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14 **UNITED STATES DISTRICT COURT**
15 **CENTRAL DISTRICT OF CALIFORNIA**

16 UNITED STATES OF AMERICA,

17
18 Plaintiff,

19 vs.

20 STUART H. WOLFF,

21 Defendant.

CASE NO. CR-05-398 GAF

**DEFENDANT'S MOTION FOR
EVIDENTIARY HEARING;
MEMORANDUM OF POINTS AND
AUTHORITIES; DECLARATION OF
JOHN F. GIBBONS; AND EXHIBITS**

Hearing Date: December 7, 2009

Hearing Time: 1:30 p.m.

Trial Date: January 26, 2010

1 **MOTION FOR EVIDENTIARY HEARING**

2
3 Defendant Stuart H. Wolff (“Wolff”), by his attorneys Greenberg Traurig LLP,
4 respectfully requests an evidentiary hearing to determine the circumstances surrounding
5 Pricewaterhouse Cooper’s (“PwC”) material modification of various workpapers,
6 destruction and/or loss of highly relevant evidence, and recent false statements to the
7 Government about propriety and timing of these material workpaper modifications. In
8 support of this Motion, Wolff submits a Memorandum of Points and Authorities filed
9 contemporaneously herewith and states as follows:

10 1. The Indictment in this matter was returned by the Grand Jury and filed on
11 March 27, 2005, charging Wolff and a co-defendant with conspiracy, false statements in
12 public filings, falsification of corporate books and records, lying to accountants,
13 circumvention of internal accounting controls, and securities fraud. This case involves
14 and turns on allegations that Wolff and others engaged in a conspiracy to actively
15 conceal financial records and information from Homestore.com, Inc.’s (“Homestore”)
16 auditor, PwC. Thus, evidence documenting exactly what information was conveyed to
17 PwC and what PwC did or did not do with this information during the charged audit and
18 quarterly review periods is critical. As the outside auditor to a publicly traded company,
19 PwC was required by law to maintain a set of workpapers that specifically documented
20 what they knew and what work they did when they reviewed and signed off on the
21 revenue numbers at the heart of this case. PwC employees have long denied making any
22 substantive changes to its work papers, specifically and particularly after the
23 commencement of an internal investigation that commenced on November 14, 2001. In
24 addition, PwC has provided little or no explanation for the loss of voluminous evidence
25 that would shed light on the modifications that were in fact made to PwC’s workpapers.

26 2. After current counsel was retained and this Court authorized early return
27 subpoenas, the defense uncovered proof that: (i) PwC materially altered numerous
28 workpapers after the commencement of the Homestore internal investigation, including

1 key exhibits that the Government introduced into evidence in the first trial; and (ii) that
2 PwC's lead audit partner on the Homestore engagement, Richard Withey ("Withey"),
3 gave false testimony at the first trial in relation to those – and perhaps other –
4 modifications. Specifically, Withey testified that none of PwC's documents or
5 workpapers had been materially modified after Homestore's internal investigation began
6 and that he personally instructed and advised the PwC audit team that all existing
7 documentation had to remain precisely as it was.

8 3. In mid-July, 2009, the defense provided its proof to the Government so that
9 the Government could conduct its own independent investigation. The Government
10 thereafter re-interviewed Withey and other PwC personnel. PwC admitted for the first
11 time that Withey's trial testimony was "confused" and that various workpapers were
12 indeed modified after the commencement of the internal investigation. PwC and the
13 Government contend that PwC did nothing improper; that at the time of these
14 modifications, Homestore's counsel had frozen PwC out of its internal investigation and
15 PwC was completely unaware of the issues raised in the investigation. The defense can
16 prove that PwC's recent contentions are just as false as Withey's original trial testimony
17 and that PwC knew exactly what the issues were when it doctored and altered key pieces
18 of the Government's evidence. What the defense cannot know – because it cannot
19 compel answers from PwC without an evidentiary hearing – is what PwC's workpapers
20 originally documented that led PwC to violate professional standards by modifying some
21 of them and why so much evidence related to those modifications is now gone.

22 4. The accompanying Memorandum of Points and Authorities details the
23 factual background and timeline of this matter up to and including the Government's
24 most recent interviews of PwC employees (October 20, 2009). Specifically, the defense
25 can show that:

26 a. After the commencement of the internal investigation, PwC modified
27 its quarterly review workpapers for 2001 and audit workpapers for Homestore's 2000
28

1 Form 10K without any justifiable reason or indication that it had done so (indeed, many
2 of these workpapers were actually back-dated);

3 b. PwC failed to obtain signed management representation letters prior
4 to filing quarterly reports with the SEC and then falsified its workpapers to conceal these
5 facts (PwC's receipt of contemporaneously signed representation letters is specifically
6 charged in the Indictment and was the subject of extensive testimony in the first trial);

7 c. A massive amount of PwC documents are missing, including a vast
8 number of PwC's 2000-2001 email communications, external binders, and facsimile
9 communications that would have shed light on the pre-modification content of critical
10 workpapers;

11 d. PwC actively participated with Homestore's original outside counsel,
12 Fenwick & West ("Fenwick"), in its internal investigation and as a result of its
13 participation, PwC received key information from Fenwick in relation to the issues in this
14 case (directly contrary to Withey's (and other PwC auditors') 2009 statements to the FBI
15 and U.S. Attorneys Office); and,

16 e. PwC's modifications and attempts to rewrite their actual interactions
17 with Homestore during the prior quarterly reviews and audit follow a pattern that is
18 consistent with when PwC learned what the key issues were in the investigation.

19 5. An evidentiary hearing should be granted if the defendant can show that
20 material facts were in doubt or dispute. *See, e.g., U.S. v. Batiste*, 868 F.2d 1089, 1091-92
21 (9th Cir. 1989) ("The district court may elect to put the government to its proof at an
22 evidentiary hearing even where, as here, no material facts stated in its papers are in
23 dispute."); *see also U.S. v. Panitz*, 907 F.2d 1267, 1273 (1st Cir. 1990) ("The test for
24 granting an evidentiary hearing in a criminal case should be substantive: did the
25 defendant make a sufficient threshold showing that material facts were in doubt or
26 dispute?"). The defense, as detailed in the attached Memorandum of Points and
27 Authorities, has sufficiently shown that there are disputed material facts that need to be
28 resolved in a pre-trial evidentiary hearing. The case cannot be defended without

1 resolving the extent to which and the circumstances related to PwC's substantial
2 tampering and distortion of the evidentiary record while acting in the dual roles of both
3 outside auditor and investigator. At present, PwC and the Government contend nothing
4 improper occurred, a position categorically rejected by the defense and belied by the
5 documentary evidence attached to this Motion.

6 Accordingly, the defense requests an evidentiary hearing to determine, among
7 other things: (a) what workpapers were modified and why; (b) why PwC provided false
8 testimony and statements to the Government with respect to the modifications, including
9 false claims that it had been excluded from the internal investigation, and any
10 information about it, by Homestore's initial outside counsel; (c) why so much critical
11 evidence in areas likely to contain exculpatory material has conveniently vanished; (d)
12 why these materials were not produced to the SEC when it subpoenaed them in 2002; and
13 (e) why PwC failed to retain these files and records although litigation has been
14 continuously underway since January 2002 and PwC's own document retention
15 guidelines demand their retention. Without an evidentiary hearing narrowly tailored to
16 answer these questions, the defense will be severely prejudiced and unable to adequately
17 prepare for trial or analyze the need for other motions.

1 CONCLUSION

2 For all the foregoing reasons, Defendant Stuart H. Wolff respectfully requests that
3 the Court set an evidentiary hearing for a date mutually agreeable to the parties and the
4 Court in order to determine the extent and circumstances surrounding Pricewaterhouse
5 Cooper's material modification, destruction and/or loss of highly relevant evidence, and
6 statements relating thereto.

7
8 Dated: October 23, 2009

Respectfully submitted,

9 STUART H. WOLFF

10
11 /s/ John F. Gibbons
12 John F. Gibbons

13 /s/ Daniel D. Rubinstein
14 Daniel D. Rubinstein

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Defendant Stuart H. Wolff (“Wolff”) requests an evidentiary hearing to determine:
4 (i) the circumstances surrounding PricewaterhouseCoopers’s (“PwC”) material
5 modification of critical documents and workpapers (core evidence in this case) after the
6 commencement of Homestore.com, Inc.’s (“Homestore”) internal investigation; (ii)
7 PwC’s purposeful destruction and inexcusable loss of an unusually large quantity of
8 crucial and highly relevant evidence; and, (iii) the falsity of PwC’s recent statements to
9 the Government about the scope and timing of those modifications. The Government has
10 disputed the material facts detailed below and an evidentiary hearing is needed to
11 determine the truth about what really transpired.

12 The tampered and missing evidence is crucial to the defense of this case. The
13 Government indicted Wolff on a series of charges that rest, at their core, on the
14 proposition that he schemed to mislead and withhold evidence from Homestore’s outside
15 auditor PwC in order to fraudulently inflate its revenue numbers.¹ PwC reviewed and
16 signed off on those revenue numbers and the Indictment charges it would not have
17 allowed Homestore to record revenue from the transactions at issue but for this
18 concealment.² Therefore, knowing what information Homestore employees conveyed to
19 PwC and what PwC did or did not do with that information is critical. As outside auditor
20 for a publicly traded company, PwC was legally required to maintain a set of workpapers
21 that specifically documented what it knew and the work it performed for Homestore.³
22 Those workpapers should unambiguously reflect (or refute) the core scheme alleged in
23

24 ¹ Declaration of John F. Gibbons, Oct. 23, 2009, attached hereto as Ex. A, Ex. 1 thereto (Indictment).
25 PwC is mentioned eighty-two times in the Indictment. Lying to PwC is charged: (i) as an object of the
conspiracy (*id.*, at ¶ 44d) and (ii) substantively in Counts Ten – Fourteen. *Id.*, at ¶¶ 173-74.

26 ² *Id.*, at ¶ 38 (Indictment).

27 ³ Ex. A, Ex 2 thereto, § 339 (American Institute of Certified Public Accountants Professional Standards
28 (2001)).

1 the Indictment. In the first trial, the Government introduced seven of PwC's workpapers
2 into evidence and solicited detailed testimony as to their content and significance from
3 PwC lead audit partner Richard Withey ("Withey"). As Withey's testimony confirmed,
4 the very purpose of PwC's workpapers – and their importance here – is, "[s]o that
5 somebody could – so that there is a record of the work performed that somebody could
6 go back and see what we did."⁴ That is precisely what the defense wants to do – go back
7 and see what PwC did – and fundamental fairness and due process require that it be
8 afforded a fair opportunity to do so. As outlined below, PwC's tampering and
9 modifications now make that impossible.

10 PwC has long denied making any substantive changes to its workpapers and has
11 provided little or no explanation for its loss of voluminous relevant evidence. At Wolff's
12 first trial, Withey unequivocally testified that *none* of PwC's documents or workpapers
13 had been materially modified after Homestore's internal investigation began and that he
14 personally specifically instructed and advised members of the PwC audit team that all
15 existing documentation had to remain precisely as it was.⁵ Withey's statements were
16 false. Over the last year, the current defense team assembled proof that PwC had
17 materially altered numerous workpapers after the commencement of the internal
18 investigation, including key exhibits that the Government had introduced into evidence in
19 the first trial.⁶

20 In mid-July 2009, the defense provided that evidence to the Government so that it
21 could conduct its own independent investigation. As a result, the Government re-
22 interviewed Withey and other PwC personnel. When confronted with the evidence the
23 defense had compiled, PwC conceded that Withey's trial testimony was wrong and that
24 various PwC workpapers were in fact modified in November and December 2001 (after

25 ⁴ *Id.*, Ex. 3 thereto, at 163 (Withey Trial Tr., June 2, 2006).

26 ⁵ *Id.*, Ex. 4 thereto, at 39-40 (Withey Trial Tr., June 6, 2006).

27 ⁶ All seven of the PwC workpapers introduced into evidence were last modified after the
28 commencement of the internal investigation.

1 the commencement of Homestore’s internal investigation). Forced to abruptly change
2 course, PwC and the Government now take the position that PwC’s modifications were
3 not improper because they occurred at a time when PwC had virtually no knowledge of
4 the facts and allegations being explored in the internal investigation and was being
5 frozen out of that investigation by Homestore’s outside attorneys Fenwick & West
6 (“Fenwick”).⁷ In a nutshell, PwC and the Government contend that even if the defense is
7 correct and PwC had wanted to modify its workpapers to protect itself and point the
8 finger elsewhere, it would not have known what to change.

