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

15 UNITED STATES OF AMERICA,) No. CR 05-398-GAF
16)
Plaintiff,) GOVERNMENT'S OPPOSITION TO
17) DEFENDANT'S MOTION RE:
v.) INTELLIGENCE AND IVY LEAGUE
18) EDUCATION; DECLARATION OF AUSA
STUART H. WOLFF,) MICHAEL R. WILNER; EXHIBITS
19)
Defendant.) Hearing Date: December 15, 2008
20) Hearing Time: 1:30 p.m.
21)

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 In this corporate fraud criminal case, the government is
4 required to establish that defendant Wolff knew about the
5 fraudulent transactions at Homestore and acted willfully in
6 conduct that contributed to the fraud. Proof that defendant
7 Wolff is a bright man -- as evidenced by his fine educational
8 background and advanced degree in a sophisticated scientific area
9 -- is directly relevant to establishing that defendant possessed
10 the requisite knowledge and intent. Defendant Wolff's level of
11 intelligence and education are therefore appropriate topics for
12 the government to establish at trial, as they help prove the
13 required elements of the charged crimes. There is simply no
14 undue prejudice in showing that the college-educated defendant
15 Wolff was smart enough to understand the bogus nature of the
16 deals in this case.

17 Furthermore, although Wolff now objects to the government
18 alluding to his intellectual capacity by calling him "Dr. Wolff"
19 at trial, he regularly used his honorific title while he was
20 Homestore's CEO. Indeed, the fraudulent quarterly reports that
21 defendant submitted to the SEC -- key evidence of his criminal
22 conduct -- repeatedly refer to him as "Dr. Wolff" and/or
23 "Stuart H. Wolff, Ph.D." Defendant can hardly be unfairly
24 prejudiced by use of a title that he used when he committed the
25 charged crimes. Further, because defendant now requests waiver
26 of jury trial and it appears that this case will be tried to the
27 Court, there will be no undue prejudice from reference to
28 defendant's educational accomplishment.

1 Directly put, if defendant used the title "Dr." Wolff when
2 he ran Homestore, he can be referred to as "Dr." Wolff at trial.
3 The Court should deny the defense motion.

4 **II. FACTS**

5 **A. The Revenue Inflation Scheme and the**
6 **Fraudulent Roundtrip Deals**

7 The Indictment alleges that Homestore engaged in a
8 deliberate scheme to overstate its revenue during 2001. As
9 explained in more detail in other filings with this Court,
10 Homestore deliberately inflated its revenue in 2001 by engaging
11 in fraudulent roundtrip deals. In those deals, Homestore routed
12 money to itself through three-legged transactions with other
13 companies, which resulted in Homestore paying itself for
14 advertising on its own website. Homestore lost money in these
15 transactions because it paid more money to the vendors than it
16 received in advertising revenue. Additionally, Homestore
17 purchased products and services from those companies that
18 Homestore did not need, did not use, or could have obtained at a
19 far lower price.

20 The purpose of the roundtrip deals was so that Homestore
21 could improperly record the sale of advertising from the rigged
22 transactions as "revenue." Homestore recorded a total of over
23 \$67,000,000 in revenue from the bogus roundtrip deals during the
24 first three quarters of 2001. That revenue was disclosed to the
25 public in, among other documents, quarterly reports filed with
26 the SEC on Form 10-Q.

1 In the process of preparing the 10-Qs and recording revenue,
2 Homestore personnel deliberately withheld crucial information
3 about the roundtrip deals from its outside accountants.
4 Homestore personnel also took deliberate steps to conceal the
5 true nature of the interlinked legs of the transactions. These
6 steps included preparing management representation letters to the
7 auditors that falsely stated that Homestore had turned over all
8 records, and fully disclosed its business dealings, to the
9 accountants.

10 **B. Charges in the Indictment**

11 The Indictment's charges against defendant Wolff are based
12 on his role in the revenue inflation scheme. Defendant Wolff is
13 charged with:

- 14 • conspiracy to violate the federal securities laws;
- 15 • filing false quarterly reports with the SEC
16 regarding Homestore's financial performance;
- 17 • lying to Homestore's outside accountants,
18 including signing false management representation
19 letters;
- 20 • causing the preparation of false corporate books
21 and records; and
- 22 • insider trading (defendant Wolff personally sold
23 millions of dollars of Homestore stock based on
24 his knowledge of Homestore's fraudulently inflated
25 results).

1 These charges generally require the government to prove that
2 defendant Wolff knew certain facts, acted willfully, and/or acted
3 with fraudulent intent.

