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**UNITED STATES DISTRICT COURT**

**CENTRAL DISTRICT OF CALIFORNIA**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

STUART H. WOLFF,

Defendant.

CASE NO. CR-05-398 GAF

**DEFENDANT STUART WOLFF'S  
SUBMISSION CONCERNING  
SENTENCING**

SENTENCING DATE: April 19, 2010

**REDACTED VERSION**

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1 Defendant Stuart Wolff, by and through his attorneys John F. Gibbons and  
2 Daniel D. Rubinstein, respectfully submits the following Submission Concerning  
3 Sentencing.

4 **I. Introduction**

5 Mr. Wolff is the former Chief Executive Officer and Chairman of the Board of  
6 Directors of Homestore.com (“Homestore”). On January 7, 2010, Mr. Wolff pled guilty  
7 to count one of the Indictment, charging him with conspiracy in violation of 18 U.S.C.  
8 § 371. He is scheduled to be sentenced on April 19, 2010.

9 For 46 years, Mr. Wolff has led an exemplary life--both professionally and  
10 personally. However, for reasons that are expounded on later in this Submission,  
11 Mr. Wolff made an uncharacteristic decision in early 2001 to “green-light” the improper  
12 recording of revenue and not use his power and authority to stop it. As the government  
13 correctly notes in their Sentencing Memorandum, this was a “disastrous decision” that  
14 caused injury to Homestore’s employees, investors and others; it also had a devastating  
15 impact on all the defendants’ lives, including Mr. Wolff. He is truly sorry for his actions,  
16 takes full responsibility for his conduct, realizes and feels devastated by the harms  
17 caused, and knows that he likely will live the rest of his life making amends for his  
18 misconduct. Mr. Wolff is prepared and accepts that he will be punished. We respectfully  
19 file this Submission, and provide the Court with personal information about Mr. Wolff,  
20 via the attached letters of family, friends and co-workers, to put his conviction and  
21 conduct into context. We urge the Court to review each of the letters attached hereto to  
22 gain a fuller appreciation of the true character of the person the Court will sentence on  
23 April 19, 2010.

24 **II. Sentencing After Booker**

25 Since *United States v. Booker*, 543 U.S. 220 (2005), rendered the United States  
26 Sentencing Guidelines (the “Guidelines”) advisory, courts must determine sentences for  
27 criminal defendants by reference to the seven factors set forth in 18 U.S.C. § 3553(a).  
28 These factors include: (1) the nature and circumstances of the offense and the history

1 and characteristics of the defendant; (2) the purposes of sentencing; (3) the kinds of  
2 sentences available; (4) the Guidelines calculation; (5) policy statements issued by the  
3 U.S. Sentencing Commission; (6) the need to avoid unwarranted sentence disparities  
4 among similar defendants convicted of similar conduct, and; (7) the need to provide  
5 restitution to any victim of the offense. In *United States v. Carty*, 520 F.3d 984, 991-94  
6 (9th Cir. 2008) (*en banc*), the Ninth Circuit described the procedures a district court must  
7 follow in imposing a sentence after the Supreme Court's decisions in *Rita v. United*  
8 *States*, 551 U.S. 338 (2007), *Gall v. United States*, 552 U.S. 38 (2007), and *Kimbrough v.*  
9 *United States*, 552 U.S. 85 (2007). The defense will not repeat all of them here as this  
10 Court is well aware of the law on this subject. We would, however, emphasize the Ninth  
11 Circuit's directive that "[t]he overarching statutory charge for a district court is to  
12 'impose a sentence sufficient, but not greater than necessary'" to meet the societal goals  
13 of punishment, deterrence, rehabilitation and productive citizenship as set forth in 18  
14 U.S.C. § 3553(a). *Carty*, 520 F.3d at 991. In addition, "[t]he district court may not  
15 presume that the Guidelines range is reasonable," but, instead, must "make an  
16 individualized determination based on the facts." *Id.* (citations omitted). Finally, we  
17 highlight the following additional directive from the Ninth Circuit: "'One theme' runs  
18 through the Supreme Court's recent sentencing decisions: *Booker* empowered district  
19 courts, not appellate courts, and breathed life into the authority of district court judges to  
20 engage in individualized sentencing." *United States v. Whitehead*, 532 F.3d 991, 993  
21 (9th Cir. 2008) (affirming district court's sentence of 1,000 hours of community service,  
22 restitution and five years supervised release where the applicable guideline range was 41-  
23 51 months based upon defendant's repentance, his young daughter's dependence upon  
24 him, and the court's finding that "defendant's crime did not pose same danger to the  
25 community as many other crimes.") As further amplified below, we respectfully urge  
26 that an individualized consideration of all of the Section 3553(a) factors relating to Mr.  
27 Wolff supports the imposition of a three year sentence, along with substantial restitution.  
28

1 **III. Factor One: Circumstances of the Offense/Characteristics of Defendant**

2 **A. Personal Background**

3 Mr. Wolff is almost 47 years old and, but for his actions in 2001, has been a  
4 productive and law abiding member of our community (business, personal and  
5 philanthropic) for that entire period of time. Mr. Wolff was born in Tulsa, Oklahoma,  
6 where he lived with both of his parents and sister before going off to college. As the  
7 attached letters make abundantly clear, Mr. Wolff has been a selfless, honorable, honest,  
8 giving, forthright and dedicated father, spouse, sibling, friend and member of his  
9 community his entire life. Long time friend Jenk Jones recounts:

10 I have known Stuart since he was less than a year old, when his family  
11 moved in next door to us. My son and Stuart are six days apart in age  
12 and grew up almost like brothers, sharing two homes, ours and that of  
13 the Wolff's. As a coach and a father who played sports with all the  
14 neighborhood kids, I have worked with Stuart in baseball, basketball  
15 and soccer. Between those sports and the countless hours he spent at  
16 our house I know him well. I don't know the particulars of the case in  
17 question, but allegations of wrongdoing seem totally out of character  
18 for a young man who was always polite to his elders, supportive of his  
19 friends, a good student and eager to help in any worthwhile project.  
(Exhibit A)

18 Similarly, Stuart's sister, Dr. Cindy Zelby, informs:

19 Stuart and I were both raised with very strong family values including  
20 respect for parents, honesty, education, caring about others, and hard  
21 work...Stuart has flaws and as his sister I would be more than happy to  
22 point them out to you in detail. However, lying and cheating were  
23 never part of his personality. I would know because I played countless  
24 games of Yahtzee, Scrabble, Life and Sorry with him when we were  
25 kids. If he was going to cheat anyone it would have been me. He  
26 never cheated one time. He bit me and he kicked me but he never  
27 cheated. (Exhibit B)

25 Indeed, such a humble and caring upbringing is part of the reason that his criminal  
26 activity of 2001 is so out of character, as Mr. Wolff's father, Milt Wolff, explained in his  
27 letter to the Court:  
28

1 He has never been in trouble with any agency in his life much less the  
2 D.O.J. He is a good and kind individual and a very good father and  
3 husband. (Exhibit C)

4 Echoing these same character traits, Mr. Wolff's mother, Diana, states:

5 Stuart has always been a good and kind man to anyone he has met in  
6 his life. He has never hurt anyone or broken the laws of the United  
7 States, his religion or our family. He has never lied, cheated or stolen  
8 anything from anyone in his life. He is a great son, brother, husband  
9 and father, full of love, caring and humor.

