



LAW OFFICE OF  
STEVEN D. ZANSBERG, LLC

September 7, 2021

*via email*

Hon. Edward J. Davila  
United States District Court for the Northern District of California  
280 South 1st Street  
San Jose, CA 95113

**Re: *United States v. Elizabeth Holmes*, No. 18-CR-258-EJD-1**

Your Honor:

As you know, I represent Dow Jones and Company, Inc. (“Dow Jones”), publisher of *The Wall Street Journal*. I write to bring to your attention two points that were left unresolved in your Order (Doc. 965) partially granting my client’s Motion to Intervene for the Limited Purpose of Seeking to Unseal Judicial Records (Doc. 881) and to raise an additional issue of access to the trial exhibits. Dow Jones hopes that the Court and the parties can swiftly and efficiently resolve these matters without resort to formal briefing in the midst of the ongoing trial.

1. Records Concerning The Government’s Omnibus Motion to Rejoin the Two Trials and to Exclude the Testimony of Dr. Mindy Mechanic

Dow Jones’ motion sought the unsealing of *all* records related to the parties’ motions to sever their trials, including “any subsequent filings in connection with the Government’s request, by formal motion, to have the two Defendants’ trials joined, again, pursuant to Fed. R. Cr. P. 8.” Doc. 881 at 20 ll. 22 - 25; *Id.* at 21 ll. 11 -14 (referring to Government’s motion to exclude the testimony of Dr. Mechanic, as similarly connected to its motion related to Ms. Holmes’ mental health defense under Rule 12.2). Though it is no longer accessible on PACER, for a period of time the Certificate of Service for Doc. 639 in the *U.S. v. Balwani* case indicated the following:

1  
2  
3  
4  
5  
6  
7  
8  
9  
10

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that she is an employee of the office of the United States Attorney, Northern District of California and is a person of such age and discretion to be competent to serve papers. The undersigned certifies that she caused copies of

**UNITED STATES' OMNIBUS REPLY IN SUPPORT OF UNITED STATES' MOTION TO REJOIN THE TRIALS OF DEFENDANTS ELIZABETH HOLMES AND RAMESH "SUNNY" BALWANI PURSUANT TO FEDERAL RULE OF CRIMINAL PROCEDURE 8(b) AND MOTION TO EXCLUDE TESTIMONY FROM DR. MECHANIC PURSUANT TO FEDERAL RULES OF EVIDENCE 401, 402, 403, AND 702**

and

**DECLARATION OF VANESSA BAEHR-JONES IN SUPPORT OF UNITED STATES' OMNIBUS REPLY.**

During the hearing on its motion, Dow Jones' counsel reminded the Court and parties that all briefing associated with the Government's Omnibus Motion was within the ambit of Dow Jones' unsealing requests. However, the Court's Order (Doc. 965) did not address this set of documents. Dow Jones respectfully requests that those records, too, be unsealed consistent with the Court's ruling.

2. Redacted Versions of Two Records Unsealed

Two of the documents that were unsealed pursuant to the Court's Order (Doc. 384 and 430) are the Government's *redacted* version. The Government proffered the redactions in those two filings in compliance with the provisional Protective Order entered on January 14, 2020 (Doc. 268). The Court formally withdrew that provisional order during the August 26 hearing. Accordingly, Dow Jones respectfully asks that unredacted versions of Documents 384 and 430 be publicly released.