9 The Government and PwC have taken a quantum leap from the frying pan into the
10 fire. The defense can establish that PwC’s recent explanations are just as false as
11 Withey’s original trial testimony, *i.e.* that at the time PwC materially modified its work
12 papers (thus altering key pieces of the Government’s evidence), PwC was aware of the
13 substantive issues and an active participant along with Fenwick in the internal
14 investigation. The defense can also show that PwC’s modifications follow a clear pattern
15 and are consistently tied to PwC learning what transactions were key in the investigation,
16 especially when that learning related to what management had or had not told PwC in
17 relation to costs associated with revenues. What the defense does not and cannot know –
18 because it cannot compel an explanation without this Court’s assistance – is (i) what did
19 PwC’s workpapers originally document that made PwC willing to violate professional
20 and legal standards by modifying them;⁸ (ii) why did so much of the support materials

21
22 ⁷ *Id.*, Ex. 5 thereto, at 1 (FBI Report of Interview of Robert Page, Sept. 17, 2009) (“Page was first
23 included in interviews of Homestore personel in connection with the company’s internal investigation at
24 the request of the Cahill Gordon firm. Prior to that time, *personnel from PwC were not allowed to*
25 *interact with Fenwick personnel regarding the work Fenwick was doing.*”) (emphasis added); Ex. 6 at 2
26 (FBI Report of Interview of Richard Withey, Sept. 17, 2009) (“*Fenwick & West was engaged by*
27 *Homestore, but this engagement was on a privileged basis so Fenwick personnel could not discuss the*
matter with PwC personnel.”) (emphasis added); and Ex. 7 (email from AUSA Wilner to John Gibbons,
Oct. 21, 2009) (“[Mary Rose of PwC] stated that *she did not become aware of the roundtrip nature of*
the improper Homestore deals until after New Year’s 2002. She was not involved in the company’s
investigation into misconduct at Homestore during November/ December 2001”) (emphasis added).

28 ⁸ *Id.*, Ex. 2 thereto, § 339 (American Institute of Certified Public Accountants Professional Standards
(2001)).

1 and documentation related to PwC's modified workpapers mysteriously vanish; and (iii)
2 why did PwC fail to retain those files and records when litigation has been continuously
3 underway since January 2002 and their own document retention guidelines demanded
4 it?⁹ In short, the evidentiary record has been heavily tampered with and the current
5 playing field is so uneven it is unplayable. Without an evidentiary hearing narrowly
6 tailored to provide answers to these questions, the defense cannot properly analyze either
7 the need for or the propriety of additional pre-trial motions, nor can it adequately prepare
8 for trial.

9 **II. FACTUAL BACKGROUND**

10 The following timeline puts into context the necessity of the relief the defense now
11 seeks.

12 • **2000 – 2001**: During 2000 and the first three quarters of 2001, Homestore
13 was a public company that was required to issue financial statements (that included
14 revenue numbers) at the end of each quarter and at the end of each fiscal year. As a
15 public company, Homestore was required to have its financial statements, including its
16 quarterly revenue numbers, reviewed by an outside auditor. PwC was Homestore's
17 outside auditor during this time period and provided these review services as well as
18 extensive consulting/business advice to Homestore.¹⁰ As part of PwC's quarterly
19 reviews and annual audits, it regularly reviewed Homestore's books and records,
20 discussed specific business transactions with Homestore executives, and assisted
21 Homestore in preparing its quarterly 10Q filings with the SEC.¹¹ In the performance of
22 its audit and review services to Homestore, and as required by General Accepted
23

24 ⁹ *Id.*, Ex. 8 thereto (PwC's Retention of Firm Documents, Apr. 12, 2001, specifically mandating that all
25 documents that support PwC's professional work, including those kept in electronic medium, be
26 retained for six years).

27 ¹⁰ *Id.*, Ex. 9 thereto, at 127-128 (Withey Trial Tr., June 2, 2006).

28 ¹¹ *Id.*, Ex. 1 thereto, at ¶ 24 (Indictment).

1 Accounting Standards (“GAAS”), PwC created a variety of documents that can generally
2 be described as its audit and quarterly review “workpapers,” which were meant to be the
3 principle record of its work.¹² These workpapers include audit programs, analysis,
4 memoranda, letters of confirmation and representation, abstracts of company documents,
5 and schedules or commentaries prepared or obtained by the auditor.¹³ Many of these
6 documents were electronically linked to each other in PwC’s internal computer system,
7 known as the “Team Asset Database”, and others were paper based external files. Each
8 quarterly review had its own set of workpapers, clearly marked as belonging to that
9 particular quarter’s review, so that PwC could provide evidentiary support for what it
10 knew and had done at the time it reviewed Homestore’s quarterly financial statements,
11 including its revenue numbers. As this case turns on allegations that Wolff and others
12 engaged in a conspiracy to actively conceal financial records and information from PwC,
13 evidence documenting exactly what information was known to PwC and what PwC did
14 or did not do with this information during the audit and quarterly reviews is critical.

15 • **November 14, 2001:** Homestore’s Audit Committee commenced an
16 internal investigation into potential accounting improprieties. Initially, Fenwick, the
17 company’s outside counsel, led this investigation. One month later, on December 14,
18 2001, independent counsel Cahill, Gordon & Reindel (“Cahill”) replaced Fenwick.¹⁴

19 • **November – December 2001:** Contrary to the story PwC recently told the
20 Government,¹⁵ during this time period, PwC personnel not only interacted and
21 communicated with Fenwick personnel about the internal investigation, PwC actively
22 assisted Fenwick in securing key information from Homestore, including the collection

23 _____
24 ¹² *Id.*, Ex. 2 thereto, § 339.03 (American Institute of Certified Public Accountants Professional
Standards (2001)).

25 ¹³ *Id.*

26 ¹⁴ Ex. A, Ex. 10 thereto, at 1-6 (Investigation Report of the Audit Committee of Homestore.com, Inc.).

27 ¹⁵ *Id.*, Ex. 5 thereto (FBI Report of Interview with Robert Page, Sept. 17, 2009) and Ex. 6 thereto, at 2
28 (FBI Report of Interview of Richard Withey, Sept. 17, 2009).

1 and analysis of Homestore's email and laptop records.¹⁶ Critically, on December 6,
2 2001, Fenwick attorneys sent PwC (including Withey) various Homestore spreadsheets
3 "just received" from a top Homestore Executive -- Sophia Losh -- (the "Losh
4 Spreadsheets") that summarized many of the three party or triangular transactions at the
5 heart of the investigation.¹⁷ As Cahill later described the Losh Spreadsheets to
6 Homestore's Audit Committee:

7 Sofia Losh was the author of the now famous AOL spreadsheet that clearly
8 indicates the "triangle" nature of various AOL deals. More particularly, the
9 schedule demonstrates that HOMS' purchases of products and services from
10 various vendors who in turn purchased media from AOL were explicitly
11 linked to revenue received through AOL's referral to HOMS of media
12 buyers.¹⁸

13 Indeed, Fenwick made sure that PwC and Withey had the Losh Spreadsheets in their
14 possession when PwC interviewed CFO Joe Shew ("Shew") on December 6, 2001 and
15 Sophia Losh on December 11, 2001.¹⁹

16 Thus, Withey's latest statement to the Government that "PwC was specifically
17 excluded from the investigation and any information about it until after Cahill was
18 engaged"²⁰ is patently false. Equally false is Withey's statement that he first gained
19 "clarity into the triangle deal structure at issue in January or February, 2002, when shown
20

21
22 ¹⁶ *Id.*, Group. Ex. 11 thereto (collection of email and laptop records evidencing PwC's assistance to
Fenwick in securing information from Homestore).

23 ¹⁷ *Id.*, Group Ex. 12 thereto (email from Bradford Lewis (Fenwick) to Withey attaching the Losh
24 Spreadsheets, Dec. 6, 2001).

25 ¹⁸ *Id.*, Ex. 13 thereto, at 3 (memorandum from Adam Zurofsky (Cahill) to the Homestore Audit
26 Committee regarding recommendations for disciplinary action, Dec. 31, 2001).

27 ¹⁹ *Id.*, Ex. 14 thereto (10A Investigation Work Program).

28 ²⁰ *Id.* Ex. 6, at 2 (FBI Report of Interview of Withey, Sept. 17, 2009)

1 a list of advertising referral companies.”²¹ The truth is that Fenwick discussed the
2 triangle deal structure information with Withey (and rushed the Losh Spreadsheets over
3 to him) on December 6, 2001. Those Spreadsheets explicitly laid out for Withey both the
4 essentials of these multi-party transactions and the advertising referral companies
5 involved.²² As set forth below, many of the modifications PwC made to key work papers
6 occurred during the weekend of December 8-9, 2001. Thus, it is not by accident that
7 Withey and PwC now deny receiving any key information until well after December 14,
8 2001, when Cahill was retained. PwC’s latest denial is a calculated falsehood. There is
9 overwhelming evidence that by December 6, 2001, *i.e.*, prior to PwC’s flurry of
10 modifications on December 8th and 9th, PwC and Withey had the Losh Spreadsheets in
11 hand and knew exactly what issues the Fenwick investigators were focusing on and, *ipso*
12 *facto*, precisely what to go back and modify in their previously written work papers.

13 • **Early December 2001:** In early December, 2001, PwC commenced a
14 Section 10A investigation.²³ As part of its 10A investigation, PwC began interviewing
15 various executives in Homestore’s Finance, Strategic Alliance (“SAG” responsible for
16 sales), and Legal departments without the presence of either outside counsel or an Audit
17 Committee member.²⁴ Significantly, prior to the weekend of December 8-9, 2001, PwC
18 interviewed at least three finance executives knowledgeable about the Losh Spreadsheets
19 and triangle deal structure, including CFO and later government cooperator Shew.²⁵

21 ²¹ *Id.*

22 ²² Ex. A, Group Ex. 12 thereto (the two Losh Spreadsheets titled “AOL Advertising Scenarios [#1 and
23 #2]” and “Q2 summary”).

24 ²³ Section 10A of the Securities Exchange Act of 1934 mandates that when an auditor becomes aware of
25 possible illegal acts, the auditor must determine whether it is likely that such illegal acts occurred. 15
U.S.C. § 78j-1.

26 ²⁴ Ex. A, Ex. 15 thereto (PwC Expanded Audit Procedures, Jan. 15, 2002); Ex. 14 thereto (10A
27 Investigation Work Program).

28 ²⁵ *Id.*, Ex. 14 thereto (10A Investigation Work Program).

1 Indeed, PwC’s contemporaneous notes of its December 3, 2001, interview of Clayton
2 Chan (sales) and its December 4 and 6, 2001, interviews with Shew confirm that the
3 triangle deals outlined in the Losh Spreadsheets were actually discussed in those
4 interviews.²⁶ All of this evidence renders Withey’s recent assertions, that PwC was
5 “specifically excluded from the investigation and any information about it” and Rose’s
6 contention days ago that “she did not become aware of the roundtrip nature of the
7 improper Homestore deals until after New Year’s 2002,” indefensible.²⁷

8 • **Mid-December 2001:** Homestore’s new counsel Cahill notified the
9 Government about potential accounting irregularities.²⁸ Later, the internal investigation
10 team, with assistance from PwC, provided the Government with select documents and a
11 report that serve as the basis for the charges in this case.²⁹ At the first trial in this matter,
12 the Government relied entirely upon *paper* printouts of PwC’s “workpapers” to
13 corroborate cooperator testimony that Homestore employees made knowingly false
14 statements to PwC.³⁰ Since that trial, and as the result of the early return subpoenas
15 authorized by this Court, the defense obtained – for the very first time – electronic
16 versions of these paper documents and a very limited set of electronic PwC emails,
17 complete with integrated links, attachments, and edit histories. These electronic records
18 have enabled current defense counsel to organize, analyze, and establish a clear pattern of
19 modifications to various critical workpapers and to confirm the loss of supporting
20 documentation related to both Homestore’s 2001 quarterly reviews and its 2000 year end
21 audit. (*See* Section III(B) and (C), *infra*.)

22 _____
23 ²⁶ *Id.*, Ex. 16 thereto (an excerpt of PwC’s handwritten investigation interview notes).

24 ²⁷ *Id.*, Ex. 5 thereto, at 2 and Ex. 7.

25 ²⁸ *Id.*, Ex. 10 thereto, at 3 (Investigation Report of the Audit Committee of Homestore.com, Inc.).

26 ²⁹ *Id.*, at 42-43.

27 ³⁰ Ex. A, Ex. 17 thereto (email from AUSA Wilner to Wolff’s prior counsel, Aug. 18, 2008) (“All of the
28 workpapers that were introduced into evidence during the first trial were obtained from the PwC hard
copy production to the SEC.”).

1 • **January 16, 2002:** PwC’s Office of General Counsel sent email
2 instructions that “all existing documentation should remain precisely as it is... Now that
3 we [PwC] have been named in a lawsuit, I wanted to emphasize that all documents
4 (related to audits, reviews, investigations, and other work for Homestore), must be
5 preserved in their current form and not modified.... All versions of all documents in any
6 form, hard copy or electronic, including workpapers, emails, and desk files. I wanted to
7 make sure to put everyone on notice to use special care to preserve the documents as they
8 exist now.”³¹ Thus, consistent with Withey’s trial testimony, PwC’s Office of General
9 Counsel knew that freezing the integrity of PwC’s contemporaneous documents and
10 workpapers was of utmost importance and would be critical in establishing what PwC
11 knew about the subject transactions during the time period covered by the Indictment.
12 Conversely, PwC knew that documents materially modified or destroyed after the
13 Homestore investigation had commenced would necessarily call into question the
14 legitimacy of all PwC’s workpapers, especially in relation to the historical record.
15 Indeed, given PwC’s stature as a sophisticated litigation-savvy accounting giant, it is
16 reasonable to presume that both the giving of and the complying with such instructions to
17 preserve documents without modification was, and continues to be, a routine customary
18 business practice at PwC.