10 \* \* \* \*

11 Honesty, goodness and kindness describe who Stuart Wolff is and has  
12 always been.... (Group Exhibit D)

13 In 1995, Mr. Wolff married his wife, Ursula Glauser, a native of Switzerland,  
14 whose entire family continues to reside there. Mr. and Mrs. Wolff have three children - -  
15 Alexander, who is 13 years old; Isabelle, who is 11 years old; and Max, who is 8 years  
16 old. When Alexander offered to write a letter to the Court undersigned counsel was  
17 hesitant to involve a minor. However, after reading the letter, it so candidly provided an  
18 insight into Mr. Wolff's character that counsel concluded it should be reviewed by the  
19 Court. Alex reflects that:

20 In this letter, I hope to show you that my dad is an honest, hard  
21 working man, who always taught me and my siblings, that to, as he put  
22 it, to cut corners was unacceptable. He also taught us that honesty is  
23 one of the most vital virtues any person could possess. Finally, he has  
24 taught us that it is important to admit when you make a mistake and  
25 not try to make excuses.... He never lets us make excuses when we  
26 don't do well on tests or play well in sports games. He taught us that  
27 same lesson again this year because he is saying to you that he made a  
28 mistake. He explained to me about what he did, although I don't  
understand all of it, and said he did not have any excuses. He said it  
was the right thing for him to say he did something wrong and not  
make any excuses and he wanted me to understand that. (Exhibit E)

Likewise, Mr. Wolff's wife, Ursula recounts that:

Stuart has always been honest in our marriage and never once in 20  
years have I ever lost confidence in his honesty or integrity.  
Sometimes it is even embarrassing because he will be completely



1 honest even in social situations where he is just not able to tell the little  
2 lies that seem to be expected in these kind of settings. I love him for  
3 this and know that I can always trust him. He has always been a caring  
4 father to our children and he takes the time to listen to them and to  
5 teach them.... Stuart teaches our kids to always tell the truth and we do  
6 not allow anything other than complete honesty from our children.  
7 (Exhibit F)

8 Long time employee James Thomas, who was at Homestore during the time period  
9 covered in the indictment, attests to Mr. Wolff's character, empathy, and sincere desire to  
10 utilize his intelligence to help society, recounting:

11 I have known Mr. Stuart Wolff since May 1998. It has been my  
12 distinct pleasure to have worked for him in various capacities as an  
13 Operations Specialist at Homestore.com, and most recently as a  
14 Research Analyst with Scinovate Research Company. In both  
15 instances these companies were founded to assist the general public in  
16 various ways helping the consumer....Mr. Wolff was always open and  
17 truthful with me....which I felt demonstrated a high level of personal  
18 integrity and honest concern....(Exhibit G)

19 Not only has Mr. Wolff shown his character to family and those he grew up with,  
20 but he has shown these same positive character traits and commitment to friends over the  
21 last 25 years. Mr. James Geraghty, who has known Mr. Wolff since the first week of  
22 college, states:

23 From the very first week of freshman year in college, Stuart  
24 recognized my unlimited potential. He recognized immediately how  
25 much I wanted to succeed in this academically challenging  
26 environment. He took it upon himself to challenge me....He taught me  
27 the importance of academic integrity and how the honor code worked  
28 and why it was so important to follow it. When I would skip class he  
would tell me that I was only hurting myself. When I drank too much  
he told me I was poisoning my mind and body. When I didn't study as  
hard as he did, he would tell me that I was potentially wasting the great  
opportunity that I had been given....Stuart never wavered in his  
support and help. No one even knows about any of this until now  
because Stuart never talks about it. (Exhibit H)

Similarly, twenty-year friend and former co-worker Cliff King, says:

I have known and kept in contact with Stuart since 1989 when we  
worked together doing scientific research at Bell Laboratories in

1 Murray Hill, New Jersey. I have known Stuart to be an extremely  
2 honest and trusted colleague. He had a very good reputation at Bell  
3 Labs for doing honest and solid research. I can also tell you that he is  
4 a friend who has always been willing to put his family and friends first.  
(Exhibit I)

5 Church and outreach programs were and remain very important to Mr. Wolff.  
6 Rabbi Ted Ritter reflected this in his letter, commenting:

7 I am writing this letter on behalf of Stuart Wolff. Stuart and his family  
8 have been members of my congregation in Thousand Oaks for almost  
9 ten years. During this time they have shown a devotion to their  
10 children and a commitment to the Jewish community of the Conejo  
11 Valley.... It is also my belief that Stuart and Ursula are model parents:  
consistently putting their children first and looking out for their best  
interests as they grow and develop. (Exhibit J)

12 Importantly, Mr. Wolff has always focused his work efforts on things he thought  
13 added value to society, and this started from a very young age, as recounted by Diana  
14 Wolff:

15 He has always worked on projects that had great potential to help  
16 others and make the world better. His science fair project was on  
17 alternative energy and this was 30 years before today's environmental  
crisis. (Group Exhibit D)

18 Similarly, Bernard and Marcia Robinowitz recount the following experience:

19 My wife and I worked with Stuart to develop a new method of writing  
20 prescriptions. Our goal was to make the world a safer and more  
21 efficient place; Stuart tirelessly and honestly endeavored to help us  
succeed; this was not the work of a criminal. Just the opposite he  
worked for the betterment of all.

22 \* \* \* \*

23 In the 1990's, Stuart, my husband, and I tried to start a company that  
24 would have eliminated many prescription errors and increased patient  
25 prescription compliance. Stuart and Bernard were the idea men; I was  
26 the technical/bookkeeper person. We did not get a patent covering our  
27 product, but we did incur expenses. I would tell Stuart the amount we  
28 had to come up with, and he would contribute his share. He never  
once asked me if he could see my records or doubted the costs  
presented. In every respect, Stuart was an honest and honorable  
partner as he has been throughout his whole life. (Group Exhibit K)

1 Even today, fully realizing that he will soon be imprisoned, Mr. Wolff continues to  
2 use his intellect and energy to try and help others. His partner in one endeavor, Mr.  
3 James Geraghty, explains:

4 We have developed a program called the ‘Computer Youth Academy’  
5 that I am very excited about. I am on the Advisory Board of the  
6 Government sponsored Neighborhood Networks National Consortium  
7 (NNNC) and our Computer Youth Academy has tremendous potential  
8 to help this program achieve its ambitious goals with respect to  
9 educating children in affordable housing.... I need him, organizations  
like NNNC needs him, and most importantly, there are many kids that  
also need him. (Exhibit H)

10 Similarly, Mr. Wolff’s partner (James Thomas) in a venture called Scinovate  
11 Research Company, echo’s these same sentiments:

12 In both instances these companies were founded to assist the general  
13 public in various ways helping the consumer to ensure fairness within  
14 difficult transactions that would otherwise be complex and time  
15 consuming in nature. In both cases the public was well served by these  
16 highly sophisticated and forward thinking applications, and it is my  
hope that this meaningful and unselfish work on behalf of others will  
be taken into consideration by you. (Exhibit G)

17 There is simply no question that people who know Mr. Wolff well believe that a  
18 three year sentence of incarceration, potentially followed by some form of community  
19 service, would serve best the interests of society to both punish and rehabilitate. Beth  
20 Richtman sums this up eloquently:

21 I’ve known Stuart long enough to know that he is a person with an  
22 incredible capacity and desire to do good things for the world. I know  
23 this situation has been extremely difficult and humbling for him. I  
24 know how deep his regrets are. I know that in the future Stuart will  
25 make sure to never ever do anything remotely close to any bright line  
26 again. I honestly hope that he’ll be able to quickly get back to what he  
27 does best: work with others on thinking through difficult problems  
whose solution could make the world a better place and in general  
inspiring people like me to work hard toward our own dreams.  
(Exhibit L)

28 Similarly, Bernard Robinowitz confirms and suggests that because Mr. Wolff “has  
a great mind for science” a sentencing court should consider imposing a sentence to “use

1 his talent to benefit the country.” (Exhibit K). As amplified below, we urge the Court to  
2 consider fashioning just such a sentence that imposes punishment (3 years incarceration)  
3 followed, if the Court believes something more is needed, by some form of community  
4 driven service, so that Mr. Wolff can continue giving back to society as he can so ably  
5 do.

