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12 UNITED STATES DISTRICT COURT
13 FOR THE CENTRAL DISTRICT OF CALIFORNIA

14 UNITED STATES OF AMERICA,) No. CR 05-398-GAF
15)
Plaintiff,) GOVERNMENT'S RESPONSE TO
16) DEFENDANT'S MOTION FOR
v.) EVIDENTIARY HEARING
17)
STUART H. WOLFF,) Hearing Date: December 7, 2009
18) Hearing Time: 1:30 p.m.
Defendant.)
19) Trial: January 26, 2009
20)
_____)

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 Defendant Stuart Wolff awaits retrial in this criminal case
4 for his role in the Homestore.com financial scandal. Wolff,
5 Homestore's former CEO, approved of and implemented a fraudulent
6 scheme to report inflated revenues to investors in that publicly
7 traded corporation. Eleven other former Homestore executives and
8 outside vendors have already been convicted and sentenced for
9 their roles in the scheme.

10 In Wolff's first trial, the government called one witness
11 from the PricewaterhouseCoopers (PWC) accounting firm and
12 introduced a handful of the firm's accounting records. That
13 evidence helped establish Wolff's guilt on several specific
14 criminal lying-to-accountant counts. The PWC evidence also
15 corroborated the overwhelming proof that Homestore personnel
16 engaged in a wide-ranging plot to inflate the company's financial
17 results.

18 Wolff's defense team has expended enormous energy recently
19 to discredit PWC. Wolff believes that the accounting firm
20 improperly modified records and gave incorrect statements to the
21 prosecution and in court. At best, Wolff believes that PWC
22 personnel "papered up" their files to distance themselves from
23 the misconduct at Homestore. At worst, though, Wolff implies
24 that PWC was complicit in the fraud scheme and deliberately
25 obstructed the government through false documents and statements.
26 Defendant's pretrial motion seeks some sort of an evidentiary
27 hearing at which Wolff intends to depose PWC representatives in
28 advance of trial.

1 Wolff's attack on the PWC personnel has some merit, although
2 it does not exculpate Wolff for his involvement in the fraud
3 scheme. After further investigation, the government agrees that
4 there are some inconsistencies in the PWC records and in recent
5 witness statements, particularly when PWC personnel have been
6 asked to recall non-essential details of the Homestore debacle
7 eight years after the fact. The evidence suggests that there are
8 benign explanations regarding the PWC records and the witnesses'
9 statements. However, Wolff would undoubtedly be able to impeach
10 the credibility of PWC witnesses at trial with their inconsistent
11 statements, even as he falls short of establishing his
12 sensational allegations of cover-up and misconduct.

13 * * *

14 The PWC issue is collateral, though, to the central point of
15 this case. The government will present at trial conclusive proof
16 that Homestore personnel engaged in a well-conceived scheme to
17 fraudulently inflate its revenue by tens of millions of dollars
18 throughout 2001. Wolff -- the hands-on chief executive of the
19 company -- was a crucial participant in the plot. The evidence
20 at trial will prove that Wolff: (a) approved the scheme;
21 (b) authorized the expenditures associated with scheme;
22 (c) publicized the scheme's illegal results to investors; and
23 (d) personally profited from the scheme by selling Homestore
24 stock based on inside information. No evidence from PWC is
25 necessary to convict Wolff for these charged crimes, nor could
26
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1 PWC establish any colorable or conceivable defense to these
2 charges.

3 So, to streamline the upcoming trial and avoid unnecessary
4 expenditure of time, the government is prepared to forego calling
5 any PWC employee as a witness or submitting any PWC records into
6 evidence in the government's case-in-chief. The government will
7 also not seek to establish that one of the objects of the charged
8 conspiracy was to commit the offense of lying to the auditors.
9 Additionally, the government has separately moved under Rule
10 48(a) to dismiss the substantive lying-to-the-accountants counts
11 in the indictment that arguably rely on evidence from PWC.

12 To be sure, the Court will hear testimony at trial that
13 Homestore executives and employees intended to lie to PWC, and
14 created numerous false contracts and records that were
15 deliberately sent to the auditors. This is crucial evidence of
16 the criminal intent and knowledge of Wolff and his
17 co-conspirators during the fraud scheme. The false statements to
18 PWC were a necessary component of the true goal of the scheme:
19 inflating Homestore's financial results to deceive shareholders.
20 The government is certainly able to establish through telling
21 admissions by Homestore employees that they intended to mislead
22 PWC -- without relying on testimony from those PWC personnel.