19 • **January 25, 2002:** PwC’s outside counsel, Gibson, Dunn & Crutcher
20 (“Gibson, Dunn”), hand-delivered a letter to the SEC enclosing copies of various
21 communications from PwC’s Office of General Counsel directing PwC employees and
22 staff members to retain documents pertaining to Homestore as previously requested by
23 the SEC.³² Significantly, this letter (which pre-dates the SEC’s first subpoena to PwC)
24 was provided at the SEC’s request and confirms that the SEC recognized the urgent need
25

26 ³¹ *Id.*, Ex. 18 thereto (Hilary Krane email, Jan. 16, 2002).

27 ³² *Id.*, Ex. 19 thereto (Gibson, Dunn letter, Jan. 25, 2002 producing document retention emails from
28 PwC’s Office of the General Counsel).

1 for assurances from PwC that none of its documents would be modified or disappear
2 while the Government prepared its subpoenas in the case.

3 • **January 28, 2002:** The SEC served its first subpoena on PwC.³³ As the
4 subpoena reflects, the SEC was very knowledgeable about the types of documents
5 needed in order to understand what had occurred; thus, it requested PwC’s workpapers
6 (including the electronic versions stored in the Team Asset Database) and associated
7 support materials including e-mails, faxes, schedules, analyses, correspondence, desk
8 files, memoranda, notes, spreadsheets, presentations, consulting billing records, the
9 identity of all PwC personnel who had performed any work concerning Homestore, and
10 the identity of those persons with “editor rights” to the Team Asset database and/or the
11 authority to hard delete items in it.

12 • **February 2002:** Pursuant to the above-referenced subpoena, PwC produced
13 various hard copy and electronic records to the SEC. A February 7, 2002 production
14 letter confirms that PwC agreed to produce electronic versions of its 2000 and 2001
15 “snapshot” Team Asset audit workpapers the following day and to produce “all desk files
16 and e-mails and all other electronic information from individual computers” thereafter at
17 the end of the Homestore audit.³⁴ The next day, February 8, 2002, PwC did produce a
18 “snapshot” of its 2001 audit workpapers; however this was a *post*-investigation snapshot.
19 PwC did not produce the promised “snapshot” of its 2000 audit workpapers at that
20 time.³⁵

21
22
23 _____
³³ *Id.*, Ex. 20 thereto (SEC subpoena to PwC, Jan. 28, 2002).

24 ³⁴ *Id.*, Ex. 21 thereto (Gibson, Dunn letter to SEC, Feb. 7, 2002). A “snapshot” of workpapers permits
25 parties to review the workpapers as they existed on the date the snapshot was taken, whether in draft or
26 final form. Multiple “snapshots” can exist on any given day because individual employees may save
27 drafts on their laptop hard drives in addition to the final versions saved on the company’s system. The
defense is unsure which 2001 “snapshot” PwC sent to the SEC in February 2002.

28 ³⁵ *Id.*, Ex. 22 thereto (Gibson, Dunn letter to SEC, Feb. 8, 2002).

1 • **May 20, 2002:** Three months later, PwC produced electronic and hardcopy
2 versions of a “snapshot” of its year-end 2000 audit workpapers “which were recovered
3 from PwC’s back-up servers.”³⁶ PwC’s production letter offered no explanation for why
4 this 2000 “snapshot” had not been produced in February as promised. This production
5 letter confirms both PwC’s understanding of the importance of its back-up servers in this
6 litigation and its ability to retrieve relevant evidence from them. Only recently (in May
7 of 2009), the defense was advised, for the first time, that these PwC back-up tapes no
8 longer exist and, accordingly, it is now impossible to restore any other PwC “snapshots”
9 taken during the critical time period.³⁷

10 • **Spring/Summer 2002:** PwC began accumulating e-mails, electronic files,
11 and external files that its individual audit team members had in relation to Homestore’s
12 2000 and 2001 audits.³⁸ Shockingly, PwC allowed each Homestore audit team member
13 to conduct their own individual document review and cull their own files (electronic and
14 hard copy) for relevant documents. This unregulated employee-controlled approach to
15 an investigation was in sharp contrast to the investigative approach PwC had adopted in
16 the Homestore internal investigation less than six months earlier; there, PwC had
17 employed a systematic keyword search approach to collect and analyze Homestore
18 emails generated from back-up tape restorations and laptops.³⁹ Yet, for the collection of

19 _____
20 ³⁶ *Id.*, Ex. 23 thereto (Gibson, Dunn letter to SEC, May 20, 2002).

21 ³⁷ *Id.*, Ex.’s 24 and 25 thereto (Greenberg Traurig - Gibson Dunn correspondence, May 29, 2009 and
22 June 9, 2009, respectively). PwC explained that its normal back up procedure was to maintain monthly
23 “snapshots” of all its computer records for a one-year period of time. (*Id.*) After a year elapsed, each
24 monthly snapshot would roll-off the back-up server. (*Id.*) Clearly, the SEC’s subpoena and PwC’s
25 internal document holds should have prevented the loss of PwC’s back-up tapes. When PwC’s normal
26 back up procedure is coupled with its reasonably presumed practice not to destroy documents when
27 litigation is imminent much less on-going, the explanation that these back-up tapes were lost simply
28 because the responsible personnel (apparently multiple employees) did not get the memo is highly
suspect.

³⁸ *Id.*, Ex. 26 thereto (Robert Page email, Apr. 23, 2002, produced to the defense for the first time in
Sept. 2008).

³⁹ *Id.*, Ex. 27 thereto (Memorandum by Ben Hodges to File, Mar. 5, 2002).

1 its own emails, PwC used no back-up tape restorations or laptop restorations whatsoever
2 and no systematic keyword searches were performed by outside counsel or anyone else
3 not personally involved in the matters under investigation. Instead, each PwC audit team
4 member was directed to “forward each e-mail separately” – one by one – to a designated
5 mail-box.⁴⁰ As the defense now has learned, the PwC employee managing this
6 designated mail-box, Robert Page (“Page”), was one of the PwC employees who
7 materially modified documents after the commencement of Homestore’s internal
8 investigation. (Section III(A), *infra*.)

9 Not surprisingly, there are gaping holes in the e-mails that PwC has produced,
10 particularly in critical areas related to the modified workpapers.⁴¹ In addition, as detailed
11 in Section III(C), *infra*, the defense now can prove that PwC never produced certain
12 emails by and amongst the PwC auditors. Most disturbingly, PwC’s back-up tapes – the
13 very tapes from which PwC had retrieved the “snapshot” it provided to the SEC on May
14 20, 2002 – could have been, but were not, used to generate a comprehensive set of PwC
15 emails. As noted above, PwC’s counsel now advises that these back-up tapes no longer
16 exist and, thus, it is no longer possible to obtain a complete set of PwC’s pertinent e-
17 mails.⁴²

18 • **March 27, 2005**: The Grand Jury returned the Indictment on March 27,
19 2005. The Government indicted Wolff on a series of charges that rest, at their core, on
20 the proposition that he schemed to mislead and to withhold evidence from PwC in order
21 to fraudulently inflate revenue numbers. Specifically, the Indictment charges in
22 Paragraph 38:

23 _____
24 ⁴⁰ *Id.*, Ex. 26 thereto (Robert Page email, Apr. 23, 2002).

25 ⁴¹ *Id.* PwC did not directly produce emails for staff members (such as Katherine Graham) who had
26 worked on the Homestore account, but had left the company prior to April 2002, because they were not
27 present to self-select their own emails. Graham was identified by PwC to the SEC as a core member of
the Homestore audit team. *Id.*, Ex 28 thereto (Gibson, Dunn Letter to the SEC, May 3, 2002).

28 ⁴² *Id.*, Ex. 25 thereto (Gibson, Dunn letter, June 9, 2009).

1 Defendants Wolff and Tafeen, co-conspirators Giesecke and Shew, knew
2 that Homestore's outside auditor, PwC, would not allow Homestore to
3 record revenue from the fraudulent roundtrip transactions if PwC knew the
4 true, circular nature of these transactions. Homestore employees engaged in
5 various fraudulent acts to conceal and disguise the true nature of the
6 fraudulent roundtrip transactions from PwC....⁴³

7 To that end, the Government's central theme at the first trial was the purported
8 concealment of material facts and documents from PwC and Wolff's knowledge that
9 PwC would purportedly not allow these circular transactions. In the upcoming trial,
10 Wolff's defense will be based in part on the contentions that the pertinent documents and
11 information were in fact provided to PwC, that PwC had blessed similar transactions in
12 2000, and that Wolff never schemed to mislead Homestore's auditors. More pointedly,
13 as discussed in section III(B)(2), *infra*, the defense submits that PwC was concealing this
14 knowledge when it modified its 2001 quarterly review workpapers and 2000 audit
15 workpapers in December of 2001, which, in the case of the 2000 audit, occurred nine
16 months after it had issued its audit opinion (submitted with Homestore's Form 10K) and
17 six months after it finalized and archived its 2000 workpapers.

18 • **February 2006:** The defense served a trial subpoena on PwC. Although
19 the Government had produced discovery before the first trial, this trial subpoena sought
20 information not previously produced.

21 • **April 24, 2006:** PwC responded to Wolff's trial subpoena – mid-trial – and
22 provided a limited number of documents sought by the subpoena.⁴⁴ Despite this trial
23 subpoena, the SEC's 2002 subpoena, and a 2005 Rule 16 discovery request letter, it now
24 is clear that Wolff proceeded to his first trial without obtaining a number of key records,
25 including: (1) the *electronic* versions of the 2000 and 2001 "snapshots" of the Team
26 Asset audit workpapers; (2) *electronic* versions of the e-mails with viewable attachments;

27 ⁴³ *Id.*, Ex. 1, at ¶ 38 (Indictment).

28 ⁴⁴ *Id.*, Ex. 29 thereto (Def.'s Subpoena to PwC on Feb. 21, 2006 and PwC's letter response to same on
Apr. 24, 2006).

1 (3) facsimile correspondence between Homestore and PwC regarding the 2000/2001
2 audit and quarterly reviews; (4) drafting histories of key PwC workpapers; (5) internal
3 PwC communications between the Homestore audit team and the PwC audit teams for
4 the Homestore counterparties identified in the Indictment; (6) external binders
5 maintained by PwC containing the documents Homestore supplied to PwC during the
6 relevant period in 2000/2001, including the transaction documents at the heart of the
7 Government's charges; and, (7) the Microsoft Access Database PwC used to track
8 document requests and receipts to and from Homestore in 2001. (*See* Sections III(A) to
9 (C), *infra.*)

10 • **January 14, 2008**: The Ninth Circuit reversed Wolff's conviction and
11 remanded the case for re-trial (on other grounds).

12 • **August 18, 2008**: This Court authorized early return subpoenas directed to
13 PwC and Homestore for the production of specific records not made available to the
14 defense prior to the first trial.⁴⁵

15 • **Recent Events**: Pursuant to those early return subpoenas, Homestore
16 produced approximately fifty boxes of materials (including the computer hard drives of
17 various key witnesses that the defense had long been led to believe were forever lost),
18 nine CDs of electronic material, and all the back-up tapes left in its possession for 2001.
19 Homestore's back-up tapes for March 2001 are corrupted and unreadable and the four
20 April 2001 tapes are still missing.⁴⁶ In addition, the SEC produced three CD's that
21 include electronic versions of PwC's workpapers for 2000 and 2001 that had never been
22 produced to the defense.⁴⁷ The SEC has recently confirmed that to the best of its
23 knowledge all electronic documents produced to it by PwC have now been made

24 _____
25 ⁴⁵ *Id.*, Ex. 30 thereto (Order, Docket Entry 925).

26 ⁴⁶ *Id.*, Group Ex. 31 thereto (Cahill's letter to the Government, Sept. 6, 2005) and Homestore's
27 Supplemental Production, Apr. 28, 2009 (from Michael King and Susan Williams at Hennelly &
Grossfeld).

28 ⁴⁷ *Id.*, Ex. 32 thereto (SEC letter to Wolff's prior counsel, Sept. 4, 2008).

1 available to the defense, but it appears that the snapshot of the 2000 database that PwC
2 restored from its back-up tapes and provided to the SEC in May 2002 is now missing.⁴⁸
3 Finally, PwC produced seven CD's of electronically stored workpapers, electronic
4 documents, and electronic e-mails that had *never* been previously produced to the
5 defense. PwC also allowed the defense to inspect ninety boxes of documents that PwC
6 represented it believed contained duplicative or non-responsive material.⁴⁹ After the
7 defense reviewed these materials, the parties' counsel engaged in several telephone
8 conversations and exchanged several confirming letters. During these exchanges, the
9 defense confirmed that the following evidence had existed at one time, but now is
10 missing:

- 11 (1) A complete set of PwC's e-mail communications during 2000 and
12 2001;
- 13 (2) PwC's pre-investigation contemporaneous workpapers for 2001
14 and 2000, as well as any other "snapshots" that may have existed;
- 15 (3) A complete set of the PwC external files for 2000 and 2001 that
16 were maintained at the time as support for PwC's audit and review
17 work;
- 18 (4) A complete set of facsimile correspondence between PwC and
19 Homestore regarding PwC's quarterly review and audit work for
20 years 2000 and 2001;
- 21 (5) The "Microsoft Access Database" created by auditor Page to track
22 the quarterly review and audit information PwC requested and
23 received from Homestore in 2001;
- 24 (6) The "snapshot" of the electronic work paper database PwC
25 provided to the SEC on May 20, 2002;
- 26 (7) A complete set of PwC's billing records (including the detail) on
27 the Homestore matter; and

28 ⁴⁸ *Id.*, Ex. 33 thereto (SEC letter to Greenberg Traurig, July 15, 2009).

