such evidence not adequately disclosed by August 10 2020. *See*
23 *United States v. Yagi*, 2013 WL 10570994, at *11 (N.D. Cal. Oct. 17, 2013).

1 DATED: June 30, 2020

Respectfully submitted,

2
3 /s/ Amy Mason Saharia
4 KEVIN DOWNEY
5 LANCE WADE
6 AMY MASON SAHARIA
7 KATHERINE TREFZ
8 Attorneys for Elizabeth Holmes
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CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2020 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