6 **B. Background Of The Offense**

7 As the Court knows, Mr. Wolff is an engineer by education and training.  
8 Mr. Wolff’s first job was at IBM, where he worked as an Integration Engineer and  
9 learned to make computer memory chips. After leaving IBM, he worked in Tulsa,  
10 Oklahoma for approximately one year as an Informative Technology Director before  
11 taking a job at TCI Interactive in 1993. From 1993 to 1996 at TCI, Mr. Wolff worked on  
12 issues regarding health care, creating an interactive television system that would be used  
13 to provide information to viewers to help medical patients, among others, make informed  
14 decisions. While working at TCI, Mr. Wolff and the company began looking at the  
15 Internet as a way to communicate information to those who needed it the most.

16 It was during this time period that Mr. Wolff recognized that the real estate market  
17 could benefit by using the Internet to provide information to consumers interested in  
18 purchasing a home. Mr. Wolff began talking with the National Association of Realtors  
19 (“NAR”) to see if he could bring TCI and NAR together in a deal. After TCI declined to  
20 pursue the venture with the NAR, Mr. Wolff started working with the organization on his  
21 own, and was subsequently asked by the NAR to become the Chief Executive Officer of  
22 the company that eventually became Homestore. He was 33 years old at the time, with  
23 no upper management experience, and though highly educated, had no education or  
24 experience with accounting rules, best business practices, or regulatory/legal  
25 requirements.<sup>1</sup>

26  
27  
28 <sup>1</sup> This information is provided not to excuse Mr. Wolff’s subsequent criminal actions, but simply to put  
them into context, as Mr. Wolff was a young, inexperienced executive running a booming internet  
company at the height of the Internet explosion.

1 Homestore started out as a small private company with less than 25 employees for  
2 the first few years. However, in a very short time--and by the year 2000--the company  
3 had several thousand employees who reported through various executives to Mr. Wolff.

4 Homestore had gone public (via an initial public offering) in 1999. One significant  
5 consequence of that was that the company's financial results--and particularly its  
6 revenues--became a dominant measuring stick of the company's success. As a result, the  
7 company looked aggressively to conclude transactions that could generate reportable  
8 revenue. This aggressive mind-set led to horrible decisions in 2001, but to best put that  
9 2001 criminal behavior into context, we refer to the sentencing memorandum filed on  
10 behalf of Peter Tafeen, a top executive at Homestore in 2001. Mr. Tafeen is someone the  
11 government previously characterized as providing nothing but blunt and honest  
12 descriptions of the events of 2001.<sup>2</sup> Here is Mr. Tafeen's candid reflection of those  
13 events:

14 [I]n 2000 Homestore engaged in several two-party roundtrip  
15 transactions that essentially involved the company recognizing its own  
16 cash as revenue. Mr. Tafeen, who had no knowledge of the relevant  
17 accounting rules, was informed at the time by members of  
18 Homestore's Finance Department that these transactions were  
19 permissible. Some members of the Finance Department (including  
20 former Homestore CFO Joseph Shew) have continued to maintain that  
21 the roundtrip transactions that took place in 2000 were permissible  
22 under the accounting rules.

23 \* \* \* \*

24 In the first quarter of 2001, Homestore was on pace to badly miss its  
25 revenue targets. Mr. Tafeen was told by the Finance Department that  
26 because of new accounting rules he could no longer use the two-party  
27 roundtrip deals to make up the shortfall. He spoke with his counterpart  
28 at AOL (Eric Keller) about ways to generate revenue, and Mr. Keller  
suggested turning the two-party roundtrip deals into three-party  
roundtrip deals.... Mr. Tafeen believed the roundtrip deals were  
improper from the outset... But perhaps reflecting the mentality of the  
pre-Enron era, Mr. Tafeen did not stop to think of the consequences (to

<sup>2</sup> Government's Motion For Downward Departure (for Peter Tafeen) dated 10/23/06, pp. 1-2, 7-8, 10-11, 14-15.

1 himself or to others) of what it meant to engage in transactions solely  
2 for the purpose of creating bogus revenues. He wrongly assumed that  
3 the worst that would happen was that the SEC might require the  
4 company to restate its public filings. The idea that his conduct was  
5 criminal and could lead to prison time never entered his mind until  
6 long after the fact.

7 Mr. Tafeen's admissions and insights are important to this sentencing for several  
8 reasons. First, they confirm that Mr. Wolff did not conceive of the scheme, instigate it,  
9 or participate in its day-to-day implementation. Indeed, the government acknowledges  
10 such, commenting, "Wolff did not conceive of the revenue inflation scheme alone, nor  
11 was he involved in all aspects of its day-to-day execution." (Government Sentencing  
12 Memorandum, 3/11/10, p. 3). Second, like Mr. Tafeen, Mr. Wolff did not stop to think  
13 of the consequences (to himself and others) of not using his power and authority to stop  
14 the illegal revenue-recognition practices. As explained in his letter to the Court  
15 (Exhibit M), in retrospect Mr. Wolff's bad choices and wrongful decisions now seem to  
16 have been clear cut, unambiguous, and simple choices between right and wrong and  
17 Mr. Wolff so recognizes today. But, at the time, the incremental process of moving from  
18 good and acceptable in 2000 to bad and criminal in 2001 led him to rationalize and  
19 attempt to justify conduct that had no justification. Mr. Wolff accepts that now and for  
20 that he will be punished. But for the reasons below, we urge the Court to impose a three  
21 year sentence, which would be much more time than any of the other executives received  
22 (*see at 33-37 supra*)--which we urge is a proportionate and just result.

23 As a footnote to this Background section, it is relevant to note that in November  
24 2001, Homestore executive Allan Merrill learned of a third-party's request for a kickback  
25 to keep part of the scheme quiet. Mr. Merrill notified Mr. Wolff of the situation, despite  
26 requests by Mr. Shew and Mr. Giesecke that he not do so. Mr. Wolff did not try to  
27 cover-up these facts or bury the investigation at that time. Although he certainly could  
28 have tried to do so, Mr. Wolff immediately alerted Homestore's Board of Directors,  
triggering the internal investigation that led to the entire revenue recognition situation  
being uncovered and vetted.

1           **C. The Offense and Its Aftermath**

2           The conduct involved in this case is accurately reflected in the plea agreement.  
3 This offense is Mr. Wolff's first and only experience with the criminal justice system.  
4 As explained above, it was the product of a lapse in good judgment and the mistaken  
5 (and yes, indefensible) 2001 belief that these were accounting decisions that might lead  
6 to SEC battles and restatements, but not criminal behavior that was hurting others and  
7 could lead to prison time. Mr. Wolff knows now that his actions were and remain wrong  
8 and he fully accepts that fact. The government disputes this contention, incorrectly  
9 portraying Mr. Wolff's acceptance as "grudging" and only provided on the eve of trial.  
10 (Government Sentencing Memo. at 3, 14). That portrayal is inaccurate and is belied by  
11 the evidence and testimonials detailed below.

12           First, Mr. Wolff's probation officer (whom the government accurately describes as  
13 "experienced") interviewed him on February 2, 2010, and concluded that Mr. Wolff had  
14 accepted responsibility for his crimes. Indeed, the probation officer quotes first hand his  
15 acceptance of responsibility. (PSR ¶¶ 81, 97). Second, the timing of Mr. Wolff's plea  
16 must be put into the proper context. As this Court well knows, after current counsel was  
17 retained and this Court authorized early return subpoenas, we uncovered proof that the  
18 evidentiary record was inaccurate and seemingly had been tampered with. In defense  
19 counsel's professional judgment, neither counsel nor Mr. Wolff could properly analyze  
20 any plea bargain until those issues were resolved. Specifically, the defense had sufficient  
21 proof that Pricewaterhouse Coopers ("PwC") had materially altered numerous  
22 workpapers after the commencement of the Homestore internal investigation, including  
23 key exhibits that the government introduced into evidence in the first trial, and that  
24 PwC's lead audit partner had provided false testimony at the first trial in relation to those  
25 modifications.

