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17 **UNITED STATES DISTRICT COURT**
18 **CENTRAL DISTRICT OF CALIFORNIA**
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20 UNITED STATES OF AMERICA,
21 Plaintiff,
22
23 vs.
24 STUART H. WOLFF
25 Defendant.

CASE NO. CR-05-398
**DEFENDANT'S RESPONSE TO
THE GOVERNMENT'S MOTION
IN LIMINE REGARDING
PRECLUDING OR LIMITING
EVIDENCE REGARDING AOL;
DECLARATION OF RICHARD A.
SAUBER**

Hearing Date: December 15, 2008
Time: 1:30 p.m.

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 The government’s motion to exclude certain evidence regarding America Online,
3 Inc. (AOL) should be conditionally granted in part and denied in part.
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5 The government first seeks an order “preventing the defense from . . . offering
6 evidence of business transactions of [AOL] that do not relate to Homestore.com.” Gov’t
7 Mot. 1. As the defense has informed the government, the sole purpose of seeking to
8 admit such evidence would be to rebut the improper testimony elicited by the
9 government at the first trial—namely, that the charged transactions were (in the view of
10 those lay witnesses) unusual, atypical, or not taught “at the Harvard Business School.” If
11 the government pursues such testimony at retrial—and counsel for the government has
12 indicated such intent—the defense must be permitted to introduce evidence illustrating
13 the relevant similarities between the charged transactions and those AOL (an industry
14 leader) entered into with other companies. Accordingly, the defense has no objection to
15 the entry of an order prohibiting *both parties* from “offering evidence of business
16 transactions . . . that do not relate to Homestore.com” or directly to Mr. Wolff’s state of
17 mind; the government cannot, however, insist that it alone should be able to introduce
18 evidence comparing the charged transactions to the broader marketplace.
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24 The government also requests an order preventing the defense from cross-
25 examining certain former AOL executives regarding a civil enforcement action recently
26 filed against them by the Securities and Exchange Commission (SEC). That request
27 should be denied. Such cross-examination is plainly relevant to the possible bias of those
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1 witnesses, who face massive civil liability and professional ruin at the hands of the
2 government. Notably, the government relied heavily on the testimony of those
3 individuals at the first trial, expressly contrasting AOL's treatment of the disputed
4 transactions (of which it approved) with Homestore's treatment (which it alleged to be
5 criminal). Those witnesses, who have been charged with civil fraud relating to *other*
6 transactions, have clear incentives to favor the government's theory in this case – both to
7 avoid the suggestion that wrongdoing with respect to Homestore is consistent with their
8 malfeasance in the other transactions and to curry favor with the government in hopes of
9 settling the civil charges on favorable terms. Such bias is paradigmatic material for
10 cross-examination.
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14 BACKGROUND

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16 The government has charged Stuart Wolff, the former CEO of Homestore, with
17 participating in a scheme to inflate Homestore's revenues in the first three quarters of
18 2001. According to the government, Homestore engaged in so-called "roundtrip"
19 transactions wherein (1) Homestore would overpay for products from a vendor; (2) the
20 vendor would use its excess profit to buy something from an intermediary; and (3) the
21 intermediary would in turn spend much of its profits by advertising on Homestore's
22 websites. The government contends that these transactions were wrongful because
23 Homestore was essentially buying its own revenue, and further contends that Mr. Wolff
24 knowingly concealed essential elements of these transactions from Homestore's auditors
25 and investors.
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1 The indictment avers that AOL, a major Internet service provider, served as the
2 intermediary for the majority of these allegedly “roundtrip” transactions. Specifically,
3 the government maintains that Homestore would buy products from certain vendors, the
4 vendors would use the money from these purchases to buy online advertising from AOL,
5 and AOL would then use that money to pay for advertising space on Homestore’s
6 websites.
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9 Several AOL employees testified at the first trial. The government called Steven
10 Rindner, a vice president in the business affairs group at AOL at the time the alleged
11 roundtrip transactions occurred. The defense called Mark Wovsaniker, a senior vice
12 president of accounting policy.¹ At the retrial, either party may seek to call Joseph Ripp,
13 AOL’s CFO (who was personally involved in AOL’s business dealings with Homestore).
14 On May 19, 2008, the SEC charged all three men (and a fourth AOL executive, John
15 Kelly) with a variety of securities-fraud violations. See Compl. in *SEC v. Kelly*,
16 S.D.N.Y. Civ. No. 08-4612 (Gov’t Mot. Ex. 3). The complaint alleges that Rindner,
17 Wovsaniker, and Ripp caused AOL to enter into various fraudulent transactions in order
18 to inflate AOL’s revenues. Although the SEC complaint does not specifically charge the
19 Homestore transactions at issue here, several of the transactions charged are described as
20 “round-trip” advertising deals. See, e.g., *id.* ¶ 25.
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25 More particularly, the complaint alleges that the conduct of Rindner, Wovsaniker,
26 and Ripp “artificially inflated online advertising revenue” reported by AOL, ultimately
27 requiring AOL to restate a total of \$1.26 billion in revenue. *Id.* ¶¶ 6, 7. The complaint
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¹ The defense also called Samara Jaffe, who worked as a director on AOL’s commerce team.