23 * * *

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1 Wolff is not entitled to conduct a pretrial evidentiary
2 hearing, and certainly cannot conduct a lengthy or distracting
3 hearing to grill the PWC accountants. If he wishes to subpoena
4 any PWC personnel for the upcoming bench trial, Wolff can do so
5 in the same manner as with any other potential witness. However,
6 there is no basis under federal criminal law for Wolff to
7 question those witnesses under oath before trial in the unique
8 manner that he proposes. There certainly is no basis now that
9 those witnesses are excised from the government's case-in-chief.
10 Moreover, Wolff's remaining complaints regarding PWC's document
11 retention policies are unsupported, ancillary to the case before
12 this Court, and do not merit the relief that he seeks here.

13 Directly put, there is no factual issue for this Court to
14 decide before trial. Wolff's complaints against PWC are
15 unrelated to the evidence establishing his guilt in the indicted
16 plot. As such, there is no need for this Court to devote time to
17 questioning of PWC personnel before trial. For these reasons,
18 the government respectfully requests that defendant's request for
19 an evidentiary hearing be denied.

1 **II. FACTS**

2 Wolff claims that PWC's conduct and records are at the heart
3 of the criminal charges against him. In reality, though, the
4 case focuses on a corrupt plan to "cook the books" at Homestore.
5 Indeed, the indictment in this case begins with a two-page
6 overview of the offense that does not even mention PWC.¹ Wolff
7 and his employees certainly intended to deceive shareholders, the
8 public, and PWC through the fraud scheme here, and affirmatively
9 acted in a criminal manner on that intent. It was those
10 fraudulent actions, though -- not any alleged after-the-fact
11 misconduct by PWC -- that are central to the criminal case here.

12 For the Court's convenience, the government sets forth below
13 the facts it intends to prove at trial to establish Wolff's
14 criminal liability here. As will be apparent, no aspect of this
15 proof relies in any way on evidence from PWC.

16
17 ¹ In the first footnote in his motion, Wolff points out
18 that PWC is mentioned 82 times in the Indictment. He does not
19 mention that the body of the indictment is 19,268 words,
indicating that PWC is actually referred to fairly infrequently
in the detailed charging document.

20 Moreover, most of the references to PWC occur in
21 (a) the section of the indictment that expressly charges lying-
to-the-auditors as part of the manner and means of the conspiracy
22 (33 times) or (b) the introductory paragraph asserting that
Homestore lied to its auditors (8 times). Both of these sections
23 are now irrelevant to the case, as the government will not pursue
this theory at trial. Eleven additional references to PWC occur
24 in counts 10 through 15, which will not be litigated at trial.

25 As to the heart of the government's case, PWC is not
mentioned at all in counts 2 through 9 (false SEC filings and
26 false corporate books and records) and 16 through 20 (insider
trading), which are 13 of the 14 counts to be tried. The
27 defense's literary analysis of PWC's alleged centrality to the
charges here falls wide of the mark.

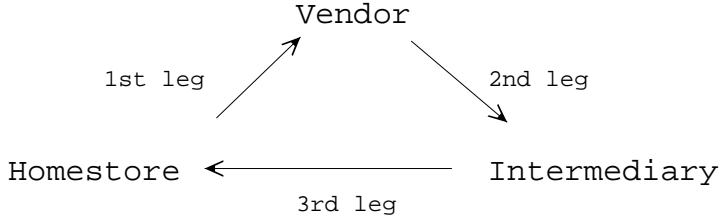
1 In the first leg of the fraudulent transactions, Homestore
2 purchased an item from a vendor. In the second leg, the vendor
3 transferred most of the money to an intermediary company. In the
4 third leg, the intermediary purchased online advertising from
5 Homestore.² (Declaration of AUSA Michael R. Wilner, Ex. 1
6 at 6-10 (testimony of former Homestore Vice President-Finance
7 John DeSimone and charts of first leg payments)).

8 Homestore reported the amount received from the third leg as
9 "revenue" on its financial statements. Homestore improperly
10 recorded approximately \$67 million in revenue from fraudulent
11 transactions during the first three quarters of 2001. That sum
12 was material to investors and analysts who covered Homestore and
13 its stock's performance.

