

3. A decision from the Northern District of California denying a motion to suppress evidence filed by Theranos founder Elizabeth Holmes, finding that the government did not suppress evidence in a database that Theranos had produced to the government (and then decommissioned) without the private key needed to access the database.

In *U.S. v. Holmes*, 2021 WL 3395146 (N.D. Cal. Aug. 4, 2021), U.S. District Judge Edward J. Davila denied a motion to suppress evidence filed by Elizabeth Holmes, the founder and CEO of Theranos, Inc., finding that the government did not suppress evidence in a database that Theranos had produced to the government without the necessary private key to access the database and then decommissioned.

Theranos used a bespoke database called the Laboratory Information System (LIS) containing all patient test results and quality control data at Theranos, among other information. Beginning in the fall of 2015, the Securities and Exchange Commission (SEC) and Department of Justice (DOJ) issued multiple subpoenas and document requests relating to Theranos' databases. In April and June 2018, the DOJ served grand jury subpoenas on Theranos for information from the LIS database and requested a copy of the database itself along with the necessary software to access and search it. On June 5, 2018, a day after the second subpoena, Holmes' outside counsel at WilmerHale emailed Theranos' in-house counsel to discuss giving LIS to the DOJ to "let them figure it out" and noting they "won't know what to do with it[.]" *Id.* at *2. The email continued, "Our experts are the only ones who understand it, and we don't want to make them percipient witnesses." Other emails between WilmerHale and in-house counsel discussed how to produce a copy of the LIS database to the government, and internal Theranos emails revealed that the copy would be encrypted and require both a password and a private key to access its information.

On July 25, 2018, the government requested that Holmes produce the LIS database and any software necessary to access or search it. In its response describing the software needed to use the LIS database copy, WilmerHale did not mention that it would be encrypted and require an additional key to access. That same day, a Theranos employee who was working on preparing the database copy emailed in-house counsel explaining that the database was more like a "whole system with layers of applications and data" and that "if we are just handing over a database I'm not sure it will meet the needs[.]" In-house counsel replied that it was not Theranos' problem if its database was "inconvenient for outsiders." In-house counsel then informed WilmerHale that only one Theranos employee knew the private key to the LIS database copy. Ultimately, Theranos was unable to obtain the private key.

When Holmes produced the LIS database copy to the government on August 27, her cover email included the password but failed to mention the required private key. *Id.* at *3. WilmerHale subsequently represented that it was unaware of additional information or software that would facilitate the government's access to the database. After this production, Theranos began to decommission and dismantle the original LIS database, and by August 31, Theranos had vacated the facility in which it was housed. At this time, Theranos employees and agents knew that once the system was taken apart, it might be difficult or impossible to rebuild because the encryption key would be lost.

The government tried repeatedly and unsuccessfully to access information from the copy of the LIS database in September and October 2018. In March 2019, the government learned that the

original LIS database had been decommissioned and that Theranos had advised the assignee of its assets that it would be a “herculean undertaking to get it up and running again.” In October and November 2020, the government further learned that the LIS database was encrypted and that no one possessed the private key or could access an alternative version of the LIS database. The parties agree that the LIS database copy produced to the government could not be accessed without the private key and that information on the original was lost and potentially irretrievable. *Id.* at *4.

Judge Davila began his analysis of Holmes’ motion to suppress evidence with the relevant legal standard, noting that Holmes’ motion was based on the government’s duty to preserve potentially exculpatory evidence and that the loss or destruction of such evidence might rise to the level of a due process violation if the government acted in bad faith. A finding of bad faith would require more than mere negligence or recklessness, but sanctions could still be imposed if the government’s conduct did not rise to the level of a constitutional violation, based on balancing the quality of the government’s conduct and the degree of prejudice to the accused. Judge Davila noted that the government bears the burden of justifying its actions, and the defendant bears the burden of demonstrating prejudice.

Judge Davila then listed a number of factors the court weighs in considering each party’s burden: “In evaluating the Government’s conduct, the court should inquire whether the evidence was lost or destroyed while in [government] custody, whether the Government acted in disregard for the interests of the accused, whether it was negligent in failing to adhere to established and reasonable standards of care for police and prosecutorial functions, and, if the acts were deliberate, whether they were taken in good faith or with reasonable justification. ... In evaluating prejudice against the defendant, the court must consider, among other things, the centrality of the evidence to the case and its importance in establishing the elements of the crime or the motive or intent of the defendant; the probative value and reliability of the secondary or substitute evidence; the nature and probable weight of factual inferences or other demonstrations and kinds of proof allegedly lost to the accused; the probable effect on the jury from absence of the evidence, including dangers of unfounded speculation and bias that might result to the defendant if adequate presentation of the case requires explanation about the missing evidence.”