1 further alleges that “Rindner and other Business Affairs senior executives played a
2 leading role in negotiating, structuring, documenting, and implementing certain of the
3 round-trip transactions.” *Id.* ¶ 27. It alleges that Wovsaniker “directed that the
4 contingent pieces of round-trip transactions be documented as separate, independent
5 transactions, without any cross-referencing, thereby concealing the economic reality of
6 those transactions from auditors.” *Id.* ¶ 30. The complaint requests disgorgement, civil
7 penalties, permanent injunctions against further violations, and a lifetime bar against the
8 defendants’ serving as officers or directors of publicly traded companies.
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12 ARGUMENT

13 **I. The Court Should Preclude *Both* Parties from Introducing Evidence** 14 **Comparing the Charged Transactions to the Business Practices of Companies** 15 **Other than Homestore.**

16 The government seeks an order prohibiting the defense from introducing evidence
17 of transactions between AOL and companies other than Homestore. The government’s
18 request, however, is in fact a demand that *it alone* be allowed to elicit testimony
19 comparing the charged Homestore transactions to the broader marketplace. The defense
20 respectfully submits that if the government insists on introducing evidence purporting to
21 show how “unusual” or unorthodox the charged transactions were, then the defense must
22 be allowed to introduce evidence showing that relevant portions of these transactions
23 were similar to those in which AOL (and perhaps also other industry leaders) routinely
24 participated during the time period in question. The defense has no objection to an order
25 prohibiting *both* parties from comparing these deals to the broader marketplace unless
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1 such knowledge is directly tied to the defendant's state of mind, but the government
2 cannot have it both ways.

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4 The government's motion applies a double standard. On the one hand, the govern-
5 ment asserts that because "this case is about *Homestore*," AOL's business practices are
6 irrelevant. Gov't Mot. 14. What AOL or other companies might or might not have been
7 doing, the government contends, has no bearing either on the legality of Homestore's
8 actions or on Mr. Wolff's state of mind regarding those actions. *Id.* at 14–17.

9
10 On the other hand, the government appears to believe that the business practices of
11 companies *other than AOL are* relevant when such evidence supports the prosecution.
12 The government indicates that it "expects that Homestore employees will testify that they
13 never engaged in roundtrip deals before joining the company." *Id.* at 16 n.9. This means
14 that the government intends to elicit testimony from various witnesses about the business
15 practices of firms other than Homestore. As the following examples from the first trial
16 illustrate, the government hopes to make such comparisons repeatedly:
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- 20 • The government asked former Homestore CFO and COO John Giesecke:

21 Q. Did you ever do a transaction like this or see a transaction like this
22 when you worked at Disney?

23 A. No.

24
25 Q. And what about when you worked at the Pricewaterhouse firm as an
26 auditor? Did you ever come across a transaction like this?

27 A. No, I did not.
28

1 5/41² (Sauber Decl. Ex. A).

- 2
- 3 • The government elicited similar testimony from Clayton Chan, who was a vice
- 4 president in Homestore's Strategic Alliance Group:

5 Q. Mr. Chan, when you worked at Clorox, did you ever work on any

6 round-trip deals?

7 A. No, sir. . . .

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9 Q. When you worked at Procter & Gamble, did you work on any of these

10 round-trip transactions? . . .

11 [A.] No, sir. . . .

12 Q. Did you ever hear of anyone at either of those companies working on

13 round-trip transactions like those you worked on at Homestore? . . .

14 [A.] No, sir. . . .

15 Q. At Spring Street did you work on any round-trip deals like the ones

16 you described today?

17 A. No, sir.

18

19 Q. Mr. Chan, at the Harvard Business School, did they teach that round-

20 trip deals were an acceptable way to generate revenue? . . .

21 [A.]: No, sir.

22 10/73–75 (Sauber Decl. Ex. B).

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- 24 • Even after the government had *objected* to the defense asking AOL's Mark
- 25 Wovsaniker whether significant features of the AOL-Homestore deals were
- 26 "unusual" (see 34/133–135 (Sauber Decl. Ex. C)), the government made its
- 27 own comparison on cross-examination:
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² References to transcripts from the first trial are designated with the day of trial, followed by the specific page number of that day's testimony. Thus, "Day 5, page 41" is represented as 5/41.

1 Q. You were uncomfortable because you knew this was an unusual deal?

2 A. Yes.

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4 34/180–181 (Sauber Decl. Ex. C).