14 Ex-Homestore employees and vendor-witnesses to be called at
15 trial will establish the bogus nature of the first leg
16 transactions. These witnesses (many of whom pled guilty to
17 felonies and/or admitted to SEC civil violations) will explain
18 that Homestore paid millions of dollars to vendors to buy
19 products and services that Homestore did not need or never used.
20 The sole reason for paying for the products was to start a flow
21 of funds that would improperly return to Homestore as revenue.

22 _____

23 ² This schematic diagram shows the flow of funds in a
24 typical roundtrip deal:



1 The evidence will further establish the fraudulent nature of
2 the remainder of the transactions. Even though they purportedly
3 sold products to Homestore, the vendors transferred most of the
4 money received from Homestore to other companies in the
5 second leg of the roundtrip deals. Those second leg transfers
6 were based on secret, unwritten agreements with Homestore. Then,
7 in the third leg of the deals, companies paid a portion of this
8 money back to Homestore based on facially stand-alone contracts
9 for the sale of advertising or other products.

10 The government will prove that Homestore employees engaged
11 in numerous deceptive tactics to conceal the true nature of the
12 roundtrip deals. Those tactics included altering contract dates,
13 falsifying valuations of useless products bought from vendors,
14 omitting key terms of the deals from the purchase contracts, and
15 directly lying to PWC about the fundamental terms of the deals
16 and the accuracy of Homestore's financial statements.³ (Ex. 2
17 at 12-13 (testimony of former Homestore Vice President-Business
18 Clayton Chan); Ex. 3 at 14-15 (testimony of former Homestore
19 salesperson Sailesh Patel)).

20
21
22 ³ Again, the government will prove at trial that
23 Homestore executives intended to deceive PWC as part of the
24 revenue inflation scheme. This evidence is relevant and
25 admissible to establish the mental state of Wolff's co-
26 conspirators to inflate the company's financial statements
27 through illegal means and to commit the charged offenses. The
28 government does not need to call any PWC personnel (or anyone
else outside Homestore) in order to prove the criminal intent of
Wolff and his colleagues. Also, this testimony is entirely
unrelated to Wolff's claims that PWC allegedly modified evidence
long after the commission of the crimes.

1 money-losing propositions that did not make economic sense for
2 Homestore's perspective -- other than to generate bogus revenue.
3 Even so, Tafeen testified that Wolff approved use of the
4 roundtrip deals beginning in March 2001. (Ex. 4 at 17-19).

5 Tafeen also testified about a frank discussion with Wolff,
6 Giesecke, and Shew about the fraudulent deals in May 2001. At a
7 corporate event at the Calamigos Ranch conference center, the
8 four executives discussed using the money-losing, roundtrip deals
9 to meet Homestore's second quarter revenue targets. Tafeen
10 explained that Wolff and his top subordinates expressly agreed
11 that Homestore would implement the fraudulent roundtrip deals and
12 lie to PWC about the deals in order to falsely claim revenue from
13 the deals:

14 Q. I'm trying to understand the specific words that
15 you recall now Mr. Shew saying.

16 A. "Is everybody in agreement and understand that we
17 are going to hide this from Pricewaterhouse?"

18 Q. [] So there wasn't just a silent nodding.
19 Everybody actually voiced their agreement with it?

20 A. It was like playing ring around the rosy.

21 "Yes."

22 "Yes."

23 "Yes."

24 "Yes."

25 (Ex. 4 at 20-21).

1 and tracked against actual business performance. At those
2 meetings, Wolff received and reviewed "Risk & Opportunity
3 Reports" that updated Homestore's revenue throughout the quarter,
4 including the revenue from the fraudulent deals. (Ex. 5 at 38
5 (Shew testimony)).

6 Moreover, Wolff personally approved virtually all of the
7 payments made to vendors. Those wire transfers started the flow
8 of funds that wound through the vendors and intermediaries and
9 back to Homestore as revenue. Wolff's signature was required for
10 large, infrequent wire transfers of this size. For the roundtrip
11 deals, Wolff specifically was told that the payments were related
12 to deals with an intermediary. (Ex. 7 at 56-60 (wire transfer
13 forms)).