Judge Davila first examined Holmes’ request to suppress evidence of customer complaints, testing results, and other material based on this balancing test. Holmes argued that allowing the government to use that evidence as “evidence of fraud” after failing to gather and preserve the LIS database would violate her rights to present a complete defense and to receive due process, as the entirety of the database was necessary to refute that evidence.

In evaluating that argument, Judge Davila first examined whether the LIS database was potentially exculpatory, noting that Holmes contended that it was “potentially useful evidence” rather than materially exculpatory. *Id.* at *5. Judge Davila explained that potentially useful evidence constituted “evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant.” *Id.* (internal citations omitted). The government argued that the LIS database was either highly inculpatory and would bolster its case against Holmes, or it would be useless to both sides because there was no indication it contained data reflecting the accuracy of Theranos test results.

Judge Davila cast doubts on Holmes' argument that the LIS would be exculpatory, as the record did not show Holmes ever informing the government of its exculpatory value or rushing the government in its efforts to access the database copy. The parties disagreed as to whether the LIS database could have been used to assess the accuracy of Theranos test results. Holmes argued that the LIS database could have been used to assess the proportion of tests that were accurate and the reasons why certain tests were inaccurate. On the other hand, the government maintained that external evidence was needed to make this evaluation and had already indicated that Theranos' test results were questionable. Judge Davila found that Holmes' arguments did not show how information from the database could be validated without external data, and therefore any exculpatory value was speculative. *Id.* at *6.

Judge Davila then held that the government had not acted in bad faith. Judge Davila stated that the presence or absence of bad faith turned on the government's knowledge of the apparent exculpatory value of the evidence at the time it was lost or destroyed. Having already found that any exculpatory value of the LIS database was speculative, Judge Davila reasoned that the exculpatory value was not apparent to the government on August 31, 2018, when it was destroyed. Further, the government did not lose or destroy evidence in its possession; it was never given the additional key required to access its encrypted copy of the LIS database, so the sole working version of the LIS database was only ever in Theranos' possession until it dismantled the database hardware. He stated that the Ninth Circuit had never found that the nonmoving party acted in bad faith when the usefulness of the evidence was speculative. He added that for the nonmoving party to have acted in bad faith, the Ninth Circuit required it to have been responsible for the destruction or loss of potentially exculpatory evidence. Judge Davila stated Holmes did not cite to case law that suggested the government could be held responsible for its inaction as to the LIS database when it was unaware of and had no control over its destruction.

Judge Davila noted that there were only four days between the government's having received the LIS database copy and when the original database was dismantled, and he rejected the implication that the government was responsible for failing to immediately realize it could not access the information in the LIS database copy and manage to receive the additional key in those four days. *Id.* at *7. He also noted the absence of evidence in the record indicating that at the time of the destruction, the government was aware that it would take place, that a separate encryption key was necessary to access the database, that dismantling the database would result in the permanent loss of the key, or that reconstituting the database would be very difficult or impossible.

Judge Davila was also unpersuaded by Holmes' argument that the government failed to preserve evidence. *Id.* at *8. To the contrary, Judge Davila described the government as having preserved unusable evidence Theranos produced. Reiterating that it was not clear the LIS database was even exculpatory, Judge Davila held the government did not act in bad faith or commit a due process violation. Further, because the government never actually possessed an accessible copy of the LIS database or cause its loss or destruction, Judge Davila found no need to further analyze the government's conduct or whether other sanctions were warranted. Judge Davila denied Holmes' motion to suppress.

Judge Davila then also denied Holmes' request for an evidentiary hearing on her motion to suppress. *Id.* at *9. Judge Davila stated that in the Ninth Circuit, an evidentiary hearing on a motion to suppress is necessary when a defendant alleges facts with sufficient definiteness, clarity, and

specificity to enable the trial court to conclude that contested issues of facts exist. *Id.* at *8. Holmes asserted two such factual disputes: first, as to who bears responsibility for the loss of the LIS database, and second, as to the degree of prejudice associated with the government's failure to collect and preserve the LIS database. *Id.* at *8-*9. Judge Davila found that no material factual dispute existed as to either of these issues, reiterating his prior analysis, and stated that an evidentiary hearing would therefore be fruitless.