5 The government cannot have it both ways. The government’s own logic compels
6 the conclusion that evidence of others’ business practices—Disney’s, Spring Street’s,
7 AOL’s, or those taught at Harvard Business School—is not relevant to evaluate the
8 Homestore transactions charged in this case. Notably, the government does not contend
9 that Mr. Wolff knew about those other practices, so it is difficult to see how such
10 evidence would be probative of his state of mind. Indeed, the government appears to
11 acknowledge (Gov’t Mot. 14–17) that the factfinder can infer nothing about the
12 wrongfulness of Homestore’s transactions, or Mr. Wolff’s knowledge of any
13 wrongdoing, from what other companies were doing. The defense has therefore offered
14 to the government that both sides simply agree not to introduce evidence regarding other
15 companies’ business-practices and how the charged transactions might compare to them
16 absent direct evidence that Mr. Wolff was personally aware of such information. The
17 government rejected that offer, although it remains on the table. In the absence of such
18 an agreement, the Court should enter an order excluding what both sides effectively
19 agree is irrelevant evidence.
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25 If, however, the government is allowed to introduce evidence that the alleged
26 Homestore deals were unusual in comparison to other companies’ practices, then the
27 defense must be allowed to present evidence that the Homestore deals were *not* unusual.
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1 And contrary to the government’s assertion, evidence regarding AOL’s business
2 practices would be precisely that. Mark Wovasaniker, an executive in AOL’s finance
3 department, indicated at the first trial that one crucial component of Homestore’s alleged
4 “roundtrip” deals involving AOL—an “ad representation” agreement allowing AOL to
5 sell advertising space on Homestore’s website—was similar to agreements AOL had with
6 other business partners. See 34/133 (Sauber Decl. Ex. C). And the SEC’s civil filings
7 against various AOL personnel describe numerous deals that, like the Homestore deals
8 alleged here, involved a company recognizing as revenue payments that originated from
9 its own expenditures. See, *e.g.*, Gov’t Mot. Ex. 3.

13 The government claims that these AOL deals “bear no resemblance” to the alleged
14 Homestore deals because they each involved only two companies rather than three, Govt.
15 Mot. 8, but that ignores the fact that all the deals share in common *the precise feature*
16 that the government contends is wrongful: expenditures that resulted in the company’s
17 receipt of advertising revenue. Compare, *e.g.*, Gov’t Mot. Ex. 3 ¶ 2 (referring to the
18 AOL deals as “‘round-trip’ transactions”), with Indictment ¶ 2 (referring to the alleged
19 Homestore deals as “‘roundtrip transactions’”). More fundamentally, the fact that *the*
20 *government* believes the deals are not substantially similar does not answer whether *the*
21 *witnesses* hold the same belief. For example, while the government hopes to elicit from
22 Clayton Chan that “roundtrip” transactions were not taught at Harvard Business School,
23 Mr. Chan may well acknowledge—when faced with overwhelming evidence concerning
24 the undisputed industry leader in 2001—that such transactions were commonplace

1 among Internet companies during the relevant time period. Indeed, the government
2 simply hopes to prevent the defense from testing the assertion that the charged
3 transactions were “unusual” to any and all observers. But that is precisely the function of
4 cross-examination.
5

6 The fact remains, however, that the only reason the defense would compare the
7 alleged Homestore deals to deals made by AOL (or any other company) is if the
8 government insists on making this an issue. The most expedient course would be to
9 prevent the government from opening the door in the first place: the Court should order
10 that neither party may—in the absence of a demonstrated nexus to Mr. Wolff’s state of
11 mind—introduce evidence of business practices at companies other than Homestore. If,
12 however, the Court concludes that the government’s evidence on that issue is relevant,
13 then it should deny the government’s motion, which seeks to hamstring the defense from
14 presenting rebuttal evidence.
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19 **II. The Court Should Permit the Defense To Use the SEC Civil Complaint To**
20 **Show the Potential Bias of Certain AOL Witnesses.**

21 The Court should deny the government’s request to bar the defense from
22 introducing evidence that the SEC has filed a civil complaint against AOL executives
23 Steven Rindner, Mark Wovsaniker, and Joe Ripp, in the event that any or all of them
24 testify in this case. The defense agrees with the government that the civil complaint,
25 which contains only allegations of fraud, does not constitute proof of fraud sufficient to
26 impeach the witnesses’ character for truthfulness under Fed. R. Evid. 608(b). See, *e.g.*,
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1 *United States v. Morrison*, 98 F.3d 619, 628 (D.C. Cir. 1996). However, the civil
2 complaint is highly relevant to a different matter: potential bias in the witnesses’
3 testimony. See, e.g., *United States v. Ray*, 731 F.2d 1361, 1364 (9th Cir. 1984) (noting
4 the difference between bias evidence and truthful character evidence); see also *United*
5 *States v. Hankey*, 203 F.3d 1160, 1171 (9th Cir. 2000) (“Evidence is relevant to a matter
6 of consequence to the determination of the case if it has a mere tendency to impeach a
7 witness’ credibility by a showing of bias or coercion.”).