14 Additionally, Wolff personally intervened in dealings with
15 AOL (one of the counter-parties in the deals) at least 20 times
16 during a two-week timespan in order to secure revenue for
17 Homestore for the second quarter of 2001. In one e-mail, Wolff
18 demanded payment from AOL by referring to the roundtrip deals,
19 stating that "we [Homestore] need to get our cash now just as you
20 have gotten yours." Wolff also asked an AOL employee to
21 "change the timing of the buckets" of certain payments to enable
22 Homestore to inappropriately record additional revenue after the
23 quarter's close. (Ex. 9 at 65-66 (Wolff e-mails)).

24 After having participated at a high level in implementing
25 the roundtrip deals, Wolff then directly made false statements to
26 investors and the securities markets about Homestore's financial
27 performance. Wolff personally approved the contents of

1 press releases issued after each quarter's close. He also was
2 the lead speaker during conference calls with investors, and
3 approved the script used in presentations explaining Homestore's
4 financial results. (Ex. 5 at 40-42 (Shew testimony); Ex. 6
5 at 53-54 (Giesecke testimony)). The government intends to play
6 selected excerpts of recordings of Wolff on the investor calls at
7 trial.

8 In those communications with investors during 2001, Wolff
9 falsely expounded on Homestore's inflated financial successes
10 during the first and second quarter. Wolff bragged about
11 Homestore's revenue growth, and spoke confidently and
12 knowledgeably about all aspects of Homestore's business.
13 Additionally, Wolff signed Homestore's quarterly reports on SEC
14 Form 10-Q before they were filed with the agency after each
15 quarter. Those reports contained financial statements that
16 included tens of millions of dollars from the fraudulent
17 roundtrip deals. (Ex. 6 at 49 (Giesecke testimony)).

18 At no time, however, did Wolff disclose to investors or in
19 the SEC filings the fact that Homestore paid itself in sham
20 transactions in order to claim enough revenue to meet investor
21 expectations. That information was deliberately withheld from
22 investors.

23 Wolff was well aware of the significance of his public
24 remarks about Homestore's financial performance. In deposition
25 testimony that he gave to the Department of Justice in an
26 unrelated antitrust investigation in early 2001, Wolff

1 acknowledged the consequences of failing to meet quarterly
2 revenue expectations for his publicly traded company:

3 We miss one quarter, we're essentially dead. . . .

4 [I]f we had not made our [fourth quarter 2000] numbers
5 and we were fortuitous, I think we would probably be
6 clobbered, even this quarter, and I think once we get
clobbered, until we're ten years down the road, I don't
think you ever get back.

7 (Ex. 8 at 61, 63-64 (emphasis added)).

8 Indeed, Wolff is an individual of exceptional intelligence
9 and sophistication who easily grasped the significance of the
10 roundtrip deals. Wolff possesses Ph.D. and Masters degrees in
11 electrical engineering from Princeton University and an
12 undergraduate degree from Brown University. He successfully
13 guided Homestore through an initial public offering of its stock.
14 He also regularly presented himself as the public face of
15 Homestore in interviews, media events, and industry conferences.
16 The government will easily establish that Wolff possessed the
17 native intelligence to understand the fraudulent roundtrip deals.

18 Additional evidence will show that Wolff was a micromanager
19 who closely monitored virtually all aspects of Homestore's
20 business operations, supporting the conclusion that he focused on
21 the details of the roundtrip deals. Wolff controlled a company
22 of nearly 3,000 employees. Even so, he was involved in such
23 mundane matters as the design of Homestore employee ID badges;
24 office assignments; distribution of tickets to sporting events;
25 and the height of the flagpole at Homestore's headquarters.

26 (Ex. 9 at 6773 (Wolff e-mails)). It is inconceivable that Wolff
27 could delve so deeply into the routine aspects of Homestore's

1 business, yet be unaware of the massive roundtrip deals that
2 deeply affected the company's bottom line throughout 2001.

3 Finally, uncontroverted evidence showed that Wolff sold a
4 tremendous amount of stock during the period of the fraud. On
5 five occasions during 2001, Wolff sold Homestore stock for a
6 profit of over \$8.6 million. (Ex. 10 at 74-85 (Wolff filings
7 with SEC regarding stock trades)). These sales occurred during
8 "trading windows" following Wolff's announcements of fraudulently
9 inflated financial results for the company. These trades form
10 the basis of the insider trading charges in the indictment.