⁴⁹ *Id.*, Ex. 34 thereto (Greenberg Traurig letter, Mar. 23, 2009).

1 (8) PwC's back-up tapes for both its workpapers and e-mails in 2000
2 and 2001.⁵⁰

3 **III. ARGUMENT**

4 It is undisputed that in 2000/2001, PwC performed auditing and consulting
5 services on strategic transactions involving Homestore. The thrust of the Indictment is
6 that Homestore lied about and concealed the linked relationships in certain multi-legged
7 transactions, such as the AOL advertising referral agreement and related third-party
8 vendor agreements, from PwC. Given the structure of the Government's Indictment and
9 PwC's central role in the case, authentic documents reflecting PwC's knowledge of the
10 structure of these multi-legged transactions, particularly its knowledge of the linkage
11 between the cost and revenue legs of these transactions, is critical. PwC's lead audit
12 partner Withey testified at the first trial that he instructed his staff to freeze all documents
13 related to Homestore as soon as the internal investigation began, that these instructions
14 were followed, and that no workpapers were modified after the commencement of that
15 investigation, *i.e.*, after November 14, 2001.⁵¹ PwC's Office of General Counsel
16 confirmed its instructions to use "special care" to preserve "all" documents as they
17 currently existed and not to modify any of them.⁵² Clearly, Withey and PwC knew that
18 any modifications to PwC's workpapers after November 14, 2001, would not only look
19 and be suspicious, they would destroy the evidentiary value of PwC's workpapers.
20 Thus, in the best interests of PwC, Withey testified at the first trial that no workpapers
21 were materially modified.

22 Now, however, the defense has marshaled undeniable evidence that establishes a
23 pattern of workpaper modifications by PwC that go to the heart of the case: what PwC
24 knew about costs being associated with revenue in various transactions and when it knew

25 _____
26 ⁵⁰ *Id.*, Ex. 24 thereto (Greenberg Traurig letter, May 29, 2009).

27 ⁵¹ *Id.*, Ex. 35 thereto, at 104 (Withey Trial Tr., June 6, 2006).

28 ⁵² *Id.*, Ex. 18 thereto (Hilary Krane email, Jan. 16, 2002).

1 it. (Sections III (A) to (C), *infra.*) Faced with irrefutable proof that after the internal
2 investigation commenced, modifications were indeed made to the very workpapers that
3 documented PwC's review work on these transactions, PwC and the Government now
4 take the unsupportable position that: (a) Withey was "confused" during his testimony in
5 the first trial; (b) PwC's 2001 review work was timely, *i.e.*, it was "not improper"⁵³ for
6 PwC to reach back and continue documenting that work well after the quarterly reports
7 had been filed and the internal investigation was underway; and, (c) when PwC made its
8 November and December 2001 workpaper modifications, it was unaware of what the
9 internal investigation was revealing about the linked relationships in specific triangular
10 transactions, *i.e.*, PwC would not have known what to modify even if it had been
11 inclined to reinvent history. In short, PwC and the Government have moved from
12 denying PwC's conduct to justifying it. Based upon the evidence below and attached
13 hereto, the defense categorically rejects and disputes PwC's and the Government's
14 denials of wrongdoing by PwC and their new-found justifications for conduct that cannot
15 be excused. Accordingly, the defense requests an evidentiary hearing to get to the
16 bottom of what really happened, which the defense contends has and will continue to
17 have a devastatingly prejudicial impact on Wolff.

18
19 **A. PwC Repeatedly And Consistently Denied Making**
20 **Substantive Modifications To Its Workpapers**

21 During Wolff's first trial, Withey testified about PwC's work papers as follows:

22 Q: What were the work papers intended to – what purpose did they
23 serve?

24 A. They served as a record of the work performed.

25 Q: Did you alter Pricewaterhouse's work papers of the quarterly
26 reviews after the investigation of this matter began?

27 A: Absolutely not.

28

⁵³ *Id.*, Ex. 6 thereto (FBI Interview of Richard Withey on Sept. 17, 2009).

1 Q: Did -- well, are you aware of any member of your team who
2 deliberately altered any of these work papers?

3 A: I'm not. As I said, we gave very clear instructions to our team
4 members not to touch anything.

5 Q: Why?

6 A: Because we wanted to preserve the record as it stood.⁵⁴

7 Withey's answers were not off-the-cuff; they were part of a carefully crafted PwC
8 message that their workpapers were a trustworthy contemporaneous record of the work
9 they had performed and were unaltered by what they had learned in the internal
10 investigation. Indeed, on direct examination the day before the above quoted testimony,
11 Withey was asked to "explain the significance, if any, of the dates that are listed here
12 [referencing Exhibit 706, a PwC workpaper]." Withey answered:

13
14 The created-by date is the date that the work paper was initiated. And then
15 the modified date is the date that the last – the last time it would have been
16 in any way touched in the database. The thing about our database was that
17 the version we had back then was one of the earliest versions, and all the
18 quarters were contained in the same database as the annual year-end audit.
19 So if somebody ran a spell check or something on the file during the year-
20 end, that would show up as a modified date. So that, I assume, something
21 like that is why there is a December date on there.⁵⁵

22 At no point during Withey's three days of trial examination did he ever explain or even
23 hint at the explanation he has now given the Government – that work done earlier in the
24 year was still being documented after the commencement of the internal investigation.
25 Indeed, the substance of Withey's sworn answers at trial stated just the opposite.

26 As Withey admitted at the first trial, freezing workpapers as they existed at the
27 inception of the internal investigation was essential and the only way "to preserve the

28 ⁵⁴ *Id.*, Ex. 35 thereto, at 104 (Withey Trial Tr., June 6, 2006).

⁵⁵ *Id.*, Ex. 36 thereto, at 9-11 (Withey Trial Tr., June 5, 2006).

1 record as it stood.”⁵⁶ Inasmuch as PwC and Withey knew that Homestore’s Audit
2 Committee was initiating an internal investigation into a potentially illegal act on
3 November 14, 2001,⁵⁷ that the SEC would become involved shortly – late November or
4 early December, ⁵⁸ and that PwC had initiated its own 10A investigation on or around
5 December 3, 2001,⁵⁹ PwC should have clearly noted any changes it made to its
6 workpapers and promptly admitted them later.⁶⁰ Indeed, PwC audit team member Page
7 clearly understood that PwC had such an obligation when he testified at a civil deposition
8 that new information from PwC’s post–November 14, 2001 investigation was in fact
9 separated from contemporaneously done work – “we added that information [new
10 information] on the top as a kind of head note to clearly separate the work we did at the
11 time versus the work we did subsequent to that.”⁶¹ Eventually in 2002, PwC did in fact
12 freeze its workpapers, but that was well after it had made substantive modifications to
13 key workpapers – modifications that revealingly insert alleged management
14 representations, rewriting PwC’s knowledge regarding the transactions at issue.
15 Understandably, PwC never advised the SEC that after the internal investigation had
16 commenced, it modified, without citation, its work papers thereby destroying the
17 historical record of what it knew and did at the time of its quarterly reviews.

18
19
20 ⁵⁶ *Id.*, Ex. 35 thereto, at 104 (Withey Trial Tr., June 6, 2006).

21 ⁵⁷ *Id.*, Ex. 37 thereto (Withey email Apr. 5, 2002).

22 ⁵⁸ *Id.*, Ex. 38 thereto, at 36-39 (Withey Trial Tr., June 6, 2006).

23 ⁵⁹ *Id.*, Ex. 39 thereto (email from Mary Shelton-Rose to Richard Withey, Robert Page, Christian Jester,
24 and others at PwC, Dec. 14, 2001 attaching the 10A Investigation Work Program).

25 ⁶⁰ *Id.*, Ex. 40 thereto, at 11 (*In Re Madden*, SEC Rel. No. 53574 (Mar. 30, 2006) (“Madden and
26 Huffman violated applicable professional standards by inappropriately modifying the working papers
27 months after the issuance of the audit report and, in some cases, after learning of the government
investigations of Tenet concerning outlier payments.”)).

28 ⁶¹ *Id.*, Ex. 41 thereto, at 252 (Page Dep. Tr., Nov. 18, 2003).

1 **B. PwC Modified Key Workpapers**

2 Key modified workpapers were admitted into evidence at Wolff’s first trial. The
3 Government relied upon these materially altered workpapers to corroborate several
4 cooperating witnesses’ testimony that Wolff and Homestore deliberately misled PwC
5 about the charged scheme. Those workpapers had been altered after the fact to make it
6 look as though Homestore executives provided false information and directly lied to PwC
7 during the course of its quarterly reviews of 2001. Set forth below are several concrete
8 examples of PwC alterations that occurred after Homestore’s internal investigation
9 commenced – an investigation in which PwC, like the proverbial fox guarding the hen
10 house, acted as an investigator even though its own conduct was plainly at issue in the
11 investigation.

12 **1. PwC’s Second and Third Quarter 2001 Workpapers**

13 During Wolff’s first trial, Government Exhibits 706, 710, and 711 were admitted
14 into evidence.⁶² These exhibits were admitted one after the other through the testimony
15 of lead audit partner Withey, who testified that they were true and correct copies of
16 PwC’s workpapers.⁶³ Withey specifically testified that Exhibit 706 was a “pre-
17 investigation” workpaper and that he did not believe any information was added or
18 deleted from this workpaper as a result of the internal investigation.⁶⁴ He later testified
19 that no work papers of any kind had been modified after the internal investigation began.
20 (Section III(A), *supra*.)

21 The Government used this collective testimony to argue the prosecution’s central
22 theme to the jury, that “[T]he PwC workpapers discuss how Pricewaterhouse was lied to
23 about revenue ‘not’ being associated with those expenses to the vendors. In the second
24 quarter, the workpaper that documents this allegation is 710; in the third quarter, the

25 _____
26 ⁶² *Id.*, Exs. 42, 43, and 44 thereto (Trial Ex. 706, Trial Ex. 710, and Trial Ex. 711, respectively).

27 ⁶³ *Id.*, Ex. 45 thereto, at 10-11, 24 and 52 (Withey Trial Tr., June 5, 2006).

28 ⁶⁴ *Id.*, Ex. 45 thereto, at 10-11 (Withey Trial Tr., June 5, 2006).

1 workpaper is 711.”⁶⁵ But contrary to PwC’s testimony, Exhibits 710 and 711 had been
2 modified in a totally self-serving manner after PwC became involved in Homestore’s
3 internal investigation. Not only did PwC tamper with documentary evidence that was
4 instrumental in Wolff’s original conviction, its workpaper modifications call into
5 question the very credibility of the testimony the Government’s cooperating witnesses
6 gave about what they purportedly did or did not tell PwC.

7 **a. Second Quarter 2001**

8 Homestore’s 2001 second quarter ended on June 30, 2001, and the company issued
9 its second quarter 10Q financial statement (reviewed by PwC) on August 14, 2001.⁶⁶
10 Exhibit 710 is a PwC second quarter (2001) work paper titled “Other Assets (Short and
11 Long Term).” It addresses three transactions between Homestore and outside vendors,
12 all of which are charged in the Indictment: (1) CNM Network;⁶⁷ (2) NameProtect;⁶⁸ and
13 (3) EasyRoommates.com.⁶⁹ With respect to these transactions, Exhibit 710 states:

- 14
- 15 1. CNM Networks: “Management represented that the price paid for
16 these minutes was fair market value and that the agreement was
17 limited to a cash outlay for asset (ie no revenue associated with this
18 agreement).”
 - 19 2. NameProtect: “Management represented that the price paid for the
20 URL addresses was fair market value and that the agreement was
21 limited to a cash outlay for asset (ie no revenue associated with this
22 agreement).”

22 ⁶⁵ *Id.*, Ex. 46 thereto, at 59-60 (Trial Tr. (Government Closing Argument), June 20, 2006).

23 ⁶⁶ *Id.*, Ex. 1 thereto, at ¶ 119 (Indictment).

24 ⁶⁷ *Id.*, Ex. 1 thereto, Count One (¶ 80(c)) and overt acts 30 and 38, and Count Eleven (¶ 174)
25 (Indictment).

26 ⁶⁸ *Id.*, Count One (¶¶ 80(i), 86-88, 110-112) and overt acts 26, 39 and 40, and Count Eleven (¶ 174)
27 (Indictment).

28 ⁶⁹ *Id.*, Count One (¶ 56(a)) and overt acts 5 and 10, Count Five (¶¶ 80, 86, 87, 88, 110, 112, 160, 172),
and Count Eleven (¶ 174) (Indictment).

1 3. EasyRoomates.com: “Management represented that the price paid
2 for the Easyroomates content and emails was fair market value and
3 that the agreement was limited to a cash outlay for asset (i.e. no
 revenue associated with this agreement).”