26           In mid-July 2009, and as part of the process of trying to resolve the case, the  
27 defense provided its proof to the government so that the government could conduct its  
28 own independent investigation. In fact, the government agreed to move the trial date to

1 allow itself an appropriate amount of time to investigate the matter. We do not intend to  
2 re-visit the issues surrounding PwC's actions, but it is eminently fair to note that the PwC  
3 issues were an impediment to finalizing plea negotiations and needed to be resolved  
4 before a plea deal could be consummated. Indeed, as reflected in its filings of  
5 November 13, 2009, the government acknowledges that there were problems with PwC's  
6 records and witnesses and that Mr. Wolff's positions had some "merit". (Government  
7 Resp., Nov. 13, 2009, at 2). Moreover, the government agreed not to call any PwC  
8 employee as a witness or submit any PwC records into evidence. (Id. at 3). The  
9 government further agreed not to seek to establish that one of the objects of the charged  
10 conspiracy was to commit the offense of lying to the auditors. (*Id.*) Thereafter, the Court  
11 denied defendant's further requests for relief. It was only at this juncture that the  
12 defense, for the first time, felt it could analyze the entire landscape and the evidence the  
13 Court would allow the government to introduce at trial. These pre-trial motions cleaned  
14 up an infirm record and opened the door to finalizing plea discussions. Thus, the truth is  
15 that Mr. Wolff did not grudgingly accept responsibility for the (amended) conspiracy  
16 count or unnecessarily delay his acceptance until the eve of trial. Mr. Wolff properly and  
17 appropriately sought resolution of a key component of the case and pled shortly after that  
18 pre-trial issue had been decided. The government's claim that Mr. Wolff pled late in the  
19 game is wrong and we hope this Court understands why the defense needed to explore  
20 the PwC issues before any plea bargain could be consummated. Mr. Wolff should not be  
21 penalized for that the fact that his new counsel found conflicts and infirmities in the  
22 record and sought to resolve them.

23 The government's claim that Mr. Wolff has only grudgingly accepted  
24 responsibility is further belied by the attached testimonial letters that recount how  
25 profoundly he has accepted his responsibility and is bound and determined to make  
26 amends for his misbehavior. In addition to these letters, Mr. Milton Wolff recounts as  
27 follows:

28 By working very hard, Stuart built Homestore from a sleepy little  
company that was about to go broke to an important contributor to the



1 real estate market. Of the thousands of Internet companies that were  
2 created in the 1990's, it is still one of the few Internet companies that  
3 is still around even to this day. He did a lot of things right in building  
4 up Homestore and then he did some things very wrong. I know Stuart  
5 feels very remorseful and sorry that people were hurt by his bad  
6 decisions. As his father I also feel terrible about it. Both of us have  
7 talked extensively and in detail about what went on in 2001 and he  
8 knows and accepts the role he had in the problems. He knows he  
could have stopped the deals and he wishes he had taken action to  
terminate the executives that put the problematic deals together.  
(Exhibit C)

9 Similarly, practicing attorney Tim Sottile (a former clerk to Judge Lew who knows  
10 the import of being candid in these letters) and a long time friend of Mr. Wolff's  
11 describes:

12 Having known Stuart Wolff for the last thirteen years as a family  
13 friend.... I can think of no other person who has come to such a  
14 sincere acceptance of responsibility for the actions that have brought  
15 him to this point and who is so profoundly sorry for the pain that his  
actions have caused others.

16 \* \* \* \*

17 He exhibited this concern through the philanthropic programs he made  
18 a priority at his former company ???such Habitat For Humanity and  
19 his ongoing efforts to personally fund and develop initiatives to  
20 promote computer programming skills and technical literacy for inner  
21 city kids. He has not engaged in these good works with fanfare or  
22 publicity but in an understated way with an eye to achieving positive  
23 results for those who could benefit from his efforts rather than to gain  
24 attention or recognition for himself.

25 \* \* \* \*

26 Having known him before his company went public and after, during  
27 its highs and lows, and throughout the long and difficult period leading  
28 to his sentencing I can tell you that he always remained the same  
concerned, honest and hard working person. (Exhibit N)

Similarly, Cindy Zelby notes the following:

It is frankly hard for me to understand how my brother ended up in this  
unfortunate situation. I know he feels really bad about it as do my  
parents and myself. We are a close knit family and the last thing we

1 would want is for any of us to hurt other people. I have talked to him  
2 many times about it and I know he feels bad that others were hurt by  
3 his actions. I do know as his sister, that his mistakes from 2001 were  
highly atypical of his normal behavior. (Exhibit B)

4 Diane Wolff echo's these same sentiments:

5 Something went wrong in his life at Homestore - he knows that and I  
6 know that and you know that. He has never intentionally harmed  
7 anyone in his life but people did get harmed by his actions at  
8 Homestore and he feels very sorry that these people were hurt by the  
9 mistakes he knows he made. Stuart accepts and feels remorse for his  
10 wrong doing and hopes to spend the rest of his life helping others and  
11 making up for this. He has never before hurt anyone or broken the  
laws of the United States, his religion or our family. He has never  
before lied, cheated or stolen anything from anyone in his life.

(Group Exhibit D)

12 Additionally, Cliff King, who recently spent time with Mr. Wolff, relays that:

13 Stuart and his family welcomed me into their home last month for a  
14 short visit, and I had an opportunity to speak with him regarding the  
15 plea and the events in 2001 for which he will be sentenced. Stuart  
16 very much wanted to talk to me about the mistakes he had made and  
17 expressed great regret about what had happened. I know him well and  
18 I can tell you that he has suffered greatly over this experience. I know  
Stuart Wolff to be an extremely honest person, and I do not believe  
that anything like the events of 2001 will ever occur in his life again.

(Exhibit I)

19 Finally, business associate and former Vice President at Homestore Stephen Bove  
20 sums up the complexity of sentencing a person like Mr. Wolff eloquently:

21 Unlike many web-internet companies, the products at Homestore very  
22 frequently if not always relied on complex upfront deal-making with  
23 numerous parties, and ongoing maintenance of the delicate  
24 relationships around those contracts as the products evolved. The  
25 number of "deals" upon which Homestore was built was astounding  
26 and the architect/diplomat/strategist behind those deals and the design  
27 of the products that served them was Stuart. The company could  
28 simply not have existed without him. Since 2001, I think Stuart's role  
in non-financial dealings at Homestore has been largely overlooked,  
especially the tremendous load those deals placed on him and the deep  
amount of creativity he had to have to craft them and hold the

1 company together as we careened forward into a marketplace battling  
2 massive competitors like Microsoft, Yahoo and AOL.

3 \* \* \* \*

4 At Homestore, we were literally saving our customers millions of  
5 hours and tens of millions of dollars each year.... The missteps he  
6 made in 2001 were, in my humble view, an extreme anomaly, and a  
7 great tragedy, given how much good he had done....there is no doubt  
8 that bad decisions were made and lines of legality crossed. And in  
9 recent discussions with Stuart his obvious contrition and humility have  
10 made me sure that he recognizes that he made terrible mistakes, knows  
11 what he did was wrong, and feels tremendously bad about any harm he  
12 may have caused to his shareholders, his friends, his family and all of  
13 us who were on the team at Homestore. (Exhibit O)<sup>3</sup>

14 **IV. Factor Two: Purposes of Sentencing**

15 The proposed binding plea agreement, which the Court indicated at the plea  
16 hearing it intends to accept, will result in a sentence within a range of three to five years.  
17 We respectfully urge the Court to impose three years which would fulfill the law's  
18 mandate for fashioning a sentence "sufficient, but not greater than necessary," to satisfy  
19 the purposes of sentencing. Section 3553(a)(2) specifically requires:

- 20 (2) the need for the sentence imposed -
- 21 (A) to reflect the seriousness of the offense, to promote respect  
22 for the law, and to provide just punishment for the offense  
23 [retribution];
  - 24 (B) to afford adequate deterrence to criminal conduct [general  
25 deterrence];
  - 26 (C) to protect the public from further crimes of the defendant  
27 [specific deterrence]; and
  - 28 (D) to provide the defendant with needed educational or  
vocational training, medical care, or other corrective  
treatment in the most effective manner [rehabilitation].