11 **C. PWC's Role as Homestore's Auditor and in the**
12 **Post-Discovery Investigation of the Fraud Scheme**

13 PWC served as Homestore's outside auditor in 2001. In this
14 capacity, PWC was expected to conduct an abbreviated "review" of
15 Homestore's financial statements following the first three fiscal
16 quarters of the year, and a more extensive audit of the company's
17 books following the close of the business year. Additionally,
18 after the discovery of the fraud scheme in November and December
19 2001, Homestore's Board of Directors retained PWC to participate
20 in the company's internal investigation into the misconduct.
21 This work led to PWC assisting Homestore to file restated
22 financial reports with the SEC in mid-2002.

23 During the government's investigation of the Homestore
24 criminal cases, PWC personnel uniformly and consistently stated
25 that they were not informed of the roundtrip nature of the bogus
26 Homestore deals during 2001. PWC was aware of the first leg
27 transactions because Homestore reported the costs associated with

1 On their face, the PWC workpapers appeared to have been
2 prepared during the quarterly review period following the end of
3 the second and third quarters. That suggests that the
4 information about Homestore's false representations to PWC was
5 conveyed in approximately July (review period after second
6 quarter) and October (third quarter) of 2001.

7 Wolff has demonstrated that these workpapers were likely
8 modified in December 2001 to add information regarding the asset
9 purchases and management's statements about them.⁶ PWC personnel
10 now believe that they may have supplemented the quarterly
11 workpapers in advance of the year-end audit, a practice that was
12 not improper at the time.⁷ Eight years afterward, however, PWC
13 personnel are not able to fully explain why the documents
14 regarding the Homestore deals were modified in this manner.
15 Nevertheless, the PWC auditors insist that they properly
16 conducted their quarterly reviews during 2001. The PWC personnel

18
19 ⁶ Wolff received some materials related to his current
20 motion through the early return of trial subpoenas (without
21 government objection to the request). However, it appears that
22 many of the key records upon which Wolff now relies were either:
23 (a) produced by PWC to defendant in related civil litigation in
24 2002 or 2003, and were the subject of civil depositions many
25 years ago; or (b) produced by PWC to the Securities and Exchange
Commission in the SEC's enforcement investigation, which were
then made available to Wolff in this criminal case during 2005
and 2006. See Wilner Decl. at ¶¶ 4-8. Wolff's allegations that
PWC engaged in a massive conspiracy to alter and destroy records
are heavily undercut by the firm's own production of materials to
Wolff and the government.

26 ⁷ In the wake of the Enron scandal and the Sarbanes-Oxley
27 revisions to the securities laws, accounting practices and
28 regulations now require workpaper documentation to be completed
within stricter time guidelines.

1 deny participating in any cover-up or intending to mislead anyone
2 by adding to the workpapers.

3 Consistent with common auditing practice, PWC kept
4 relatively few of its client's business records (contracts,
5 invoices, bank records, etc.) that it reviewed during its
6 quarterly reviews of Homestore's financial statements. Instead,
7 junior PWC personnel frequently conducted "field work" by driving
8 to Homestore to look at business records at Homestore's offices.
9 PWC personnel stated that they did not make wholesale copies of
10 Homestore business documents to be stored at PWC's facilities.
11 While Wolff complains in his motion about PWC's alleged failure
12 to produce records from its 2001 review work (copies of
13 contracts, faxes, etc.), there is no evidence that the firm ever
14 kept any of those materials in its files.

15 **III. CHARGES IN THE INDICTMENT**

16 The Indictment charges defendant Wolff for his role in the
17 revenue inflation scheme. Defendant Wolff is charged as follows:

- 18 • Count One - conspiracy to violate the federal
19 securities laws.⁸ The government intends to prove that
20 the conspiracy operated from March through November
21 2001. The objects of the conspiracy were to commit the
22 crimes of: (i) securities fraud; (ii) filing false
23 reports with the SEC; and (iii) violating the corporate
24 recordkeeping provisions. So that the issue in Wolff's
25 motion need not be addressed at trial, the government

26
27 ⁸ 18 U.S.C. § 371.

1 will not pursue a fourth conspiracy object (lying to
2 Homestore's accountants) originally alleged in the
3 Indictment.