4 (Ex. 1, Ex. 22 thereto.) PwC’s statements are identical (except for the specific designated
5 products, e.g. minutes for CNM Networks, URL addresses for NameProtect, and content
6 and emails for EasyRoomates.com): management represented that there was no revenue
7 associated with these deals. Critically, these supposed representations by Homestore’s
8 management are charged in Count Eleven of the Indictment (“False and Misleading
9 Statement – Statements by Homestore Finance Department employees to PWC that
10 Homestore had derived no revenue from these transactions with CNM Network,
11 NameProtect, and EasyRoomates.com in the first and second quarters of 2001”).⁷⁰

12 Exhibit 710 reflects that it was created by PwC auditor Katherine Graham on July
13 24, 2001, and last modified on December 9, 2001, by PwC auditor Mary Shelton Rose
14 (“Rose”), one of PwC’s lead auditors on the Homestore engagement.⁷¹ As noted above,
15 Withey (the only PwC witness who testified at Wolff’s first trial) swore that no one at
16 PwC materially modified PwC’s workpapers after Homestore’s internal investigation
17 began on November 14, 2001. In fact, Government Exhibit 710 was materially modified
18 on November 17, 2001 – four months *after* PwC had completed Homestore’s second
19 quarter 2001 review and days *after* Wolff and the Audit Committee initiated the internal
20 investigation. This modification is first revealed in Rose’s November 17, 2001, response
21 to an email from Jennifer Campos (PwC, “Campos”) about this work paper, with copies
22 to other PwC auditors on the Homestore engagement Michelle Stalick (“Stalick”) and
23 Page. Rose’s November 17 email response states the following about Government
24 Exhibit 710, “I have reviewed with Jen [Campos] *and she is revising now.*”⁷² In addition

25 _____
26 ⁷⁰ *Id.*, at ¶ 174 (Indictment).

27 ⁷¹ Ex. A, Ex. 43 thereto (Trial Ex. 710 admitted into evidence at the first trial).

28 ⁷² *Id.*, Ex. 47 thereto, at 2 (email from Campos to Rose, copying Stalick and Page, Nov. 17, 2001)
(emphasis added).

1 to evidencing the falsity of Withey’s trial testimony and the unreliability of one of the
2 Government’s key trial exhibits, this email raises serious questions about why PwC
3 would be revising a work paper for a reporting quarter that had closed months earlier,
4 particularly when Homestore’s second quarter Form 10Q had been previously issued
5 with PwC’s approval and PwC was participating in Homestore’s internal investigation
6 and conducting one of its own.

7 But the story of Exhibit 710 does not end there. The defense has also discovered a
8 coaching note from Rose to Campos that was “marked for deletion.”⁷³ Rose created this
9 coaching note on November 16, 2001 – just days after PwC learned of Homestore’s
10 internal investigation. The coaching note, which is an earlier version of Exhibit 710,
11 contains questions from Rose “in bold” and responses from Campos. (*Id.*) Significantly,
12 it reflects internal PwC communications that expose PwC in the act of materially
13 modifying a critical second quarter workpaper in the middle of the internal investigation.
14 (*Id.*) First, in response to Rose’s comments, Campos responded, “Mary see comments
15 below. Let me know how you want to integrate into W/P [workpaper] or Grid” (*Id.*)
16 Second, Rose instructed Campos to “[a]dd some words about reviewing significant
17 components of 6/30 balance and making a selection of contracts to review for new
18 stuff... and to [s]ee Q3 documentation.” (*Id.*) (emphasis added.) Third, Rose – on two
19 different occasions – asked questions about any revenue being associated with the deals:
20 (1) regarding CNM: “is homs trying to get revenue here or is this retail mark up a non
21 event”; and (2) regarding EasyRoomate: “do we have any revenue?” (*Id.*) Yet, at the
22 time Rose made these inquiries, she supposedly had received a prior representation from
23 John Desimone in Homestore’s Finance Department that there was no revenue associated
24 with these assets.⁷⁴ Fourth, Rose’s coaching note contains blocks of content that were in
25

26 ⁷³ *Id.*, Ex. 48 thereto (coaching note including Campos’ answers to Rose questions).

27 ⁷⁴ These inquiries by Rose directly conflict with a story she told the FBI on the eve of the first trial,
28 where she specifically reported that:

1 fact finalized as Exhibit 710. Significantly, although this coaching note version of
2 Exhibit 710 (last modified on December 9, 2001) contains much of the final language in
3 that Exhibit, it does *not* contain the purported representations by Homestore’s
4 management concerning the CNM, NameProtect, and EasyRoomate transactions, *i.e.*, it
5 does not include the key statements: “management represented that the price paid [for
6 each product] was fair market value and that the agreement was limited to a cash outlay
7 for asset (ie no revenue associated with this agreement).” In fact, the Government
8 specifically called this supposed representation to the attention of the jury several times
9 during its examination of Withey.⁷⁵

10 That same day (Sunday, December 9th), Rose made the final and critical
11 modification to this second quarter workpaper (the workpaper expressly reveals that it
12 was last modified by Mary Shelton Rose on December 9, 2001). (Ex. A, Ex. 43 thereto).
13 It is only this last version of the workpaper -- which was introduced to the jury as
14 Government Exhibit 710 -- that actually contains the crucial references to supposed
15 representations made by Homestore’s management. (*Id.*) In short, the critical language in
16

17 Rose had been asking Jason Boling [Homestore] for information about the items
18 categorized as ‘other assets’ during the review of Homestore.com’s financial records for
19 the second quarter of 2001. *John Desimone came to Rose’s work area late one evening
20 shortly before this second quarter review was completed.* Rose asked Desimone if there
21 was any revenue associated with these assets. DeSimone replied there was not.

22 *Id.*, Ex. 49 thereto (Rose’s FBI report of interview, Jan. 25, 2006) (emphasis added). Now, on
23 the eve of the re-trial, Rose reported the following to the Government:

24 In an interview today, Mary Rose of PwC stated her recollection of speaking with John
25 DeSimone in 2001 regarding the growth of the “other assets” category of Homestore’s
26 financial statements. Ms. Rose recalled DeSimone explaining the legitimacy of the
27 purchases and that there was no revenue connected to the deals. *Although Ms. Rose
28 recalled the discussion as being in connection with a quarterly review, she is presently
(2009) not certain whether the discussion was after the second or third quarter of 2001.*
(Emphasis added).

Id., Ex. 7 thereto (AUSA Wilner email to John Gibbons, Oct. 20, 2009).

⁷⁵ *Id.* Ex. 50 thereto at 27 (Withey Trial Tr., June 5, 2006); *see also Id.* at 24, 30-33, and 51-55.

1 this workpaper, which was seemingly tracked in the Indictment and later admitted into
2 evidence against Wolff through Government Exhibit 710, grew out of a series of
3 surreptitious alterations to that document that occurred *after* PwC became involved in
4 Homestore’s internal investigation. Indeed, the last critical modification occurred days
5 after December 6, 2001, when PwC had received the Losh Spreadsheets from Fenwick
6 with specific details about the “triangular” transactions.

7 **b. Third Quarter 2001**

8 Homestore’s 2001 third quarter ended on September 30, 2001, and it issued its
9 third quarter Form 10-Q (again reviewed by PwC) on November 14, 2001.⁷⁶
10 Government Exhibit 711 is a PwC third quarter 2001 workpaper titled “Other Assets
11 (Short and Long Term).”⁷⁷ It addresses the following transactions between Homestore
12 and outside vendors (five out of six of these transactions are charged in the Indictment):
13 (1) First Aid Exchange;⁷⁸ (2) SmartForce;⁷⁹ (3) Dorado;⁸⁰ (4) UPromise;⁸¹ (5) CD
14 Layouts;⁸² and (6) EyeWonder.⁸³ For each of these transactions, Exhibit 711 – like
15 Exhibit 710 – contains virtually identical statements of representations that Homestore’s
16 management purportedly made to PwC:

17 _____
18 ⁷⁶ Ex. A, Ex. 1 thereto, at ¶ 157 (Indictment).

19 ⁷⁷ *Id.*, Ex. 44 thereto (Trial Ex. 711).

20 ⁷⁸ *Id.*, Ex. 1 thereto, Count One (¶¶ 80(g) and 160) and overt acts 24, 34, and 35, and Count 13 (¶ 173)
21 (Indictment).

22 ⁷⁹ *Id.*, Count One (¶¶ 103-112, 147, 149) (Indictment).

23 ⁸⁰ This transaction was not charged in the Indictment.

24 ⁸¹ Ex. A, Ex. 1 thereto, Count One (¶¶ 80(h) and 160) and overt acts 31 and 41, Count Seven (¶ 172),
25 and Count 13 (¶ 174) (Indictment).

26 ⁸² *Id.*, Count One (¶¶ 80(d) and 160) and overt acts 32 and 45, Count Eight (¶ 172), and Count 13 (¶
27 174) (Indictment).

28 ⁸³ *Id.*, Count One (¶¶ 80(a) and 160) and overt acts 28 and 43, and Count 13 (¶ 174) (Indictment).

- 1 1. First Aid Exchange: “Management represented that the price paid for
2 these kits was fair market value and that the agreement was limited to
3 a cash outlay for asset (i.e. no revenue associated with this
4 agreement). Management further represented that the planned usage
5 period for the kits was 12months;”
- 6 2. SmartForce: “Management represented that the price paid for these
7 minutes was fair market value and that the agreement was limited to a
8 cash outlay for asset (i.e. no revenue associated with this agreement);”
- 9 3. Dorado: “Management represented that the consideration received in
10 the form of the license approximates the investment value and
11 represent was fair market value for such license. Management further
12 represented that the agreement with Dorado was limited to an
13 exchange of the investment for this new license purchase (i.e.
14 Investment to an current and no further revenue was associated the
15 old agreement and this new agreement;”
- 16 4. Upromise: “Management represented that the price paid for this
17 advertising was fair market value and that the agreement was limited
18 to a cash outlay for asset (i.e. no revenue associated with this
19 agreement);”
- 20 5. CDLayouts: “Management represented that the price paid for the
21 software license was fair market value and that the agreement was
22 limited to a cash outlay for asset (i.e. no revenue associated with this
23 agreement);” and
- 24 6. EyeWonder: “Management represented that the price paid for this
25 license was fair market value and that the agreement was limited to a
26 cash outlay for asset (i.e. no revenue associated with this
27 agreement).”⁸⁴

28 Indeed, five out of six of these statements mimic and are virtually identical to
management’s purported representations in Exhibit 710.⁸⁵

⁸⁴ Ex. A, Ex. 44 thereto (Trial Ex. 711) (typographic errors in original).

⁸⁵ Compare Ex. 1, Ex. 43 thereto (Trial Ex. 710) with Ex. 44 thereto (Trial Ex. 711).

1 Just as the defense now can prove by extrinsic evidence that PwC modified
2 Exhibit 710 during Homestore’s internal investigation, it also can prove that Exhibit 711
3 was similarly modified. First, the 2001 “snapshot” of the Team Asset Database makes it
4 clear that PwC was revising and modifying Exhibit 711 after Homestore filed its third
5 quarter Form 10Q and had initiated the internal investigation (*i.e.*, after November 14,
6 2001).⁸⁶ That “snapshot” shows that Rose last modified the final version of this work
7 paper, *i.e.*, the version that is Exhibit 711, on Sunday, December 9, 2001, – the very same
8 day she last modified the Q2 workpaper that is Exhibit 710. Second, Campos emailed a
9 copy of the “first cut” of this work paper to Rose on October 21, 2001.⁸⁷ Like the
10 original version of Exhibit 710, this “first cut” version of Exhibit 711 does *not* contain
11 management’s purported representations for any of these six transactions. (*Id.*) Third, in
12 Rose’s November 17, 2001, email to Stalick and Page, forwarding Campos’ list of tasks,
13 Rose commented with respect to the third quarter 2001, “Other Assets (too many to list)
14 (*In process/Mary and Jen*).”⁸⁸

15
16
17
18
19
20 Finally, the defense submits that on December 9, 2001, when PwC performed its
21 last modifications to Exhibits 710 and 711, it simply cut and pasted the phrase
22 “management represented that the price paid [for each product] was fair market value and
23

24 ⁸⁶ Ex. A, Ex. 43 thereto (Trial Ex. 710).

25 ⁸⁷ *Id.*, Ex. 51 thereto (email from Campos to Rose, Oct. 21, 2001, with a portion of the workpaper
26 (Trial Ex. 711) pasted into the email).

27 ⁸⁸ *Id.*, Ex. 47 thereto at 2 (email from Campos to Rose, copying Stalick and Page, Nov. 17, 2001)
28 (emphasis added)).

1 that the agreement was limited to a cash outlay for asset (ie no revenue associated with
2 this agreement)” into each transaction description. This meant that PwC then only
3 needed to go back through these descriptions and insert the correct product into
4 management’s purported representation in order for these representations to make sense.
5 This is where PwC made a revealing mistake. A comparison of Exhibit 710’s description
6 of the CNM transaction with Exhibit 711’s description of the SmartForce transaction
7 exposes PwC’s conduct:
8

- 9 1. CNM Networks: “Management represented that the price paid for
10 *these minutes* was fair market value and that the agreement was
11 limited to a cash outlay for asset (ie no revenue associated with this
12 agreement);” and
- 13 2. SmartForce: “Management represented that the price paid for *these*
14 *minutes* was fair market value and that the agreement was limited to
15 a cash outlay for asset (i.e. no revenue associated with this
16 agreement).”⁸⁹

17 Although CNM Networks sold phone cards, SmartForce sold software products, not
18 products that involved “minutes.” Thus, the obvious explanation is that this purported
19 management representation embedded in Exhibit 711 was simply cut and pasted from
20 PwC’s December 9, 2001 modified version of Exhibit 710 because we know that the
21 CNM sentence referencing ‘minutes’ did not even exist in PwC’s December 8, 2001
22 version of Exhibit 710. Tellingly, all of PwC’s management representation modifications
23 were done days after it received the Losh Spreadsheets.
24
25
26

27 ⁸⁹ Compare Ex. A, Ex. 43 thereto, at 2 (Trial Ex. 710) with Ex. 44 thereto, at 2 (Trial Ex. 711)
28 (emphasis added).