1. Retribution: In regard to retribution, we acknowledge that Mr. Wolff's  
conduct warrants a punitive response. Three years away from his children, wife, friends

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<sup>3</sup> Attached hereto as Group Exhibit P are copies of additional letters in support of Mr. Wolff.

1 and community is punitive and a just punishment for the offense. Mr. Wolff's criminal  
2 conviction, reported in the press and forever available in this internet age, effectively  
3 brands him a pariah for the rest of his life. Moreover, the eight-year pendency of the  
4 investigation, accompanying civil suits, SEC proceedings, PwC investigation, and  
5 proposed restitution award have been draining emotionally and physically and will  
6 almost if not entirely wipe out Mr. Wolff financially--a circumstance from which he will  
7 have a hard time recovering once released from prison at age 50, or beyond. In a very  
8 real sense, a three year prison sentence will vindicate the law's rightful interest in  
9 retribution.

10       2.     General Deterrence: General deterrence may be one of the trickiest interests  
11 to properly assess. Too much quickly leads to disproportion and injustice for the  
12 individual and serves to mar, not encourage respect for the law, to the observing public.  
13 Moreover, in cases of white collar crime, there is no evidence that a long sentence (five  
14 years) would be a more effective deterrent than a three year prison sentence. *United*  
15 *States v. Adelson*, 441 F. Supp.2d 506, 514 (S.D.N.Y 2006), *aff'd mem.*, 301 Fed. Appx.  
16 93 (2d Cir. 2008) ("But as to [general deterrence], there is considerable evidence that  
17 even relatively short sentences can have a strong deterrent effect on prospective 'white  
18 collar' offenders) (*citing* Richard Frase, *Punishment Purposes*, 58 Stanford L. Rev. 67,  
19 80 (2005); Elizabeth Szockyj, *Imprisoning White Collar Criminals?*, 23 S. Ill. U. L.J.  
20 485, 492 (1998). *Cf* United States Sentencing Commission, *Fifteen Years of Guidelines*  
21 *Sentencing* 56 (2004) (noting that the Sentencing Guidelines were written, in part, to  
22 "ensure a *short but definite* period of confinement for a larger proportion of these 'white  
23 collar' cases, both to ensure proportionate punishment and to achieve deterrence")  
24 (emphasis in original).

25       Indeed, white collar offenders are likely to be deterred by enforcement of the kind  
26 the defense suggests here (three years) and by the sentences already imposed on the  
27 eleven defendants sentenced to date. Frase, *supra* at 70. In fact, the Government  
28



1 all the terms of his pre-trial release, and he has worked hard in lawful business practices  
2 to provide for his wife and three young children. The letters written on his behalf speak  
3 of his generous nature, his love for his family, his kindness, his intelligence, his  
4 helpfulness, his caring and nurturing personality, and his sense of social responsibility.  
5 From family, friends, and employees, all the letters plead with the Court not to deprive  
6 society, his community, or his family of his positive contributions for more than the  
7 required three years.

8 4. Rehabilitation: In all candor, the purpose of rehabilitation has little  
9 relevance in Mr. Wolff's case, given his background and lack of any dependencies.  
10 What Mr. Wolff will need to do upon leaving prison is to use his intellect and  
11 determination to secure work to help support his family and repay whatever debt may be  
12 left to repay.

13 **V. Factor Three: The Kinds Of Sentences Available**

14 *Post-Booker*, the Court may consider a wide range of alternatives in fashioning a  
15 just sentence. We believe and respectfully request that three years incarceration is  
16 sufficient, but not greater than necessary, to justly address Mr. Wolff's offense, allow  
17 him to return to his loving family, and resume contributing to his community related  
18 projects.

19 If, however, the Court feels something more than three years is required, we urge  
20 the Court to impose a term of one or two years of home detention on top of the three  
21 years of incarceration.<sup>5</sup> Such a sentence could be conditioned on Mr. Wolff continuing  
22 his work on behalf of the disadvantaged while also possibly permitting him to find paid  
23 employment to help support his family. It also would allow Mr. Wolff to again parent his  
24 three children, a vital role in this very complex society. This Court has the authority and  
25 discretion to so order and we urge the Court to consider this option if it deems three years  
26 incarceration insufficient.

27 \_\_\_\_\_  
28 <sup>5</sup> Co-defendants Tafeen and Shew were permitted to serve a portion of their sentences in home  
detention.

1 **VI. Factors Four And Five: The Sentencing Guidelines And Policy Statements**

2 Mr. Wolff recognizes that his conduct caused loss to individual investors in this  
3 matter; he has acknowledged this by pleading guilty and we do not dispute that fact here.  
4 However, because the Court must consider the applicable Sentencing Guideline range  
5 before imposing sentence (18 U.S.C. 3553(a)(4)) we are compelled to address the loss  
6 calculation theories proffered by the government.

7 Under the relevant Guidelines, the loss attributable to this fraud-based conspiracy  
8 overwhelmingly drives the suggested period of incarceration. The government pushes  
9 hard on high loss positions in what is clearly an attempt to overshadow all other relevant  
10 sentencing factors. Out of fairness, we note that the government minimized and virtually  
11 ignored these high loss figures and positions (with correspondingly high Guideline  
12 ranges) in its sentencing papers related to Mssrs. Tafeen, Giesecke, and Shew. Under the  
13 loss analysis the government now advocates against Wolff, these other defendants faced  
14 Guideline ranges of 262-327 months, yet each of them received a very modest sentence.<sup>6</sup>  
15 Despite those earlier sentences, the government sets forth several alternative theories to  
16 formulate “loss” and asks this Court to enhance Mr. Wolff’s offense level pursuant to  
17 U.S.S.G. § 2F1.1(b)(1)(S) “by 18 levels for a loss exceeding 80 million.”<sup>7</sup> (Government  
18 Sentencing Memo. at 10). The government advocates two theories to justify this  
19 enhancement: (i) the Average Victim Loss theory; and (ii) the Market Capitalization  
20 theory. Without unduly belaboring the point, in light of the statutory maximum cap  
21 involved, both of these theories are flawed; they are not supported by any evidence  
22 provided to the defense or the Court and, thus, overstate the provable loss in this matter.  
23 Accordingly, for the reasons set forth below, the defense suggests that the Court utilize  
24 Mr. Wolff’s net gain from stock sales during the fraud period as a proper alternative  
25

26 <sup>6</sup>Mr. Shew received a sentence of six months incarceration; Mr. Giesecke received a sentence of twelve  
months incarceration; and Mr. Tafeen received a sentence of twenty-seven months incarceration.

27 <sup>7</sup> The probation department, without analysis, has applied an 18-level enhancement to Mr. Wolff’s base  
28 offense level accepting that, under the theories advanced by the government “loss to shareholders is at  
least \$130 million,” while at the same time candidly conceding that the “Court is in the best position to  
determine which [loss] theory should be applied to this case.”

1 measure of loss (as endorsed by comment note 9 of U.S.S.G. § 2F1.1 of the applicable  
2 Guidelines). This would result in the Court finding a “gain” of between \$5 and \$10  
3 million, which would still result in an increase of Mr. Wolff’s offense level by 14 levels,  
4 pursuant to U.S.S.G. § 2F1.1 (b)(1)(0)--four levels less than the 18-level increase the  
5 government suggested. Although this decrease in offense level is not dramatic, it is the  
6 only approach justified by the evidence and counters the government’s suggestion of  
7 more than a \$1 billion dollar loss, which unfairly casts the harm of Mr. Wolff’s offense in  
8 a light that is unwarranted--a light that was not focused on any of Mr. Wolff’s previously  
9 sentenced co-defendants.