- 4 • Counts Two through Four - filing false quarterly
5 reports with the SEC.⁹ Wolff signed and caused the
6 filing of false reports on SEC Form 10-Q that
7 overstated Homestore's advertising and total revenue
8 for the first, second, and third quarters of 2001.
- 9 • Counts Five through Nine - causing the preparation of
10 false corporate books and records.¹⁰ These charges
11 involve several fraudulent contracts between Homestore
12 and vendors in the first leg transactions that:
13 (i) fail to contain all of the terms of the multi-
14 legged deal; and (ii) were post-dated.
- 15 • Counts Sixteen through Twenty - securities fraud in the
16 form of insider trading.¹¹ These counts relate to
17 Wolff's personal sales of Homestore stock between April
18 and August 2001 based on his knowledge of Homestore's
19 fraudulently inflated results. The Indictment alleges
20 that Wolff reaped over \$8 million in illegal profits
21 from the trades.

24 ⁹ 15 U.S.C. §§ 78m(a)(2) and 78ff(a); 17 C.F.R.
25 §§ 240.12b-20 and 240.13a-13.

26 ¹⁰ 15 U.S.C. §§ 78m(b)(2)(A), 78m(b)(5), and 78ff(a);
17 C.F.R. § 240.13b2-1.

27 ¹¹ 15 U.S.C. §§ 78j(b) and 78ff; 17 C.F.R. § 240.10b-5.

1 The government has separately moved to dismiss
2 four additional counts in the Indictment alleging violations of
3 the lying-to-accountants provisions of the securities laws.
4 Given the nature of the remaining charges in the case and the
5 government's decision not to pursue certain issues, the
6 government will not call any PWC witnesses or seek to offer any
7 PWC records or workpapers into evidence in its case-in-chief.

8 The government does not agree with Wolff's characterizations
9 of PWC's actions here. To the contrary, there is compelling
10 evidence from numerous independent sources corroborating PWC's
11 fundamental assertion that Wolff's co-conspirators at Homestore
12 deceived the accounting firm. Even so, though, the government
13 acknowledges that Wolff would be able to impeach the PWC
14 witnesses at trial with their arguably inconsistent prior
15 statements, or that considerable trial time would be spent
16 sorting out the details of each witness's prior testimony.

17 The most efficient response to this, therefore, is simply
18 for the government to forego reliance on the PWC-related
19 evidence, and focus on the remaining -- and overwhelming -- proof
20 of Wolff's guilt. By dismissing these counts and eliminating the
21 testimony of PWC witnesses from the government's case-in-chief,
22 the government has considerably streamlined its anticipated
23 presentation at trial.

1 **IV. ARGUMENT: THERE IS NO AUTHORITY SUPPORTING AN EVIDENTIARY**
2 **HEARING TO QUESTION WITNESSES WHO ARE AVAILABLE FOR TRIAL,**
3 **AND THERE IS NO NEED FOR THE COURT TO CONDUCT ONE HERE**

4 Wolff seeks to use this Court's authority and resources to
5 question PWC personnel under oath at a pretrial evidentiary
6 hearing. Wolff does not specifically identify which PWC
7 employees he wishes to call to testify, nor does he set forth the
8 specific areas on which he wants to question these witnesses.
9 Still, it is apparent that Wolff intends to delve into PWC's
10 conduct both during the 2001 quarterly reviews and after the
11 discovery of the fraud scheme at Homestore.

12 This inquiry is unwarranted and unnecessary. Wolff is not
13 entitled to question PWC personnel before trial. If Wolff wants
14 to elicit relevant, admissible testimony from these witnesses, he
15 can call them at trial for that purpose. That is, if there is a
16 way that PWC's allegedly modified workpapers (Defense Motion
17 at 20-38) or allegedly missing evidence (Defense Motion at 38-42)
18 could be relevant to his defense, Wolff can attempt to introduce
19 evidence of PWC's conduct at trial. With the government
20 streamlining its case as stated above, such that it will not be
21 relying on evidence of Homestore's lying to its auditors, it is
22 difficult to see how the PWC evidence is plausibly related to the
23 charges against Wolff. But even if some PWC evidence is
24 minimally relevant and admissible at trial, no evidentiary
25 hearing is warranted and defendant can simply put on his case at
26 trial.