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11 First and foremost, the fact that these witnesses are currently the subject of a civil
12 complaint by the government gives them an enormous incentive to try to please the
13 government with their performance in these criminal proceedings. Compare, e.g., *SEC v.*
14 *Treadway*, 438 F.Supp.2d 218, 221 (S.D.N.Y. 2006) (“That Goldberg and Grady were
15 cooperating in the face of serious charges by the SEC and the New York State Attorney
16 General is relevant to whether they may have a bias toward the plaintiff in this case.”). It
17 is a proper subject of cross-examination for the defense to ask these witnesses what, if
18 any, consideration they might expect from the government for their testimony here.
19 Compare *ibid.* (“Treadway may vigorously cross-examine Goldberg and Grady about
20 their bias, and whether they sought to cooperate in this and other investigations in
21 exchange for more lenient treatment by the New York State Attorney General and the
22 SEC.”). Even if the prosecution has disavowed any intention of intervening on their
23 behalf with the SEC—which is unknown to the defense—these witnesses may
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1 nevertheless harbor the (reasonable) hope that such intervention might occur if their
2 testimony is sufficiently helpful.
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4 Second, the existence of the civil proceedings provides an incentive for these
5 witnesses to portray their actions favorably. One of the major thrusts of the AOL
6 executives' testimony at the first trial was that they, unlike the Homestore executives,
7 wanted transactions to be above-board and properly documented. See, e.g., Testimony of
8 Steven Rindner 15/31–39 (Sauber Decl. Ex. D); Testimony of Mark Wovsaniker 34/203–
9 204 (Sauber Decl. Ex. C); Government's Closing Statement 40/31–32 (Sauber Decl. Ex.
10 E). The pending SEC action gives the defendants strong reason to deny any wrongdoing,
11 as any admission of error on their part could potentially be used against them in the civil
12 proceedings. See Fed. R. Evid. 801(d)(1) (testimony at one proceeding that is
13 inconsistent with testimony at a later proceeding is admissible for the truth of the matter
14 asserted).
15

16 The government offers no sound basis for preventing the defense from pursuing
17 these lines of impeachment. See *Hankey*, 203 F.3d at 1171. Consequently, the
18 government's motion should be denied insofar as it seeks to preclude cross-examination
19 concerning the SEC civil complaint.
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24 CONCLUSION


25 For the foregoing reasons, Mr. Wolff respectfully requests that the Court (1)
26 preclude both parties from introducing evidence regarding business practices of
27 companies other than Homestore that were not known to Mr. Wolff, and (2) deny the
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1 government's motion to prevent the defense from cross-examining AOL executives
2 regarding the SEC's civil complaint against them. In the alternative, the Court should
3 simply deny the government's motion in full.
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7 Dated: November 10, 2008

Respectfully submitted,

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9 ROBBINS, RUSSELL, ENGLERT, ORSECK,
10 UNTEREINER & SAUBER LLP

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12 RICHARD A. SAUBER

13 Attorney for Defendant
14 Stuart H. Wolff
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DECLARATION OF RICHARD A. SAUBER

I, Richard A. Sauber, hereby state and declare as follows:

1. I am a partner in the law firm of Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP, counsel of record for Defendant Stuart H. Wolff in this case, and am admitted *pro hac vice* to appear in the Central District of California in connection with the above-entitled action. I make this declaration in support of Defendant's Response to the Government's Motion *In Limine* Regarding Precluding or Limiting Evidence Regarding AOL.

2. Attached hereto as Exhibit A is a true and correct copy of an excerpt from the trial transcript of the testimony of John M. Giesecke during Day 5 of the 2006 criminal trial.

3. Attached hereto as Exhibit B is a true and correct copy of an excerpt from the trial transcript of the testimony of Clayton Chan during Day 10 of the 2006 criminal trial.

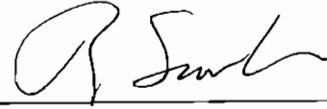
4. Attached hereto as Exhibit C is a true and correct copy of excerpts from the trial transcript of the testimony of Mark Wovsaniker during Day 34 of the 2006 criminal trial.

5. Attached hereto as Exhibit D is a true and correct copy of an excerpt from the trial transcript of the testimony of Steven Rindner examination during Day 15 of the 2006 criminal trial.

6. Attached hereto as Exhibit E is a true and correct copy of an excerpt from the trial transcript of the government's closing statement during Day 40 of the 2006 criminal trial.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed this 10th day of November 2008.



RICHARD A. SAUBER

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