10 **A. Average Victim Loss Theory**

11 As an initial matter, “the government bears the burden of proof on the facts  
12 underlying a sentencing enhancement.” *United States v. Zolp*, 479 F.3d 715, 718 (9th  
13 Cir. 2007), *citing United States v. Ameline*, 409 F.3d 1073, 1086 (9th Cir. 2005) (*en*  
14 *banc*) (“When the government seeks an upward adjustment, it bears the burden of  
15 proof.”). In addition, because the government’s proposed 18-level loss enhancement  
16 under § 2F1.1(b)(1)(S) would have an “extremely disproportionate effect on the sentence  
17 relative to the conviction, the government must prove such a factor by clear and  
18 convincing evidence.” *United States v. Lynch*, 437 F.3d 902, 916 (9th Cir. 2006).<sup>8</sup>  
19 Simply put, the defense and the Court have not been provided evidence to support losses  
20

---

21 <sup>8</sup> The government correctly notes that in *United States v. Berger*, the Ninth Circuit recently held that a  
22 court need only find a disputed loss enhancement by a preponderance of evidence “where sentencing  
23 enhancements for financial loss are based on the extent of the fraud conspiracy.” 587 F.3d 1038, 1048  
24 (9th Cir. 2009). However, this Circuit has employed a totality of circumstances test for determining  
25 whether the heightened standard of clear and convincing evidence is required. *United States v.*  
26 *Treadwell*, 593 F.3d 990, 1000 (9th Cir. 2010) (“Whether a sentencing enhancement causes a  
27 disproportionate impact warranting clear and convincing proof necessitates a look at the totality of the  
28 circumstances”). Without belaboring the point, it is the defense’s position that this Court should use the  
heightened standard because: (1) the government is seeking an 18-level increase based upon loss which  
will more than double the length of Mr. Wolff’s advisory sentence; and (2) the loss enhancement is not  
limited “to the extent of the criminal conspiracy” but rather it includes unproven conduct -- for example  
“losses” incurred in the third quarter of 2001. In any event, as detailed below, whether this Court utilizes  
a preponderance or clear and convincing standard, the government has failed to meet its burden on the  
loss issue.



1 to “average victims” caused by defendant’s fraud. The Average Victim Loss approach  
2 advocated by the government here took the average daily closing price of Homestore  
3 stock during the period of the alleged fraud (April 26, 2001 through December 21, 2001);  
4 subtracted the average daily closing price for a period following the disclosure of the  
5 fraud (here, February 22, 2002 through May 15, 2002); and then multiplied the difference  
6 by the number of outstanding shares as of the end of the first quarter of 2001, reduced  
7 (only) by the number of shares owned by Mr. Wolff at that moment. Utilizing this  
8 approach the government mathematically estimated a loss of approximately \$1.6 billion.

9 This simplistic approach completely ignores the required analysis of actual  
10 causation in fraud sentencings. Recently, in *Berger*, 587 F.3d 1038 (9th Cir. 2009),<sup>9</sup> the  
11 Ninth Circuit rejected defendant’s efforts to have the Supreme Court’s civil securities  
12 fraud standard (*e.g.* the complaint must allege that the practices plaintiff contends are  
13 fraudulent were revealed to the market and caused the resulting losses (in *Dura*  
14 *Pharmaceuticals v. Broudo*, 544 U.S. 336, 341-43 (2005)) applied to criminal sentencing.  
15 Rejecting the application of *Dura* in the criminal context, the Ninth Circuit broke from  
16 the Second and Fifth Circuits and held that “where the value of securities have been  
17 inflated by a defendant’s fraud, the defendant may have caused aggregate loss to society  
18 in the amount of the fraud-induced overvaluation, even if various individual victims’  
19 respective losses cannot be precisely determined or linked to the fraud.” *Id.* at 1044.  
20 Significantly, the Ninth Circuit did not, however, abandon the notion of actual causation  
21 in fraud sentencing; rather, the Court specifically noted that:

22 the fact that “[t]he court need only make a reasonable estimate of the  
23 loss,” U.S.S.G. § 2B1.1, cmt. n. 3, § 2F1.1, cmt. n. 8, does not obviate  
24 the requirement to show that actual, defendant-caused loss occurred.  
25 Rather, the plain language of the Guidelines commentary merely  
26 indicates that, in arriving at the loss figure, some degree of uncertainty  
27 is tolerable. . . the Guidelines’ statement that the “estimate [of loss] ...  
may be based on the approximate number of victims and an estimate of  
the average loss to each victim,” U.S.S.G. § 2F1.1, cmt. n. 8,

28 <sup>9</sup> The Court in *Berger* analyzed loss under both the pre-2001 amendment to the fraud guidelines  
(Guideline section 2F1.1) and the post-2001 amendment (Guideline section 2B1.1).

1           *presupposes* that the court has already determined that some  
2 defendant-caused loss occurred. . . In sum, each of these possible  
3 methodologies assumes that some loss was proximately caused by the  
4 defendant, while recognizing that the amount of loss may not be easily  
measurable.

5 *Id.* at 1045-46 (emphasis in original). Thus, “actual, defendant-caused loss” is the  
6 standard this Court must employ in determining loss and the government’s theories gloss  
7 over this standard in multiple respects. To begin, although the government need not  
8 precisely identify each victim’s loss (*id.* at 1044), here it has not even identified the  
9 number of shareholders who sustained a legally cognizable “loss.” Instead, the  
10 government urges this Court to base its loss finding on the total number of Homestore  
11 shares outstanding (minus Mr. Wolff’s shares), *regardless of when those shareholders*  
12 *bought or sold their shares*. This approach is fatally flawed because: (1) a shareholder  
13 who purchased stock before the fraud period should not be counted for loss purposes;  
14 (2) shareholders who sold their stock *before the fraud was revealed* likewise should not  
15 be counted for loss purposes as, without the revelation of fraud, Homestore’s stock still  
16 dropped from \$34 per share to \$3.60 per share between April 25, 2001 (date the fraud  
17 began) and December 21, 2001 (date the fraud was revealed); and (3) *after* the fraud was  
18 disclosed, the government has not provided this Court with evidence to “disentangle the  
19 underlying value of the stock, inflation of that value due to the fraud, and . . . deflation of  
20 that value *due to unrelated causes*” (*Zolp*, 479 F.3d at 719).

21           The Ninth Circuit has implicitly rejected the government’s methodology here--  
22 taking the average price during the fraud, subtracting the share price after the fraud was  
23 disclosed, and multiplying that number by the outstanding Homestore shares (less those  
24 owned by Mr. Wolff). *Zolp*, 479 F.3d at 719. As the Ninth Circuit held:

25           Measurement of loss becomes considerably more complex, however,  
26 when the court confronts a ‘pump and dump’ scheme involving an  
27 otherwise legitimate company. In such a case, because the stock  
28 continues to have residual value after the fraudulent scheme is  
*revealed, the court may not assume that the loss inflicted equals the*  
*full pre-disclosure value of the stock; rather, the court must*  
*disentangle the underlying value of the stock, inflation of that value*

1           *due to the fraud, and either inflation or deflation of that value due to*  
 2           *unrelated causes.”)*

3 *Id.* (emphasis added).

4           The government’s reliance on *United States v. Bakhit*, 218 F.Supp.2d 1232 (C.D.  
 5 Cal. 2002) to support its “average victim loss theory” also is misplaced. While  
 6 superficially supporting this theory, *Bakhit* reveals a fundamental flaw in the  
 7 government’s analysis here. Specifically, in setting forth the average victim loss theory,  
 8 the *Bakhit* court explained that “[a]s all of the shares [subject to the average victim loss  
 9 analysis] were purchased during the life of the fraud, each one was subject to this  
 10 overvaluation and the subsequent loss.” *Id.* at 1242. Unlike *Bakhit*, here, the  
 11 government has introduced no evidence whatsoever that *any* of the 104,275,843 shares  
 12 allegedly at issue were purchased during the fraud period, much less which ones, which  
 13 is the government’s burden.<sup>10</sup> Thus, the government’s reliance on the Average Victim  
 14 Loss theory necessarily fails.