1 O'Sullivan, 553 F. Supp. 2d 1349, 1350 (M.D. Fla. 2008) ("the
2 only authorized purpose of depositions in criminal cases is to
3 preserve evidence, not to afford discovery"). Thus, the Ninth
4 Circuit has set a high standard for obtaining approval to conduct
5 a Rule 15(a) deposition. The party must demonstrate: (a) the
6 unavailability of the witness for trial; (b) the need for that
7 witness's testimony in the party's case; and (c) the deposition
8 is not sought "merely for discovery purposes." United States v.
9 Fei Ye, 436 F.3d 1117, 1123 (9th Cir. 2006).

10 A criminal defendant is, of course, free to try to obtain a
11 voluntary statement or interview of a potential witness. If
12 unsuccessful in speaking with that witness, the traditional
13 remedy is for the criminal defendant to subpoena that witness for
14 trial and elicit testimony at that time. However, there is no
15 statutory basis for a defendant to get a "preview" of the
16 testimony under the guise of a pretrial evidentiary hearing as
17 proposed here.¹²

18 Wolff makes no attempt to fit his discovery request into the
19 parameters of Rule 15(a). He offers no proof that any of the PWC
20 witnesses are unavailable for trial in January 2010. Wolff did
21 not call any PWC employee as a witness in the defense case during
22 the first trial, and has not indicated that PWC personnel will be

23
24 ¹² In this case, Wolff received unusual pretrial discovery
25 in that the government voluntarily re-interviewed several
26 PWC witnesses over the last two months and promptly provided
27 Wolff the interview memoranda. The government was not obligated
28 to re-interview these witnesses, but in doing so gave Wolff more
process than is required, and created additional witnesses
statements that Wolff may use to prepare for trial and cross-
examine these PWC witnesses.

1 called by the defense in the retrial. However, Wolff remains
2 able -- as any criminal defendant is -- to subpoena PWC witnesses
3 to testify at trial on any topic consistent with the relevancy
4 and admissibility provisions of the Federal Rules of Evidence.

5 Wolff does not appear to want to obtain testimony of an
6 unavailable witness in order to preserve it for trial. Instead,
7 Wolff admittedly wishes to question the PWC witnesses in order to
8 conduct still further pretrial discovery to elicit additional
9 information from PWC. Wolff's motion is replete with requests to
10 question PWC's accountants "to determine the circumstances
11 surrounding" various issues that Wolff believes are in dispute.
12 See, e.g., Defense Motion at 1, 42, 47. These disputed matters,
13 if relevant, can be settled at trial. Wolff's discovery request
14 clearly cannot be granted under the strict provisions of criminal
15 deposition practice under Rule 15(a).

16 **B. Defendant Has Not Filed a Motion for Relief That Could**
17 **Be Assisted by Live Testimony**

18 Rather than try to squeeze his request into the strict
19 confines of Rule 15(a), Wolff makes a more generalized argument
20 that a criminal defendant has the inherent ability to request a
21 court's assistance when "material facts are in dispute." See
22 Defense Motion at 42. Yet, the cases that defendant cites invoke
23 the unsurprising premise that a district court may (or may not)
24 choose to hear live evidence in connection with a motion for
25 substantive relief from the court, such as a motion to suppress
26 evidence. See United States v. Batiste, 868 F.2d 1089 (9th Cir.
27 1989) (motion to suppress evidence obtained during arrest at
28

1 scene of bank robbery); United States v. Panitz, 907 F.2d 1167
2 (1st Cir. 1990) (no hearing necessary on motion to suppress
3 evidence or dismiss indictment based on law enforcement's sting
4 operation).

5 A district court "in the exercise of its discretion may
6 choose to hear live testimony" at a hearing on such a motion.
7 Batiste, 868 F.2d at 1091. However, district courts are
8 "busy places and makework hearings are to be avoided." Panitz,
9 907 F.2d at 1274 (quotation omitted). For this reason, "a
10 district court is not obliged to schedule an evidentiary hearing
11 on the basis of conclusory allegations, vague insinuations,
12 unsupportable inferences, rank speculation, opprobrious epithets,
13 or any combination of the foregoing." Id. But when a district
14 court must make a decision on a substantive motion, it may decide
15 that additional evidence will assist in evaluating facts material
16 to that motion.