2. 2000 Form 10K Workpapers

1
2 In an attempt to explain its 2001 workpaper modification, PwC (and apparently
3 the Government) now take the position that PwC's November and December 2001
4 modifications to workpapers related to earlier 2001 quarters were permissible because the
5 2001 year end audit had not yet been completed.⁹⁰ This new "explanation of intent" is
6 completely undercut by the fact that PwC also made a series of similar modifications to
7 workpapers from Homestore's 2000 audit long after that audit had been finalized and
8 archived. Indeed, PwC had issued its 2000 audit opinion on March 16, 2001;⁹¹ PwC
9 (Withey, Rose, and Campos) had signed off that all planned audit procedures were
10 completed and documented as of March 25, 2001;⁹² Homestore had filed its 10K on
11 April 2, 2001;⁹³ and PwC had archived its workpapers in June 2001.⁹⁴ Nevertheless,
12 PwC returned to those workpapers after the commencement of Homestore's internal
13 investigation and made substantive modifications to its year 2000 quarterly review and
14 year end audit workpapers. Clearly, these modifications were not made as part of any
15 year-end audit wrap-up (long over by then), but rather to once again alter the facts about
16 what PwC knew and when it knew it. These modifications were made in a similar
17 pattern to PwC's 2001 modifications and they also centered on the very issues at the
18 core of this case. Set forth below are some, but not all, of the alterations to PwC's 2000
19 workpapers that the defense has uncovered – many more can be provided at the Court's
20 request. What these examples make clear is that after Homestore's internal investigation
21 had commenced, PwC not only went back and inserted management representations

22 ⁹⁰ Ex. A., Ex. 6 thereto, at 2 (FBI Report of Interview of Richard Withey, Sept. 17, 2009).

23 ⁹¹ *Id.*, Ex. 52 thereto (excerpt of Homestore's 2000 SEC Form 10K, which is PwC's audit opinion filed
24 therein).

25 ⁹² *Id.*, Ex. 53 thereto (PwC Audit Completion Workpaper).

26 ⁹³ *Id.*, Ex. 54 thereto (excerpt of Homestore 2000 SEC Form 10K).

27 ⁹⁴ *Id.*, Ex. 55 thereto (PwC documenting the final archiving of its workpaper database for the 2000
28 audit, with metadata).

1 regarding linkages of cost and revenue transactions into its 2000 workpapers, it went so
2 far as to change how it had analyzed certain transactions, without once indicating that
3 changes were made one year later.

4 In a PwC memorandum, “Advertising Revenue Testing – Q4 2000”, PwC
5 addressed a transaction between Homestore and Bank of America wherein Bank of
6 America purchased advertising on Homestore’s platform and Homestore purchased a
7 marketing campaign from Bank of America in transactions that occurred in close
8 proximity.⁹⁵ Although this memorandum is dated “January 15, 2001,” its electronic
9 metadata reveals that it was actually created by PwC auditor Stalick on December 7,
10 2001, and last revised on December 29, 2001 – more than eleven months after it is dated,
11 more than eight months after Homestore’s Form 10K had been filed, and more than six
12 months after the 2000 audit documents had been archived.⁹⁶

13 The defense also recently obtained a December 30, 2001 email from Page to
14 Stalick, titled “Revenue Testing – *Revised*,” with a subsequent version of this Stalick
15 memorandum attached.⁹⁷ This version of Stalick’s memorandum, as “revised” by Page,
16 includes the following new statement regarding the Homestore/Bank of America
17 transaction:

18 “PwC noted the Company signed an agreement with Bank of America on
19 January 2, 2001. Based on the close proximity of the negotiations and the
20 signing of the two agreements, PwC considered the issue of whether the
21 two agreements may be linked. PwC discussed this issue with Joe Shew
22 and Jeff Kalina, who confirmed the agreement signed on January 2, 2001
was negotiated independently of the insertion order signed and delivered
during December 2000 and the two were not contingent upon one another.”

24 ⁹⁵ *Id.*, Ex. 56 thereto (PwC Memorandum “Advertising Revenue Testing -- Q4 2000,” dated Jan. 15,
25 2001).

26 ⁹⁶ *Id.*, Ex. 57 thereto (word file version of the PwC Memo dated “January 15, 2001” titled Advertising
27 Revenue Testing -- Q4 2000, with metadata displayed).

28 ⁹⁷ *Id.*, Group Ex. 58 thereto (email from Stalick to Page, Dec. 30, 2001, with revised memorandum
attached, the version later sent to the SEC) (emphasis added)).

1 (*Id.* at 2.) It is this December 30, 2001 version that was submitted to the SEC in 2002 as
2 part of the 2000 audit workpapers. Thus, PwC not only revised history with respect to
3 the crucial 2001 transactions, it went back and rewrote history for 2000 as well. Not
4 surprisingly, when the Government interviewed PwC auditors in September and October
5 2009, PwC offered no explanation for the modifications to its 2000 Form 10K
6 workpapers – conduct that after July 2002 is criminal.⁹⁸ For the Court’s convenience, a
7 red-line comparison of Stalick’s and Page’s versions of the memorandum is attached.⁹⁹

8 Another PwC 2000 audit workpaper memorandum, titled “Classmates.com,”
9 addresses a late 2000 transaction between Homestore and Classmates in which
10 Classmates purchased advertising on Homestore’s platform and Homestore bought
11 advertising on Classmates’ platform in transactions that occurred in close proximity.¹⁰⁰
12 Although this memorandum is dated January 10, 2001, it was substantively modified on
13 November 19, 2001 and again on December 16, 2001, after the start of the internal
14 investigation. An earlier version of the memo from June 6, 2001 by auditor Campos¹⁰¹
15 analyzes the transaction as a barter agreement under APB 29¹⁰² and tellingly includes no
16 management representations of any kind. Later, on November 19 and December 16,
17

18 ⁹⁸ 18 U.S.C. § 1519 and 17 CFR § 210.2-06 (a) and (c) (“For a period of seven years after an accountant
19 concludes an audit or review of an issuer’s financial statements . . . the accountant shall retain records
20 relevant to the audit or review, [and] . . . records (including electronic records) described in paragraph
21 (a) of this section shall be retained whether they support the auditor’s final conclusions regarding the
audit or review, or contain information or data, relating to a significant matter, that is inconsistent with
the auditor’s final conclusions regarding that matter or the audit or review.”).

22 ⁹⁹ Ex. A, Ex. 59 thereto (a red-line comparison of Stalick’s and Page’s versions of the Memorandum).

23 ¹⁰⁰ *Id.*, Ex. 60 thereto (PwC Memorandum “Classmates.com,” dated Jan. 10, 2001).

24 ¹⁰¹ *Id.*, Ex. 61 thereto (a version of Ex. 60 (fn. 100, *supra*) attached to an email from Page on June 6,
25 2001, *i.e.* in close proximity to the time that PwC archived its 2000 workpapers).

26 ¹⁰² Accounting Principles Board (“APB”) Opinion No. 29 governs exchanges of non-monetary assets.
27 The APB is the former authoritative body on the American Institute of Certified Public Accountants and
28 issued pronouncements on accounting principles. The APB was later replaced by the Financial
Accounting Standards Board (“FASB”) in 1973.

1 2001, Campos' June workpaper was modified to state that this barter agreement was
2 accounted for in accordance with EITF 99-17¹⁰³ and to include – for the first time – a
3 crucial statement about what PwC purportedly had been told: that management had
4 confirmed that Homestore had no other relationships with Classmates.¹⁰⁴ It is the
5 December 16, 2001 version that was submitted to the SEC as part of the 2000 audit
6 workpapers. For the Court's convenience, a red-line comparison of the June and
7 December 2001 versions of the memorandum are attached.¹⁰⁵ It is noteworthy that PwC
8 provided this memorandum to the SEC without explaining that it had been misleadingly
9 back-dated. Critically, anyone reading the memorandum PwC gave the SEC would have
10 believed that the document was written as of January 10, 2001, memorializing PwC's
11 then current analysis.

12 In addition, on the very same day that Rose was modifying Exhibits 710 and 711
13 (Sunday, December 9, 2001), she also modified a Promisemark workpaper from Q4
14 2000.¹⁰⁶ In fact, PwC modified this year 2000 Promisemark workpaper three different
15 times after the start of the internal investigation: on November 19th and twice on
16 December 9th, 2001.¹⁰⁷ These post-investigation modifications added and removed
17 important information: PwC added a reference to a discussion with Homestore
18 management about the timing of the Promisemark advertising campaign, as well as

19 ¹⁰³ The Emerging Issues Task Force of FASB (or "EITF") issued report No. 99-17 in January of 2000
20 governing accounting for advertising barter transactions.

21 ¹⁰⁴ Ex. A, Group Ex. 62 thereto (Two additional versions of Ex. 60 (fn. 100, *supra*) modified on Nov.
22 19, 2001 and Dec. 16, 2001, respectively). The December 16, 2001 version (Ex. 60) was submitted to
the SEC.

23 ¹⁰⁵ *Id.*, Ex. 63 thereto (red-line comparison of the Dec. 2001 and June 2001 versions of Ex. 60 (fn. 100,
24 *supra*)).

25 ¹⁰⁶ *Id.*, Ex. 64 thereto (email from Rose to Page, Dec. 9, 2001, attaching a version of a PwC
26 Memorandum "Promisemark," dated Jan. 10, 2001).

27 ¹⁰⁷ *Id.*, Group Ex. 65 thereto (three versions of the PwC Memorandum "Promisemark," dated Jan. 10,
28 2001, with accompanying metadata and the final version submitted to the SEC, bates number
PWC/HOME 05990, created on Dec. 9, 2001).

1 additional detail about a fair market value analysis it claimed to have done.
2 Significantly, each iteration of the workpaper deleted more and more detail regarding
3 PwC's review of an important settlement agreement that outlined key payment terms for
4 both sides of the transaction until the final version of the workpaper contained no
5 reference to that agreement whatsoever. PwC backdated the final version of this
6 workpaper to January 10, 2001 and submitted it to the SEC in 2002 with absolutely no
7 mention that things had been added or removed from its content long after the
8 completion of PwC's 2000 audit.

9
10 **C. PwC Also Modified Its Historical Records**
11 **With Respect To Its Purported Receipt**
12 **Of Signed Management Representation Letters**

13 Counts 10 through 14 of the Indictment charge Wolff and others with "Lying to
14 Accountants."¹⁰⁸ Specifically, Counts 10, 12, and 14 charge Wolff with providing false
15 management representation letters to PwC prior to the filing of Homestore's quarterly
16 audit reviews with the SEC – (Count 10 (Q1 2001), Count 12 (Q2 2001), and Count 14
17 (Q3 2001)).¹⁰⁹ In addition, Count One – the conspiracy section of the Indictment – also
18 extensively references Wolff's and Homestore's alleged lies to PwC in management
19 representation letters by:

- 20 1. Listing lying to the auditors as one of the four objects of the
21 conspiracy (Ex. 1, Ex. 1 thereto ¶ 44(d) (Indictment);
- 22 2. Detailing lying to the auditors in three overt acts:
 - 23 • "Overt Act No. 18: "On or about May 15, 2001, defendant
24 WOLFF signed a management representation letter addressed
25 to PWC that contained false and misleading statements and
omitted material facts, as more fully described at paragraph 64,
above" (*Id.* ¶ 160);

26 ¹⁰⁸ *Id.*, Ex. 1 thereto, at ¶¶ 173-174 (Indictment).

27 ¹⁰⁹ During Wolff's first trial, the Government realized that PwC had, in fact, never obtained a Q3 2001
28 signed management representation letter from Wolff and Homestore and subsequently dismissed Count
14. *Id.*, Ex. 66 thereto, at 188 (Trial Tr. June 19, 2006).

- 1 • “Overt Act No. 54: “On or about August 14, 2001, defendant
2 WOLFF signed a management representation letter addressed
3 to PWC that contained false and misleading statements and
4 omitted material facts, as more fully described in paragraph 111
5 above” (*Id.* ¶ 160);
- 6 • “Overt Act No. 66: On or about November 14, 2001, defendant
7 WOLFF caused co-conspirator Shew orally to confirm to PWC
8 that the contents of a management representation letter
9 addressed to PWC were accurate when, in truth and fact, the
10 letter contained false and misleading statements and omitted
11 material facts, as more fully described at paragraph 148 above”
12 (*Id.* ¶ 160); and

- 13 3. Setting forth in detail how Wolff and Homestore allegedly made
14 “false and misleading statements to PWC” in the context of
15 management representation letters during the first quarter of 2001 (*id.*
16 ¶¶ 64-65), second quarter of 2001 (*id.* ¶¶ 110-12), and third quarter of
17 2001 (*id.* ¶¶ 148-49).

