

1 ANDRÉ BIROTTE JR.
 United States Attorney
 2 CHRISTINE C. EWELL
 Assistant United States Attorney
 3 Chief, Criminal Division
 MICHAEL J. RAPHAEL (Cal. Bar # 208232)
 4 Assistant United States Attorney
 Chief, Appeals Section
 5 MICHAEL R. WILNER (Cal. Bar # 156592)
 Assistant United States Attorney
 6 Deputy Chief, Major Frauds Section
 1100 United States Courthouse
 7 312 North Spring Street
 Los Angeles, California 90012
 8 Telephone: (213) 894-3391/0687
 Facsimile: (213) 894-6269
 9 E-mail: michael.raphael@usdoj.gov
 michael.wilner@usdoj.gov
 10 Attorneys for Plaintiff
 United States of America

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

14 UNITED STATES OF AMERICA,) No. CR 05-398-GAF
 15)
 Plaintiff,) GOVERNMENT'S RESPONSE TO
 16) DEFENDANT'S SENTENCING POSITION
 v.)
 17)
 STUART H. WOLFF,) Sentencing Date: April 19, 2010
 18) Time: 1:30 p.m.
 Defendant.)
 19)
 20)

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 After reviewing defendant's sentencing filing, the
3 government reiterates its request for a 60-month sentence for
4 defendant Wolff. The government does not challenge the sincerity
5 of the moving letters submitted by Wolff's family and friends.
6 However, as to certain of the issues raised in defendant's
7 filing, the government offers the following brief responses.

8 **1. Loss Calculation**

9 Defendant quarrels with the methodology by which the
10 government and the Probation Office calculate the approximate
11 loss for sentencing purposes. While acknowledging that the loss
12 figures from any applicable method would likely lead to a
13 sentencing guideline range well over the statutory maximum, Wolff
14 argues that the government's analysis is "simplistic," fails to
15 identify the specific shareholders who lost money due to
16 defendant's confessed crime, and does not reflect an
17 "economically sound basis" linking the Homestore fraud to
18 shareholder losses. (Defendant's Sentencing Memorandum at
19 29-32.)

20 Defendant sets the sentencing bar unfeasibly and
21 unnecessarily high. The law does not require the government to
22 prove the precise loss that each shareholder incurred during the
23 period of the fraud. It is obviously not possible for the
24 government to interview all of the Homestore shareholders who
25 bought or held the company's stock during 2001 regarding the
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1 losses caused by the fraud scheme.¹ Indeed, the Ninth Circuit
2 rejected such a direct, causation-of-loss analysis in United
3 States v. Berger, 587 F.3d 1038 (9th Cir. 2009). In doing so,
4 the Court emphasized that the goal of sentencing is to calculate
5 a reasonable estimate of the loss at issue within the extremely
6 large bands under the guidelines. To do this, the loss
7 calculation in corporate fraud cases sensibly focuses on the
8 movement of a company's stock price in the face of market
9 reaction to fraudulent -- and then truthful -- information about
10 the issuer.

11 This concept is not difficult to apply in the case of
12 Homestore. During the spring and summer of 2001, Wolff and other
13 Homestore's executives lied to shareholders about the company's
14 revenue. Those lies fraudulently made the company look
15 successful in achieving publicly stated goals. The stock price
16 remained high. During the autumn of 2001, there was growing
17 concern that Homestore could not continue to hit its revenue
18 targets. The stock price fell, and fell further when the company
19 admitted that it missed its third quarter targets. There was no
20 suspicion of fraud, though, until December 2001. At that point,
21 trading of the stock was suspended. When Homestore published its
22 corrected, truthful financial statements in February 2002 --

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25 ¹ According to the company's press releases and other
26 public filings, Homestore stock was widely held by institutional
27 and individual investors. The stock was traded on the Nasdaq
28 National Market in 2001, which was the highest tier of that
exchange. Homestore was a member of the Russell 1000 stock index
and its stock was purchased by numerous mutual funds. Based on
publicly available trading information, approximately 360 million
shares changed hands during the April-December 2001 fraud period.

1 wiping out the phony results that Wolff fed to the market during
2 the previous year -- the stock price dropped yet again.

3 The government's reasonable estimate of the loss caused to
4 Homestore investors during that period is roughly \$1.6 billion.
5 The method used to make that calculation is economically sound
6 and has been endorsed by numerous courts. It is also well
7 corroborated by alternative loss calculations that, while more
8 favorable to Wolff at sentencing, all far exceed the highest
9 guideline enhancement in existence at the time of the crime.²
10 In evaluating a fraud scheme that nearly bankrupted a legitimate,
11 widely traded company, the government's methodology is accurate
12 and reliable at sentencing.

13 **2. Comparisons to Co-Defendants**

14 In arguing for the minimum sentence under the plea
15 agreement, Wolff compares himself to his former Homestore
16 colleagues and convicted co-conspirators. Two of those
17 comparisons are particularly inapt and unsupported factually.