17 In the present case, there is no request for substantive
18 relief before the Court. Wolff has not identified any basis for
19 this Court to expend time and energy in conducting an evidentiary
20 hearing. Wolff has not identified any evidence that he wishes
21 the Court to suppress or exclude. And there is no need for him
22 to do so -- the government has responded to Wolff's motion by
23 voluntarily taking PWC witnesses and documents out of its case.¹³

24
25 ¹³ Counsel for the parties have discussed for several
26 months Wolff's desire to question PWC at a court hearing. In
27 those discussions, government counsel raised on several occasions
28 the possibility that the prosecution would dismiss counts related
to PWC and/or not call PWC witnesses. The government's position
in response to Wolff's pending motion thus should not be

1 Wolff thus seeks to use the Court's authority to question
2 witnesses who will not be testifying in the government's case and
3 whose testimony is not relevant to any motion before the Court.
4 That hearing, merely a pretext for an impermissible discovery
5 request, is the type of "makework hearing" to be avoided. There
6 is no colorable motion before this Court that could conceivably
7 be aided by the evidentiary hearing that Wolff seeks.

8 **C. The Government's Case Against Wolff Centers on**
9 **Homestore Witnesses and Records, Not Those from PWC**

10 The only cause to be served by Wolff's proposed pretrial
11 evidentiary hearing would be to delve into his allegations and
12 insinuations against PWC. Wolff doggedly believes that PWC
13 somehow engaged in extraordinary professional misconduct
14 following the discovery of the charged crimes at Homestore.
15 Wolff speculates that PWC may have tampered with unspecified
16 evidence that he thinks could be favorable to his defense, and
17 deliberately lied to the Court and federal investigators
18 afterward.

19 These claims are utter conjecture. More importantly,
20 though, Wolff's animus toward PWC is entirely irrelevant to the
21 issues at hand in this trial. The trial in this case will focus
22 on Wolff's involvement in a financial fraud scheme. The only
23 relevant areas of inquiry concern the intent and actions of
24 Wolff, his co-conspirators, and their subordinates at Homestore
25 who acted upon their instructions. The evidence to support these

26 _____
27 unanticipated by his attorneys.

1 claims, in turn, will come from those Homestore witnesses and the
2 records they prepared in the scheme.

3 By deciding not to rely on PWC witnesses or documentation at
4 Wolff's trial, the government has given up what might otherwise
5 be powerful evidence regarding the fraud scheme. But with so
6 much compelling proof of Wolff's willful participation in the
7 conspiracy, the government has no strong need to litigate the
8 tangential arguments that Wolff makes regarding PWC. Proof of
9 PWC's involvement in the Homestore scandal -- be it during the
10 period of the fraud scheme in 2001, or during the later discovery
11 and investigation of the fraud -- is not relevant to any element
12 of the charged offenses nor any affirmative defense.

13 Simply stated, the after-the-fact actions of Homestore's
14 outside auditors will make no difference to the real issues at
15 trial here, which concern defendant's Wolff's culpability.
16 Wolff's criminal liability will be cogently established with
17 direct and persuasive proof unrelated to PWC. Any inquiry into
18 PWC's alleged misconduct risks distracting the Court with
19 collateral, time-wasting side issues instead of the clear
20 evidence of this defendant's guilt. A pretrial evidentiary
21 hearing for discovery purposes would be perhaps unprecedented in
22 a federal criminal case -- and it is entirely unnecessary here.

1 **V. CONCLUSION**

2 A pretrial evidentiary hearing is not warranted where Wolff
3 seeks to question witnesses whom he could subpoena to testify at
4 trial. The hearing is surely unnecessary now that the government
5 has elected not to present testimony or documents from PWC at
6 defendant Wolff's trial. The government is also prepared to
7 dismiss the counts in the indictment that charge lying to PWC and
8 to eliminate the object of the charged criminal conspiracy that
9 does the same. This decision will streamline the upcoming trial
10 and eliminate any need for the Court to sort out issues relating
11 to PWC's workpapers and allegedly missing evidence; it also
12 eliminates any plausible need for the Court to conduct a pretrial
13 evidentiary hearing regarding PWC, a third party to this case.

14 For the foregoing reasons, the government respectfully
15 requests that the Court deny defendant's motion for an
16 evidentiary hearing.

17 Dated: November 13, 2009

Respectfully submitted,

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19 CHRISTINE C. EWELL
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22 /s/

23 _____
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