18 As set forth below, the defense now can demonstrate that in addition to belatedly
19 tampering with its 2000 and 2001 workpapers, PwC also modified its historical records
20 with respect to its alleged receipt of at least three management representation letters
21 allegedly executed by Wolff.

18 1. The Q2 2001 Management Representation Letter

19 The Government charges that “[o]n or about August 14, 2001, defendant WOLFF
20 signed a management representation letter addressed to PwC that contained false and
21 misleading statements . . .”¹¹⁰ At Wolff’s first trial, this management representation
22 letter, dated August 9, 2001, was admitted into evidence as Government Exhibit 703.¹¹¹
23 Government cooperator (co-defendant John Giesecke) and PwC’s Withey both testified
24 that PwC required this management representation letter prior to the filing of
25 Homestore’s Form 10Q with the SEC.¹¹² The defense now can prove that Exhibit 703

26 ¹¹⁰ Ex. A, Ex. 1 thereto, at ¶¶ 173-174 (Indictment).

27 ¹¹¹ *Id.*, Ex. 67 thereto (Trial Ex. 703 -- Q2 Management Representation Letter from Homestore to PwC).

28 ¹¹² *Id.*, Ex. 68 thereto, at 123 (Trial Tr., Apr. 5, 2006) (Giesecke, Homestore’s former Chief Financial

1 (which indicates on its face that it was faxed from PwC to Homestore on May 8, 2002)¹¹³
2 was not signed on either August 9, 2001 (the date it bears) or “[o]n or about August 14,
3 2001” (as the Indictment alleges).

4 Homestore’s 10Q was filed on August 14, 2001 and a day later on August 15,
5 2001, PwC sent an email to Homestore acknowledging that PwC had not yet received a
6 signed management representation letter and attaching a draft version.¹¹⁴ The defense
7 has discovered a subsequent email from Stalick to Jason Boling (the Homestore
8 employee in charge of SEC compliance, “Boling”). This October 5, 2001 email – which
9 PwC failed to ever produce – was embedded in an email Boling later forwarded to
10 another Homestore employee.¹¹⁵ Stalick’s email reads:

11 Hi Jason,

12 I hope all is well. Attached is a list of open items from Q1 & Q2.
13 Please let me know if you have any questions. We would like to have
14 our records and documentation wrapped up prior to coming out for
the quarter.

15 Thanks, Michelle

16 (See attached file: Q1 & Q2 Open Items.snp)
17

18 Officer/Chief Operating Officer and a former PwC employee testified, “The auditors would have
19 required us to have provided them with this [Q1] representation letter before they would have allowed
20 us to issue the Form 10-Q.”); Ex. 69 thereto, at 94 (Trial Tr., June 6, 2006) (Withey testified, “We
21 would generally want to receive the representation letter by the time the 10-Q was filed; however, if for
logistical reasons somebody was traveling or something it was possible we would accept oral
representation and receive the letter subsequently.”).

22 ¹¹³ The Government’s Trial Ex. 703 appears to have been obtained from the SEC’s database and
23 matches what Homestore’s Audit Committee produced to the SEC on May 14, 2002. *Id.*, Ex. 67 thereto
(Trial Ex. 703).

24 ¹¹⁴ Ex. A, Ex. 70 thereto (email from Rose to Evelyn Yalung (Homestore’s controller), Aug. 15, 2001,
25 copying Katherine Graham, Campos, Stalick, and Sally Knutsen (Homestore’s VP of Finance). The
26 draft Representation Letter attached to this email was not the final version introduced into evidence in
the first trial as Trial Ex. 703.

27 ¹¹⁵ *Id.*, Group Ex. 71 (Boling email to John Desimone and Sally Knutson at Homestore, Oct. 8, 2001,
28 forwarding Stalik email, Oct. 5, 2001. with attachment).

1 A printout from PwC’s Microsoft Access Database (another critical piece of now missing
2 evidence) is attached to Stalick’s email; the fifth action item in this attachment states
3 “Rep letters – Need to obtain for 5/22/01 S-3 and 8/14/01 Q2 10-Q.”¹¹⁶ The Microsoft
4 Access Database attachment represents that action item five was opened on September
5 19, 2001 and had a due date of October 10, 2001.¹¹⁷ In addition, Campos last modified
6 Workpaper 7700-25, titled “Representation Letter – Q2 2001,” on November 18, 2001
7 (four days after Homestore’s internal investigation began and months after its second
8 quarter Form 10Q had been filed).¹¹⁸ Although we do not – and now never will – know
9 exactly what Campos modified on November 18, 2001, Workpaper 7700-25’s only
10 content is the statement “see external binder for signed representation letter.” *Id.*

11 **2. The Q3 Management Representation Letter**

12 Although the Government dismissed Count 14 of the Indictment when it realized
13 that PwC did not have a management representation letter signed by Wolff for
14 Homestore’s 2001 third quarter, PwC’s conduct with respect to this non-existent
15 document is another telling example of PwC’s modification/falsification of its records.
16 Despite the fact that a signed management representation letter for Q3 never existed,
17 PwC produced a workpaper purportedly documenting its receipt.¹¹⁹ This work paper,
18 introduced by the Government in the last trial as Exhibit 707, created by Stalick on
19 October 12, 2001 and last modified by her on December 13, 2001, states:

20
21 “PwC obtained a confirmation directly from the SVP of Business
22 Development at webMillion.com confirming the terms of the insertion

23 ¹¹⁶ *Id.* (emphasis added).

24 ¹¹⁷ When the defense recently reviewed PwC’s ninety boxes of documents, it located another printout of
25 a portion of the Microsoft Access Database, dated October 10, 2001. That printout also indicates, with
26 high priority, that PwC still needed to obtain “Rep letters – Need to obtain for 5/22/01 S-3 and 8/14/01
Q2 10-Q.” *Id.*, at 2.

27 ¹¹⁸ Ex. A., Ex. 72 thereto (PwC Workpaper 7700-25, “Representation Letter - Q2 2001”).

28 ¹¹⁹ *Id.*, Ex. 73 thereto, at 2 (PwC Workpaper 7800-7, Tickmark 2).

1 orders signed and completed with the Company for Q2 2001 and Q3 2001.
2 Refer to the signed confirmation, received directly by PwC in the binders at
3 external w/p 7800-7. Additionally, PwC obtained a representation from the
4 Company indicating the Company had fully delivered all impressions
5 related to this insertion order campaign by September 30, 2001 and had no
6 future impression or other obligations during the fourth quarter 2001. The
7 Company confirmed that the insertion order contract represents the
8 complete agreement between the Company and webMillion.com as there
9 are no other verbal, written or other agreements related to the above
10 insertion order with webMillion.com. *Additionally, the Company confirmed
11 there are no verbal, written or other agreements related to the
12 webMillions.com insertion order with any other counter party. Refer to the
13 signed representation letter at w/p 7800-29. Based on the above, PwC
14 noted this appears to be a stand-alone cash transaction.”*

15 (*Id.*) (emphasis added). In truth, there was of course no such signed representation letter
16 and Stalick acknowledged so in a subsequent email.¹²⁰

17 **3. The 2000 Representation Letters**

18 As further example of PwC’s willingness to revise, modify, and even falsify its
19 historical records, the defense has uncovered the following May 24, 2001 exchange of
20 emails between Stalick and Homestore’s Boling that, again, PwC failed to produce:

21 Hi Jason,

22 I hope all is well. We finished going through our files, and we are missing
23 one other letter. Not sure if it ever was sent to us. It relates to the May 2000
24 S-1 filing. I have attached the rep letter below. Please get Evelyn and Joe to
25 sign it and then put it in the pile with the others for John and Stuart. *Also,
26 I’m sure I’m pushing my luck on this one, but if you have letterhead with the
27 Thousand Oaks address, it would be great if you could print it on that
28 letterhead instead of the new building’s address. If not, I understand. I
apologize for not catching this one the other day. Please give me a call to
discuss if you’d like.*

Thank you,
Michelle

120 *Id.*, Ex. 74 thereto (email from Stalick to Lew Belote (Homestore), May 8, 2002, “Lew, Mary asked me to forward all the rep letters to you. I faxed all of the signed rep letters to your attention a while ago. *The following is the Q3 2001 rep letter that was never signed.*” (emphasis added)).

1 Boling responded, "I discussed this with Evelyn and she feels this looks really bad to be
2 giving a letter to Stuart that is over 1 year old for his signature. Call me when you get
3 this. Jason."¹²¹

4
5 **D. A Large Quantity Of Critical Evidence Is Missing**

6 When conducting Homestore's quarterly reviews and audits, PwC customarily
7 relied on a range of support materials such as emails, faxes, and external files (contracts).
8 Although authentic un-doctored workpapers certainly would be the best and most direct
9 evidence of what PwC knew and did, with all of PwC's workpapers now suspect, these
10 supporting materials are essential to confirm/reconstruct what PwC's original workpapers
11 actually said, *i.e.* to determine what PwC knew, when it knew it, and what it did during
12 the 2001 quarterly reviews and 2000 audit of Homestore revenues and significant
13 transactions. Unfortunately, the majority of the support material associated with PwC's
14 workpapers is now missing, making it is impossible for the defense to reconstruct the
15 modified workpapers and understand what PwC was told and what work it performed.
16 Based upon PwC's recent concession that its 2001 workpapers were modified and its loss
17 of other critical evidence, the defense respectfully suggests that PwC's claims regarding
18 concealment and representations that it supposedly received are at best suspect.
19 Although we will never know the full extent to which evidence has been tampered with
20 and/or lost, here is evidence we do know is missing.

21 **1. PwC's 2000 And 2001 Email Communications Are Missing**

22 A comprehensive set of email communications between PwC and Homestore,
23 PwC's Homestore audit team and PwC's transaction counterparty audit teams, and
24 PwC's Homestore audit team and the PwC national office is critical to reconstruct what
25 PwC knew and did in lieu of authentic workpapers. PwC's counsel does not dispute that
26 much of the exchange of information in 2001 was done via emails.¹²² These

27 ¹²¹ *Id.*, Ex. 75 thereto (email from Boling to Stalick, May 24, 2001 (never produced by PwC) (emphasis
28 added)).

¹²² *Id.*, Ex. 24 thereto, at 2 (Greenberg Traurig letter³⁸ May 29, 2009).

1 communications are vital to re-creating a historical record, which is precisely why the
2 SEC's January 2002 subpoena requested the production of these communications.
3 Disturbingly, there are gaping holes in PwC's production of emails that the defense
4 discovered and can prove by analyzing the evidence it does have.

5 First, there are a number of Homestore-related emails by and amongst PwC
6 auditors that PwC never produced – emails that were only produced by other parties to
7 these communications.¹²³ As noted above, these emails go to the very heart of the
8 Government's case and their contents beg an answer to the question – why weren't they
9 produced by PwC? In addition to the examples already provided above, here are more
10 examples of highly pertinent PwC email communications that were produced by others,
11 but not by PwC:

- 12 • June 1, 2001 email from Campos to Boling relating to the modified
13 representation letters: “Please provide the following to us by
14 Wednesday next week. It's a must... YE rep letter... Also any
original rep letters from SEC filings in fye 2001.”
- 15 • April 12, 2001 email from Page to Boling relating to a modified
16 workpaper addressing Q1 revenue testing (last modified on
17 December 9, 2001): “Based on the complete 1Q revenue analysis
18 and updated SAG numbers we have the following question [sic]...
AOL Revenue Share.”
- 19 • July 9, 2001 email from Stalick to Boling relating to a modified
20 workpaper on Q2 Advertising Revenue (also last modified on
21 December 9, 2001): “AOL - please provide the updated
agreement/amendment as soon as possible.”¹²⁴
- 22 • June 5, 2001 email from Steve Holcombe to Roger Heegaard, with
23 copy to Su Ann Lee (PwC) and Robert Brue (PwC) (regarding a

25 ¹²³ *Id.*, Group Ex. 76 thereto (various relevant emails produced by others, but not PwC, and referenced
26 in the bullet points above).

27 ¹²⁴ Audit partner Withey dramatically testified that PwC was never shown the AOL Ad Rep/Ad Ref
28 thereto at 18-19 (Withey Trial Tr., June 5, 2006).

1 workpaper related to the Homestyles Asset purchase by Homestore
2 – a significant transaction (also last modified on December 9,
3 2001) : “We need to make some adjustments to these numbers to
4 reflect the marketing expenses associated with AOL as well as
5 professional fees associated with the sale of the assets of
6 Homestyles to Homestore.”¹²⁵

- 7 • April 5, 2001 email from Donald Berglund to Brian Tubb (PwC)
8 about structuring the Investor Plus-Homestore transaction,
9 including the obligation to advertise on AOL (again, last modified
10 on December 9, 2001).¹²⁶

11 Second, Homestore maintained logs reflecting emails communications with PwC
12 and PwC’s receipt of relevant documents, including the crucial Ad Rep/Ad Ref
13 Agreement between AOL and Homestore.¹²⁷ PwC failed to produce more than half the
14 emails listed in these logs as being sent or received by PwC despite multiple subpoenas.

15 Third, when PwC recently allowed the defense to inspect the ninety boxes of
16 documents that PwC advised were duplicative or non-responsive, the defense discovered
17 numerous non-duplicative responsive email communications that PwC had never
18 produced. For example, one of these shows that PwC had actually consulted on the Q2
19 AOL transaction about which it supposedly knew so little.¹²⁸ The discovery of these
20 emails further confirms that highly relevant email communications that existed in 2002
21 (when these ninety boxes were compiled) were not turned over to the defense in earlier
22 productions, corroborating the legitimate concern that PwC documents did in fact
23 disappear after the commencement of Homestore’s internal investigation.