15           **B. Market Capitalization Theory.**

16           Alternatively, the government proposes a Market Capitalization theory, which  
 17 takes the Homestore stock price on December 21, 2001; subtracts either the stock price  
 18 when Homestore resumed trading on February 22, 2002 or when its corrected financial  
 19 statements were issued on April 1, 2002; and then multiplies the difference by the  
 20 number of outstanding shares. Under this approach, the government estimates loss at  
 21 either \$314 million or \$146 million.<sup>11</sup> Although, the Market Capitalization theory is an

22 \_\_\_\_\_  
 23 <sup>10</sup> The defense acknowledges that shares undoubtedly were purchased during the period of the fraud and  
 24 that there was loss in this case; however, the government has not carried its burden to demonstrate how  
 25 many such shares are at issue here. The following example proves this point. In Homestore’s April  
 26 2002 proxy statement, the Company confirmed that Cendent Corporation owned 19,756,303 shares of  
 Homestore stock, or approximately 16.3% of the company’s outstanding shares. Cendent acquired these  
 shares as part of the Move.com acquisition, which closed in February 2001--prior to the events in  
 question.

27 <sup>11</sup> The defense submits that the government has failed to sustain its burden to prove its Market  
 28 Capitalization theory. Nevertheless, if the Court would be inclined to adopt this theory, at a minimum it  
 should utilize January 7, 2002--the date Homestore’s shares first resumed trading--and the  
 corresponding closing price of 2.46 per share for a per share difference of \$1.14. See  
[http://www.nasdaq.com/Newsroom/news/pr2002/ne\\_section02\\_005.html](http://www.nasdaq.com/Newsroom/news/pr2002/ne_section02_005.html). The reported volume of

1 improved attempt to calculate aggregate loss linked to the fraud as required under *Berger*,  
2 the methodology by which the government purports to implement this theory suffers  
3 from the same infirmities discussed above: (i) there is no evidence as to how many  
4 shareholders sold how many shares after the fraud was revealed<sup>12</sup>; and (ii) there is no  
5 evidence to disentangle the underlying value of the stock from inflation due to fraud and  
6 deflation of that value due to other causes. Consequently, the defense and the Court have  
7 not been provided evidence or an economically sound basis on which to attribute all of  
8 the government's claimed drop in price to the matters at issue in this case.

9 That said, the defense does not argue that there was no loss in this case, but that we  
10 do not have the evidence to calculate it. Given the government's failure to prove loss by  
11 either clear and convincing or a preponderance of evidence, the defense suggests that the  
12 Court alternatively use Mr. Wolff's net "gain" as the estimate of loss, even though we  
13 recognize that "offender's gain from committing the fraud is an alternative estimate that  
14 ordinarily will underestimate the loss." U.S.S.G. § 2F1.1, cmt. n.9. Here, the PSR (at  
15 paragraph 68(a)) notes that Mr. Wolff "unlawfully sold a total of 283,000 shares of  
16 Homestore stock, resulting in a total *gross* profit of \$8,638,106." However, to be fair, the  
17 following must be netted out in order to calculate Mr. Wolff's actual "gain": (1) Mr.  
18 Wolff's basis for acquiring the shares at issue (\$15,848); (2) his transaction costs in  
19 selling the shares (\$21,420); and (3) taxes Mr. Wolff paid corresponding to those stock  
20 sales (\$2,370,205). Thus, Mr. Wolff's real "gain" was \$6,246,147. (*See* Group Ex. R  
21 (records detailing Mr. Wolff's basis, costs, and taxes on the stock sales at issue)). A  
22 finding of a gain of between \$5 and \$10 million would result in an increase of Mr.  
23 Wolff's offense level by 14, pursuant to U.S.S.G. § 2F1.1(b)(1)(O), which when  
24

25 trading that day was 15,900,700 shares. In addition, if the Court utilizes this theory, it should likewise  
26 reduce the number of shares by the number of other insiders who were, in essence, unindicted co-  
conspirators (including AOL and Cendant).

27 <sup>12</sup> The government's analysis under the Market Capitalization theory starts with the December 21, 2001  
28 price of \$3.60 per share. However, if a shareholder sold his/her shares after the fraud was revealed, for  
example on July 25, 2003 (\$3.70 share) or July 28, 2003 (\$3.88 share), there would be zero loss to that  
particular shareholder under this theory. (*See* Ex. Q for closing stock prices on those respective dates).

1 combined with the other enhancements, leaves Mr. Wolff with a total offense level of 26.  
 2 We have set forth above our arguments regarding the appropriateness of a three year  
 3 sentence, even in light of this base offense level.

4 One additional point bears mentioning. An analysis of Mr. Wolff's stock holdings  
 5 and subsequent sales in 2001 reveal that he did not personally engage in a so-called  
 6 "pump and dump" scheme. (*See* Ex. S (chart of insider stock sales admitted into  
 7 evidence as Exhibit 4229)). Below is a summary of those stock sales.

<b>Percentage of Stock Holdings Sold Through Q2-2001</b>	
Stuart Wolff	6%
Peter Tafeen	88%
Joseph Shew	65%
John Giesecke	88%

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 15 Thus, in stark contrast to his co-defendants, all of whom sold the vast majority of their  
 16 stock holdings during the period of the fraud, Mr. Wolff sold just 6% of his holdings.  
 17 Mr. Wolff's actions were consistent with the testimony of his stock broker, David  
 18 Goodenough, who testified that Mr. Wolff sold his Homestore stock *at Goodenough's*  
 19 *direction* as part of a diversification plan. (Trial Tr., June 7, 2006, at 196-203). Again,  
 20 without trying to minimize Mr. Wolff's conduct, the percentage of his stock sales (and  
 21 the external explanation for his decision to sell) puts Mr. Wolff's actions in a more  
 22 accurate context; a context inconsistent with someone engaging in a classic "pump and  
 23 dump" scheme.

24 **VII. Factor Six: Disparity With Similar Offenders**

25 18 U.S.C. 3553(a)(6) makes clear that a sentencing court should avoid  
 26 unwarranted sentencing disparities among similarly situated offenders. We appreciate  
 27 that it is tricky to try and compare one defendant with another, particularly in this case  
 28 where a number of offenders pled guilty to charges arising from the same subject matter

1 and cooperated with the government. But after factoring in a significant reduction in  
2 their prison time for their cooperation, Mr. Wolff's sentence should not be widely  
3 disparate from the sentences imposed on the three other high ranking executives integral  
4 to this revenue recognition scheme: Peter Tafeen, John Giesecke and Joseph Shew.  
5 Specifically:

6 **Peter Tafeen:** The government candidly acknowledged in the Indictment that  
7 Mr. Tafeen was the ring-master of the conspiracy, stating:

8 Defendant Tafeen introduced the concept of fraudulent roundtrip  
9 transactions at Homestore; supervised and gave directions to the  
10 Homestore employees who negotiated the fraudulent roundtrip  
11 transactions on behalf of the company; approved all of the agreements  
12 between Homestore and the vendors in the first leg of the fraudulent  
13 roundtrip transactions; personally participated in the negotiations  
14 between Homestore and some of the vendors that led to the secret,  
15 verbal side agreements between Homestore and the vendors that were  
16 part of the second leg of the fraudulent roundtrip transactions; and  
17 personally negotiated agreements between Homestore and some of the  
18 intermediaries, including AOL and Cendant, that were part of the third  
19 leg of the fraudulent roundtrip transactions. (Indictment, ¶ 41)

20 **John Giesecke:** In the Government's Sentencing Position relating to  
21 Mr. Giesecke, the government acknowledged that:

22 Giesecke participated in the process of setting Homestore's publicly  
23 announced revenue targets during 2001. In numerous meetings with  
24 his colleagues, Giesecke became aware that Homestore was likely to  
25 fall short of market expectations based on declining advertising sales.  
26 Giesecke discussed the plan to engage in the fraudulent roundtrip deals  
27 with Wolff, Tafeen, and Shew in numerous meetings throughout the  
28 year. Giesecke agreed with the others to implement the illegal deals.  
He also personally signed wire transfer requests enabling Homestore to  
spend millions of dollars on the transactions. After the end of each  
fiscal quarter, Giesecke participated in recorded conference calls with  
investors in which Wolff, Giesecke, and Shew lied about Homestore's  
financial results. (at 4-5).