18 First, Wolff argues that his relative role in the offense is
19 less than that of co-defendant Executive Vice President Peter
20

21 ² Defendant's claim that Homestore stock resumed trading
22 in January 2002 at a higher price (leading to a lower sentencing
23 loss figure) is literally true but extremely misleading.
24 (Defendant's Sentencing Memorandum at 31 n.11.) Those trades did
25 not occur on the Nasdaq market or during a period when Homestore
was listed on a national exchange. Rather, they appear to be
off-market trades required to be reported publicly.

26 Of crucial importance, the trades could not have been
27 based on accurate information regarding Homestore's finances;
28 that information wasn't available until the company filed its
restated financial results with the SEC in late February 2002.
There is no point in measuring the market's valuation of
Homestore until that corrected information was released.

1 Tafeen (whom defendant calls the "mastermind and architect" of
2 the fraud scheme) and CFO Joe Shew (called the "day-to-day
3 implementer" of the scheme), and equivalent to that of COO
4 John Giesecke (who "green-lighted" the scheme with Wolff).
5 (Defendant's Sentencing Memorandum at 28.) Wolff posits that his
6 pre-trial plea should put him on roughly the same footing as
7 those individuals for purposes of receiving a minimal sentence.

8 That analysis unfairly ignores the prompt guilty pleas and
9 acceptance of responsibility of Shew and Giesecke, and dismisses
10 the significance of the cooperation that all three executives
11 provided in the original trial of Wolff. Shew and Giesecke pled
12 guilty eight years ago, within a few months of the commencement
13 of the criminal investigation into Homestore. Wolff's last-
14 minute plea does not compare in any way to the situation of those
15 individuals. Additionally, the lenient sentences imposed on all
16 three cooperators were premised on favorable and substantial
17 government motions under USSG § 5K1.1 for the lengthy pre-trial
18 and trial assistance that Shew, Giesecke, and Tafeen provided
19 against Wolff and others. Wolff acknowledges that he provided no
20 such assistance nor did he plead guilty promptly, so he is not
21 similarly situated to those individuals and not entitled a
22 similar sentence here.

23 Secondly, Wolff persists in describing himself as having
24 sold a minimal percentage of his stock holdings. This implies
25 that Wolff's actions were less nefarious than other executives
26 who sold "the vast majority of their stock holdings."

27 (Defendant's Sentencing Memorandum at 33). In fact, Wolff
28 received far more stock options from Homestore than any other

1 executive. He also sold far more Homestore stock during the
2 fraud period than all of his co-conspirators, earning more
3 illegal profits for himself than any of the others received from
4 their sales.

5 The key difference between Wolff's stock position and that
6 of the other executives is that Wolff received a major loan from
7 Homestore as part of his compensation. That loan allowed Wolff
8 to convert his vested stock options into actual shares of stock.
9 This technique gave Wolff a considerable tax benefit (long term
10 capital gains) when it came time to sell his Homestore stock. It
11 also gave him a bigger supply of stock to sell than lower level
12 executives who simultaneously exercised their stock options and
13 sold stock periodically.³ There is little insight to be gained

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15 ³ As COO Giesecke explained at trial, he received a loan
16 of this type that was significantly smaller than the one that
17 Wolff received:

17 A. [P]rior to going public, substantially all of
18 Wolff's options were vested, and the company
19 provided him with a significant loan to exercise
20 all of his options into stock.

19 Q. Did you get those benefits? That is, the
20 accelerated vesting of your options and a loan to
21 convert the options into stock?

21 A. I was not -- none of my options were accelerated
22 in terms of vesting. I was provided a loan to
23 exercise a certain number of my options into
24 stock.

24 Q. What was the size of that loan?

25 A. I believe it was in the -- well, I don't recall
26 the exact amount.

26 Q. Was it more or less than Defendant Wolff's loan?

27 A. Substantially less.

28 (RT 4/11/06: 147).

1 for sentencing where CEO Wolff used the company's money to
2 convert all of his options to free-trading stock, yet the other
3 executives were not financially able to do so. In other words,
4 the "percentage of stock sold during the scheme v. total stock
5 holdings" that Wolff emphasizes in his chart is comparatively low
6 only because the amount of his stock holdings was skewed by his
7 favorable compensation package as Homestore's CEO. It says
8 nothing about his criminal intent or actions during the scheme.

9 **3. Restitution**

10 Wolff's attempt to play "Let's Make a Deal" on the
11 restitution issue is meritless. Wolff has consistently reported
12 assets to the government as a term of his 2006 post-trial release
13 that are millions of dollars greater than the \$8+ million that he
14 took from shareholders when he sold stock during the revenue
15 inflation scheme.

16 Now that the time for sentencing approaches, though,
17 defendant reports that these assets have shrunk in "liquidation
18 value." This includes a 20% decrease overnight in the reported
19 value of his home and a 60% decrease in the reported market value
20 of his hedge fund investments. Compare Defendant's Exhibit T at
21 pages 80-81 with pages 82-83.