24 ¹²⁵ This email, produced by Homestore not PwC, counters the Government’s theory that PwC lacked
25 knowledge of vendor’s obligations to advertise on AOL. *Id.*, Ex. 76 thereto.

26 ¹²⁶ These documents, produced by Investor Plus but not PwC, relate directly to PwC’s knowledge that
27 certain costs were associated with revenue, a key issue in the case. *Id.*, Ex. 76 thereto.

28 ¹²⁷ Ex. A, Ex. 78 thereto (extract of detailed logs maintained by Boling, Homestore’s Manager of SEC
reporting).

¹²⁸ *Id.*, Ex. 79 thereto (Stalick email to Campos, Aug. 7, 2001).

1 Fourth, the defense has discovered numerous emails that were forwarded by one
2 PwC audit team member to another, but were only produced to the defense by one of the
3 parties to the communication. This hit-or-miss production by individual PwC employees
4 not only demonstrates the systemic problem associated with PwC's decision to permit
5 audit team members to set their own individual criteria for relevance and production, it
6 confirms the incompleteness of PwC's productions and that email communications
7 during the relevant period have been irretrievably lost.

8 **2. Crucial PwC External Binders Are Missing**

9 Another category of significant and missing materials are PwC's external binders
10 which contained the non-electronic support documentation for its audit and quarterly
11 review work. These binders contained, amongst other things, the Homestore agreements
12 that PwC requested and received, as well as the management representation letters at
13 issue in this case. Despite the many references to agreements in PwC's workpapers,
14 PwC's productions to the SEC and to the defense did not contain these agreements.¹²⁹ A
15 review of the exact agreements PwC received is crucial. Indeed, some of these
16 agreements disclosed in very clear and obvious ways the supposedly concealed legs of
17 these multi-legged transactions. In fact, Withey even acknowledged that one of these
18 agreements, the Q2 2001 AOL Advertising Referral Agreement, was a "smoking gun"
19 because it would have clearly outlined the structure of the largest transaction.¹³⁰ Indeed,
20 Page confirmed during his SEC interview that he would have "made the connection on
21 the multi-legged vendor transactions if he saw the Q2 AOL Advertising Referral
22 Agreement.¹³¹ Again, given the importance to the Indictment of the allegation that Wolff

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24
25 ¹²⁹ *Id.*, Ex. 80 thereto (Jin Li email and attachment, Dec. 17, 2001) (showing an index of PwC's external
26 binders containing at least two hundred and four agreements as of that date).

27 ¹³⁰ *Id.*, Ex. 81 thereto (PwC Memorandum "Homestore/AOL Transactions," Mar. 29, 2002).

28 ¹³¹ *Id.*, Ex. 82 thereto, at 3 (Page SEC Interview Memorandum).

1 conspired to mislead PwC and conceal information from it, these missing materials – that
2 likely included at least one “smoking gun” – are critical to Wolff’s defense.

3 **3. Facsimiles Communications Between Homestore And PwC Are**
4 **Missing**

5 PwC produced virtually no records of any facsimile communications between PwC
6 and Homestore despite several references in email correspondence, between Homestore
7 and PwC during the charged conspiracy, to Homestore faxing material and documents to
8 PwC that supported PwC’s work on many of the modified workpapers.¹³² PwC’s counsel
9 has confirmed that if the facsimile communications between Homestore and PwC were
10 not in the ninety boxes of recently produced records (and they were not) these documents
11 crucial to the defense no longer exist.¹³³

12 **E. The Defense Is Entitled To An Evidentiary Hearing**
13 **Because The Missing And Modified Evidence Goes To**
14 **The Core Of The Case And Is Potentially Exculpatory**

15 The defense requests an evidentiary hearing to determine the circumstances
16 surrounding (1) the material modifications of critical PwC workpapers, (2) PwC’s
17 patently false explanations relating to those modifications, and (3) the loss of crucial and
18 unusually large quantities of missing evidence. An evidentiary hearing should be granted
19 when, as here, the defendant can show that material facts are in doubt or dispute. *See,*
20 *e.g., U.S. v. Batiste*, 868 F.2d 1089, 1091-92 (9th Cir. 1989) (“The district court may
21 elect to put the government to its proof at an evidentiary hearing even where, as here, no
22 material facts stated in its papers are in dispute.”); *see also U.S. v. Panitz*, 907 F.2d 1267,
23 1273 (1st Cir. 1990) (“The test for granting an evidentiary hearing in a criminal case
24 should be substantive: did the defendant make a sufficient threshold showing that
25 material facts were in doubt or dispute?”); *Gov’t of Virgin Islands v. Martinez*, 780 F.2d
26 302, 306 (3d Cir. 1986) (where there are genuine issues of material facts, an evidentiary
27 hearing should be conducted).

28 ¹³² *Id.*, Group Ex. 83 thereto (Christian Jester email to Boling, cc: to Withey, May 9, 2001; Boling
email to PwC, July 14, 2001).

¹³³ *Id.*, Ex. 25 thereto (Gibson, Dunn letter, June 9, 2009).

1 Here, it is manifest that there is a dispute over material facts: PwC and the
2 Government first maintained that PwC never modified or willfully lost documents and
3 now offer disprovable explanations that they contend justify such modifications, while
4 the defense argues to the contrary, as detailed above, that PwC committed willful and
5 egregious acts of modification, destruction, and/or loss in connection with relevant and
6 crucial evidence.

7 As also set forth above, most of PwC's missing and modified evidence deals
8 directly with the core allegations in the case: what information was exchanged between
9 Homestore and PwC on revenue and significant transactions and what did PwC do with
10 that information for purposes of the audit, quarterly review, and consulting services it
11 performed for Homestore? When, as here, litigation is reasonably anticipated, a party
12 must suspend its routine document retention/destruction policy and preserve relevant
13 documents. *Columbia Pictures Indus. v. Bunnell*, No. CV 06-1093, 2007 WL 2080419,
14 at *14 (C.D. Cal. May 29, 2007) (Chooljian, J.) (“A litigant is under a duty to preserve
15 what it knows, or reasonably should know, is relevant in the action, is reasonably
16 calculated to lead to the discovery of admissible evidence, is reasonably likely to be
17 requested during discovery, and/or the subject of a pending discovery request.”); *Hous.*
18 *Rights Ctr. v. Sterling*, No. CV 03-859, 2005 WL 3320739, at *2, 9 (C.D. Cal. Mar 02,
19 2005) (Fisher, J.) (sanctioning defendants for failure to implement and comply with the
20 litigation hold and for the destruction of documents). Thus, there are a multitude of civil
21 and criminal penalties in place intended to deter parties tempted to destroy documents.
22 *See, e.g.*, Fed. R. Civ. P. 37(b) (discovery sanctions, including spoliation remedies); 18
23 U.S.C. § 1519 (criminal penalties for willful destruction, alteration, or falsification of
24 records in federal investigations); 18 U.S.C. § 1520 (criminal penalties for willful
25 destruction of corporate audit records).¹³⁴

26
27
28 ¹³⁴ These criminal statutes were enacted in July of 2002 by Sarbanes Oxley in the wake of the
Enron/Arthur Anderson scandal.

1 Significantly, PwC has been reprimanded for its failure to preserve and produce
2 electronic records in other cases. *See e.g., In re Telxon Corp. Sec. Litig.*, No. 98 CV
3 2876, 2004 WL 3192729 (N.D. Ohio July 16, 2004) (entry of a default judgment against
4 PwC as a sanction for discovery abuses tied to its failure to produce electronic versions
5 of audit workpapers); *In the Matter of Pricewaterhouse Coopers, LLP*, SEC Release No.
6 47900 (May 22, 2003) (sanctioning and criticizing PwC for improper professional
7 conduct including, among other things, making significant undocumented revisions to its
8 workpapers) (Securities and Exchange Commission May 22, 2003 Press Release, “PwC
9 is Censured and Agrees to Pay \$1 Million, Establish New Document Retention Policies,”
10 available at www.sec.gov/news/press/2003-65.thm); *see also In re Smartalk Teleservices,*
11 *Inc. Sec. Litig.*, 487 F. Supp. 2d 947, 951 (S.D. Ohio 2007) (remanding matter to
12 magistrate judge to determine if auditor Pricewaterhouse Coopers engaged in spoliation
13 of evidence).

14 The fact that evidence is missing in core areas of the case is extremely suspicious.
15 Indeed, there were professional and regulatory standards in place that required PwC to
16 create and maintain accurate documentation regarding information that it obtained, work
17 it did, and the conclusions it reached (“auditor workpapers”).¹³⁵ This is precisely what
18 the SEC held in *In Re Fiedelman*, SEC Rel. No. 48578 (Oct. 1, 2003) (“It follows from
19 the [U.S. Auditing standards] AU § 339 requirements on working papers “that any
20 addition, deletion, or modification to the working papers after they have been finalized in
21 connection with the completion of the audit may be made only with appropriate
22 supplemental documentation, including an explanation of the justification for the
23 addition, deletion or modification.”). The SEC has similarly noted that,

24
25 ¹³⁵ Ex. A, Ex.’s 2 and 40 thereto (American Institute of Certified Public Accountants Professional
26 Standards § 339 and *In Re Madden*, SEC Rel. No. 53574 (Mar 20, 2006)). In *Madden*, a pre-Sarbanes-
27 Oxley case, the SEC disbarred the lead KPMG audit partner working on the Tenet Healthcare
28 engagement for engaging in conduct similar to PwC’s conduct here, *i.e.*, modifying workpapers,
“fail[ing] to include any information revealing that the change or addition occurred after the issuance of
the audit report,” and affirmatively misdating the timing of the changes. SEC Rel. No. 53574 (Mar 20,
2006).

1 [w]orking papers prepared or collected by auditors in the course of an
2 audit provide the single most important support for their representation
3 regarding compliance with GAAS. They serve as the repository for the
4 competent evidential matter necessary to afford the auditors with a
5 reasonable basis for opining on an issuer's financial position. It is therefore
6 imperative that auditors preserve their working papers in a complete
7 unaltered form.

8 *In the Matter of Aron R. Carr*, SEC Rel. No. 53573 (Mar. 30, 2006). Another applicable
9 standard states that “oral explanations on their own do not represent sufficient support for
10 the work the auditor performed or conclusions the auditor reached.” AU § 339.11. Thus,
11 it is not mere conjecture to believe that PwC did in fact carefully and contemporaneously
12 document information provided by Homestore, work done in relation to PwC's quarterly
13 reviews and audit work, and PwC's interactions and communications with Homestore –
14 since they were required to do just that.

15 Through extensive analysis and effort undertaken since current counsel entered the
16 case, assisted by the recent production of electronic files never before produced, the
17 defense has been able to unearth information about a host of important evidence that has
18 been lost due to PwC's purposeful action (or the Government's inaction). The truly
19 troubling aspect of this loss of evidence is that it is coupled with a tampered and
20 unreliable set of existing documents. The modifications that were made to PwC's
21 workpapers and the falsification of its records related to Homestore's management
22 representation letters demonstrate an intentional and clear pattern of adding/deleting
23 knowledge of the very information that is alleged to have been concealed and lied about.

24 The defense and this Court do not know and probably never will know the full
25 extent of what was modified and/or has been lost. We can, however, extrapolate from
26 PwC's established pattern of misconduct and reasonably assume that some of this
27 missing material was intentionally destroyed to further obfuscate PwC's true knowledge
28 of these transactions and that some of it would have been exculpatory to the defense.
See, e.g., Cyntegra v. Idexx Lab., Inc., No. 07-56699, 2009 WL 1041105, at *1 (9th Cir.
April 20, 2009) (granting defendant's motion for sanctions for defendant's spoliation of

1 critical evidence and concluding that “Idexx suffered prejudice because it was deprived
2 of relevant, non-cumulative evidence to support its theories in defense of the case.”);
3 *Leon v. IDX Sys. Corp.*, 464 F. 3d 951, 959-60 (9th Cir. 2006) (finding that plaintiff’s
4 “spoliation threatened to distort the resolution of the case because any number of the
5 [missing] 2,200 files could have been relevant to IDX’s claims or defenses, although it is
6 impossible to identify which files and how they might have been used.”) (citations
7 omitted). That “smoking guns” may have been lost is “precisely the reason” that
8 information “should have been preserved and produced” in the first place. *Nursing*
9 *Home Pension Fund v. Oracle Corp.*, 254 F.R.D. 559, 565 (N.D. Cal. 2008) (sanctioning
10 Oracle for failing to produce emails because after its employees received a preservation
11 instruction, they were “under a duty to preserve evidence that they knew or reasonably
12 should have known was relevant to the action.”).

13 In light of the clear dispute over the material evidence now discovered to be
14 missing and/or modified, an evidentiary hearing should be granted to permit the defense
15 to challenge the Government’s and PwC’s denials of wrongdoing and determine the
16 entire extent to which the evidentiary record in this case has been affected. *See, e.g.*,
17 *Panitz*, 907 F.2d at 1273; *Batiste*, 868 F.2d at 1091-92; *Martinez*, 780 F.2d at 306.