3. Public Access to Documentary Exhibits Admitted at Trial

The trial of Ms. Holmes will commence on Wednesday, September 8 at 9:00 a.m. As your Honor is well aware, this case is legitimately of tremendous public interest and concern. One component of the public's strong presumptive right to observe the trial is its right to inspect all documentary exhibits entered into evidence in the course of that trial, at the time they are admitted. *See, e.g., Valley Broad. Co. v. United States Dist. Ct.*, 798 F.2d 1289, 1293 (9th Cir. 1986) (granting request by the press to make copies of audio and video tapes introduced into evidence at the close of each day of trial); *United States v. Guzzino*, 766 F.2d 302, 303-04 (7th Cir. 1985) (stating that "the common law right of the public to inspect and copy judicial records . . . includes the right of the media to copy [exhibits] which have been admitted into evidence in a criminal trial"); *In re Associated Press*, 172 F. App'x 1, 4 (4th Cir. 2006) (granting writ of mandamus directing the District Court to provide the media with one copy of

each exhibit admitted into evidence and published to the jury “as soon as practically possible, but in no event later than 10:00 a.m. on the day after the exhibit is published to the jury”). As the United States Court of Appeals for the Second Circuit stated:

[T]here is a presumption in favor of public inspection and copying of any item entered into evidence at a public session of a trial. Once the evidence has become known to the members of the public, including representatives of the press, through their attendance at a public session of court, *it would take the most extraordinary circumstances* to justify restrictions on the opportunity of those not physically in attendance at the courtroom *to see and hear the evidence*, when it is in a form that readily permits . . . reproduction.

*Application of Nat’l Broad. Co., Inc.*, 635 F.2d 945, 952 (2d Cir. 1980) (emphasis added) (citations omitted); *see also Daily Press, Inc. v. Commonwealth of Va.*, 739 S.E.2d 636, 640 (Va. 2013) (with respect to trial exhibits: “to work effectively, public access must be contemporaneous. The public must be able to scrutinize the judicial process as it takes place. . . . To delay or postpone disclosure undermines the benefits of public scrutiny and may have the same result as complete suppression”).

Cognizant of the administrative burdens that numerous requests by members of the press and the public to copy admitted exhibits would place on the court clerk’s office, Dow Jones respectfully asks the Court to direct the clerk’s office (with the assistance of the parties) to follow the procedure recommended by the Federal Judicial Center:

In high-profile cases, courts work with the parties to make copies of exhibits that are entered into evidence available to news media, to the extent practical, and *courts often post these exhibits on their websites.*

Robert T. Reagan, SEALING COURT RECORDS AND PROCEEDINGS: A POCKET GUIDE at 14-15 (Fed. J. Ctr. 2010) (emphasis added), [https://northerndistrictpracticeprogram.org/wp-content/uploads/2017/05/Sealing\\_Guide.pdf](https://northerndistrictpracticeprogram.org/wp-content/uploads/2017/05/Sealing_Guide.pdf). Indeed, this approach has been adopted in a number of high-profile federal criminal trials with great success. *See, e.g.*, Assoc. Press, *Court Posts Moussaoui Trial Exhibits on Website*, (July 31, 2006), <https://www.foxnews.com/story/court-posts-moussaoui-trial-exhibits-on-website>; *see also* <https://web.archive.org/web/20170815163911/http://www.vaed.uscourts.gov/notebookcases/moussaoui/exhibits/index.htm> (providing access to 1,202 exhibits admitted during trial); Josh Gerstein, *Exhibits Go Public in John Edwards Trial*, Politico (Apr. 26, 2012), <https://www.politico.com/blogs/under-the-radar/2012/04/exhibits-go-public-in-john-edwards-trial-121782>; Peter Dujardin and

Ashley Speed, *In Unusual Move, Trial Exhibits Posted Online in McDonnell Case*, The Daily Press, (Aug. 17, 2014), <https://www.dailypress.com/news/crime/dp-nws-crime-notebook-0817-20140817-story.html>.

One alternative approach to the one above is to require the parties promptly to provide a copy of each admitted exhibit to a designated representative of the news media (e.g., Dow Jones) to make it available to all the other members of the press (and through them, the public). *See, e.g., In re Associated Press*, 172 F. App'x at 4.

#### Conclusion

Dow Jones again thanks the Court, and its administrative staff, for affording the public speedy access to all documents placed in the record in this case, in furtherance of its right independently to monitor the conduct of all participants in the criminal justice system.

Sincerely,



Steven D. Zansberg

cc: Lead Counsel of Record