\* \* \* \*

In short, Giesecke was in virtually the same position as CEO Wolff.  
(at 9).

1 **Joseph Shew:** The Government's Sentencing Position for Mr. Shew stated:

2 Shew was the Chief Financial Officer of Homestore and a key member  
3 of the company's control group. Shew was at the heart of the  
4 accounting fraud scheme. Shew directed the plan to inflate  
5 Homestore's revenues, hide the truth from the company's auditors, and  
6 lie to investors. The fraud scheme could not have succeeded for as  
7 long as it did without Shew's culpable participation. (at 1).

8 \* \* \* \*

9 Shew met with Tafeen in March 2001 to discuss inflating Homestore's  
10 revenue through the use of fraudulent roundtrip deals. Shew later  
11 discussed the deals with Wolff and Giesecke. When Homestore  
12 implemented the roundtrip deals during the first three quarters of 2001,  
13 Shew and his Finance Department were responsible for concealing the  
14 true nature of the deals from PWC. Shew also personally signed wire  
15 transfer requests enabling Homestore to spend millions of dollars on  
16 the transactions. After the end of each fiscal quarter, Shew  
17 participated in recorded conference calls with investors in which he,  
18 Wolff, and Giesecke lied about Homestore's financial results. Shew  
19 then signed Homestore's SEC filings that falsely reported inflated  
20 revenue for the company based of the roundtrip deals. (Pages 5-6).

21 As the government's own descriptions make clear, the three key cooperators  
22 critical to the revenue recognition scheme were in fact situated similarly to Mr. Wolff.  
23 Indeed, the government has stated that COO "Giesecke was in virtually the same position  
24 as CEO Wolff." The chart below details the sentences faced by each of the above  
25 individuals and the sentences they actually received after the Government's Motions for  
26 Downward Departures were granted:

27 <b>Name</b>	28 <b>P.O. Advisory Guidelines Level<sup>13</sup></b>	<b>P.O. Advisory Prison Range</b>	<b>5k 1.1 Filed</b>	<b>Sentence</b>
Peter Tafeen	29	87-108	Yes	27 months
John Giesecke	39	262-327	Yes	12 months/1 day
Joseph Shew	39	262-327	Yes	6 months

<sup>13</sup> "P.O." means Probation Officer.

1 We realize and accept that Mssrs. Tafeen, Giesecke, and Shew received  
2 consideration for cooperating with the government and testifying for the government at  
3 trial. We do not minimize that such cooperation is important to aid criminal  
4 investigations and that cooperators justifiably receive a more lenient sentence than those  
5 who later plead guilty, such as Mr. Wolff. In fact, we agree with the government that  
6 Mr. Wolff should serve a prison term longer than his co-conspirators. (Government  
7 Sentencing Memo. at 19). However, even factoring in cooperation credit, there should  
8 not be a tremendously wide disparity between Mr. Wolff's sentence and that of  
9 Mr. Giesecke (who, as the government acknowledged, was in the same position as  
10 Mr. Wolff to green-light the fraud); Mr. Tafeen (the admitted master-mind and architect  
11 of the scheme); and Mr. Shew (who the government acknowledges was the day-to-day  
12 implementer of the accounting fraud and underlying securities crimes that Mr. Wolff  
13 green-lighted, oversaw, and ratified). This is especially true because Mr. Wolff pled  
14 guilty before trial, after bona-fide motions involving PwC's misbehavior were aired and  
15 ruled on, negating a trial and/or the government's need to prepare for one. If this Court  
16 sentences Mr. Wolff to three years incarceration, that would be three times longer than  
17 Giesecke's sentence of twelve months; six times longer than Shew's sentence of six  
18 months; and thirty three percent more than Tafeen received as a sentence. We humbly  
19 and respectfully contend that a three year sentence for Mr. Wolff would be a  
20 proportionate and just result under every factor of Section 3553(a), but most particularly  
21 under this factor of avoiding unwarranted sentencing disparities.

22 **VIII. Factor Seven: Restitution and Fine<sup>14</sup>**



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**IX. Post Sentencing Issues**

**A. Medical Recommendation**

Mr. Wolff suffers from chronic sinusitis. (*See* PSR ¶ 130.) As a result, he has undergone at least three surgeries to deal with this condition. To help combat the effects of Mr. Wolff’s sinusitis, he uses on a daily basis a specialized treatment his doctor created for him several years ago. Per the recommendation of the probation officer, we request that the Court recommend that Mr. Wolff be allowed to continue with his daily treatment, as his sinus infections became much less frequent after he began using the regimen; indeed, Mr. Wolff did not have any sinus infections in 2006 until he was incarcerated at the Metropolitan Detention Center (“MDC”), where he was not provided with the medicine he needed for his prescribed, daily sinus treatment. Indeed, considering the issues Mr. Wolff had with his sinuses during the five weeks he was at the MDC, it is apparent this could be a real problem for Mr. Wolff if he does not receive the prescribed medicine he needs to treat this illness during incarceration. (*Id.*) It should be noted, though, that this medical condition is not so severe that it requires daily attention from medical personnel; as long as Mr. Wolff is allowed to have the prescribed medicine he needs to treat his sinusitis, this is a condition he can manage on his own, without the

1 need to be incarcerated at a facility with advanced medical services. We simply request  
2 that the Court so order. Mr. Wolff's physician also recommends, and the probation  
3 officer concurs, that Mr. Wolff have his PSA tested twice a year. This is a simple test  
4 that does not require advance medical services.

5 **B. Prison Facility Request**

6 Mr. Wolff respectfully requests that the Court recommend to the Bureau of Prisons  
7 ("BOP") that he be placed at FCI-Lompoc, California, at the satellite prison camp or at  
8 the lowest applicable security designation available at that facility. Alternatively,  
9 Mr. Wolff requests that the Court recommend to the BOP that he be placed at CI-Taft,  
10 California to serve his sentence in the lowest applicable security designation at that  
11 facility.

12 **X. Conclusion**

13 In any criminal case, it is difficult to convey to the Court the essence of the  
14 individual to be sentenced--his character, his accomplishments, his background, and the  
15 other factors that place the offense in the context of the defendant's entire life. There is  
16 no question Mr. Wolff made a terrible mistake nine years ago and this Court will punish  
17 him for that transgression. We believe and respectfully request that three years  
18 incarceration is sufficient, but not greater than necessary, to justly address Mr. Wolff's  
19 offense. Moreover, as reflected in all of the letters attached hereto, Mr. Wolff has been a  
20 wonderful father to his children, who will suffer the most from his absence over the next  
21 few years. As one court recently noted:

22 "But, surely, if ever a man is to receive credit for the good he has done,  
23 and his immediate misconduct assessed in the context of his overall  
24 life hitherto, it should be at the moment of his sentencing, when his  
25 very future hangs in the balance. This elementary principle of  
26 weighing the good with the bad, was plainly part of what Congress had  
27 in mind when it directed courts to consider, as a necessary sentencing  
28 factor, 'the history and characteristics of the defendant.'" *United States*  
*v. Adelson*, 441 F.Supp.2d 506, 513-14 (S.D.N.Y. 2006), *aff'd mem.*,  
301 Fed.Appx. 93 (2d Cir. 2008).

We respectfully urge the Court to impose a three year sentence in this matter.

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Respectfully submitted,  
GREENBERG TRAURIG, LLP

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