22 Instead, Wolff simply makes up a \$5 million figure that he
23 is willing to pay in restitution over the course of time. He
24 couches this request in terms of fairness to his family and his
25 purported inability to pay full restitution. However, Wolff is
26 not entitled to negotiate the terms of his restitution order
27 here. As set forth in the government's original position,
28 restitution is mandatory here under 18 U.S.C. § 3663A for Wolff's

1 conspiracy conviction. His ability to pay is irrelevant to the
2 analysis and should be disregarded. The Court should enter the
3 full \$8 million restitution order as requested by the government
4 to compensate the victims of this offense.⁴

5 **4. Wolff's Lack of Acceptance of Responsibility**

6 In his sentencing papers, Wolff seeks to convince the Court
7 that he "is truly sorry for his actions, takes full
8 responsibility for his conduct," and "knows now that his actions
9 were and remain wrong." (Defendant's Sentencing Memorandum at 1,
10 11.) Defendant also takes umbrage with the government's
11 description of his guilty plea as "grudging."

12 On this issue, Wolff can only be judged by his own conduct,
13 not his attorney's well-crafted words. From 2002 through the
14 approach of the 2010 trial in this case, Wolff refused to admit
15 his involvement in the fraud scheme. Moreover, at his 2006 trial
16 -- long enough after the criminal events and his co-conspirators'
17 guilty pleas for Wolff to reflect on his situation -- Wolff
18 voluntarily took the witness stand on his own behalf.

19 He did not come close to accepting responsibility for the
20 fraud at his company. To the contrary, Wolff flat-out denied the
21 key events at which his colleagues and subordinates spoke with
22 him directly about the plot. While Wolff need not receive an
23 enhancement for obstruction of justice based on this testimony,

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25 ⁴ Wolff's comparisons to the restitution order for
26 co-defendant Tafeen are inapposite. Tafeen pled guilty to an
27 insider trading offense under Title 15 that was not subject to
28 mandatory restitution under 18 U.S.C. § 3663A. As such, the
government agreed to a lower restitution amount for Tafeen.
However, Tafeen faced a much higher maximum custody term on his
conviction (10 years in prison versus 5 years for Wolff's
conspiracy conviction) at sentencing than Wolff.

1 it should weigh heavily in the Court's decision as to whether
2 grant him the benefit of acceptance of responsibility at
3 sentencing. See, e.g., USSG § 3E1.1, com. n.1(h) (timeliness of
4 defendant's conduct in accepting responsibility is a relevant
5 factor).

6 For example, Tafeen testified that he described the
7 fraudulent roundtrip deals to Wolff in a blunt, direct manner
8 using a whiteboard in Wolff's office in the spring of 2001.
9 Wolff's testimony on that issue denied that such a discussion
10 ever happened:

11 Q. [P]rior to the telephone call on
12 April 25, 2001, what conversations,
13 if any, had you had with Peter
14 Tafeen about the first quarter AOL
15 transactions?

16 A. Nothing that comes to my
17 recollection. He had mentioned,
18 you know, that he had an AOL deal,
19 and I think that was it. No
20 details or anything to that effect.

21 Q. What, if anything, do you recall
22 about discussions in your office
23 and Mr. Tafeen using a white board?

24 A. I don't ever remember him using a
25 white board in the four or five
26 years that I knew him, frankly. So
27 I don't have any recollection of
28 that event.

(RT 6/19/06: 6.)

23 Similarly, Shew testified about several conversations with
24 Wolff during 2001 in which Shew discussed the fraudulent deals
25 with Wolff. Shew expressly stated told Wolff that Shew did not
26 want to sign Homestore's quarterly statements or lie to the
27 company's auditors any further. Wolff professed a different, far

1 deals throughout 2001. In his defense, Wolff denied ever even
2 hearing the deals described in shorthand:

3 Q. During 2001 or at least prior to
4 the middle of November 2001, do you
5 recall anyone using the term
6 "round-trip transactions?"

7 A. Never.

8 Q. Do you recall anybody using the
9 term "triangular transactions?"

10 A. No, sir.

11 Q. "Home run?"

12 A. Never.

13 (RT 6/19/06: 7).

14 Wolff's sworn testimony in 2006 is indicative of his
15 attitude since the discovery of the fraud at Homestore. Wolff
16 has continually denied involvement in the pervasive misconduct of
17 his key lieutenants and their subordinates. To the extent he
18 admitted knowing about aspects of the scandal, Wolff expressed
19 uncharacteristic befuddlement, confusion, or lack of insight.
20 Wolff's selective memory is thoroughly discredited by compelling
21 proof that he was, in fact, a key player in this significant
22 financial scandal. The government respectfully requests that the
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1 Court ignore Wolff's eve-of-sentencing claim that he has accepted
2 responsibility for his misconduct here.

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Dated: April 13, 2010

Respectfully submitted,

ANDRÉ BIROTTE JR.
United States Attorney

CHRISTINE C. EWELL
Assistant United States Attorney
Chief, Criminal Division

/s/ AUSA Wilner

MICHAEL J. RAPHAEL
MICHAEL R. WILNER
Assistant United States Attorneys

Attorneys for Plaintiff
United States of America