4 **C. Wolff's Educational Background**

5 Defendant possesses a stellar educational and professional
6 background. This information was publicized in Homestore's
7 corporate filings with the SEC.

8 According to Homestore's April 2001 proxy statement¹ (filed
9 with the SEC during the charged conspiracy), "Dr. Wolff received
10 a B.S. in electrical engineering from Brown University and an
11 M.E.E. and Ph.D. in electrical engineering from Princeton
12 University." Before becoming Homestore's CEO, "Dr. Wolff was
13 Vice President of Business Services at TCI Interactive and at
14 AND Interactive, subsidiaries of TCI Communications, Inc., a
15 cable company."² Earlier in his career, "Dr. Wolff was an
16 engineer at IBM and a research scientist at AT&T Bell Labs."³

17 Numerous other public and business records of Homestore
18 advert to defendant Wolff's Ph.D. and educational background. In
19 Homestore's Form 10-Q filing with the SEC for the second quarter
20 of 2001, the company disclosed that:

21 Our future success depends to a significant extent
22 on the continued services of our senior management
23 and other key personnel, particularly Stuart H.
24 Wolff, Ph.D., our chairman and Chief Executive

25 ¹ See Declaration of AUSA Wilner, Ex. 1 (government trial
26 exhibit 5).

27 ² Ex. 1.

28 ³ Ex. 1.

1 questioned several key executives about defendant's academic
2 background. All were well aware of Wolff's education, his
3 advanced degree, and overall high level of intelligence. Given
4 that Homestore was an Internet-based, technology company, Wolff's
5 scientific credentials and Ph.D. were viewed positively and were
6 not concealed from employees or investors. Defendant Wolff
7 himself spoke at length about his educational background when he
8 testified in his own defense at trial.

9 Both Brown University and Princeton University are Ivy
10 League institutions. However, a review of the 40 days of
11 transcripts from the original criminal trial reveals that the
12 government used the phrase "Ivy League" on only one occasion --
13 during the government's opening statement. The government used
14 the phrase "smartest guy in the room" twice during its closing
15 argument; defendant's attorneys used the phrase four times.⁸

20
21 ⁸ Declaration of AUSA Wilner at ¶¶ 9-10. In his motion,
22 defendant claims that this phrase is "inextricably linked" to a
23 book and documentary film regarding financial misconduct at
24 Enron. The government strongly doubts that such a link exists in
the mind of a typical, lay jurymember. In the bench trial that
is currently anticipated, the Court will certainly be able to
disregard any such link.

25 Moreover, by agreement of the parties in the original
26 criminal trial, neither party made any mention of Enron or other
27 recent corporate fraud scandals at defendant Wolff's trial.
Given the context, the reference to Wolff being the
"smartest guy" during the original criminal trial clearly had no
link to the Enron debacle.

1 **III. ARGUMENT - THERE IS NOTHING UNDULY PREJUDICIAL ABOUT**
2 **IDENTIFYING DEFENDANT BY A TITLE THAT HE REGULARLY USED OR**
3 **REFERRING TRUTHFULLY TO HIS EDUCATIONAL BACKGROUND**

4 The government is entitled to present accurate evidence
5 showing that defendant Wolff was an intelligent, educated person.
6 Such evidence is relevant to establishing his knowledge regarding
7 the roundtrip deals, and to refute defense claims that defendant
8 Wolff did not and could not understand the significance of the
9 deals.

10 Defendant objects to the introduction of this evidence based
11 on Federal Rule of Evidence 403. That provision gives a trial
12 court discretion to exclude relevant evidence "if its probative
13 value is substantially outweighed by the danger of unfair
14 prejudice, confusion of the issues, or misleading the jury, or by
15 considerations of undue delay, waste of time, or needless
16 presentation of cumulative evidence." In exercising its
17 discretion, a trial court should consider "the familiar, standard
18 rule that the prosecution is entitled to prove its case by
19 evidence of its own choice." Old Chief v. United States, 519
20 U.S. 172, 187 (1997). This is particularly true under Rule 403
21 because the prosecution "needs evidentiary depth to tell a
22 continuous story" to the jury to satisfy its burden of proof.
23 Id. at 654. Moreover, the law has long permitted a prosecutor to
24 "strike hard blows" at trial, although the government "is not at
25 liberty to strike foul ones." Berger v. United States, 295 U.S.
26 78, 88 (1935).

27 In the present case, there is no allegation that the
28 government will be misstating any aspect of Dr. Wolff's personal

1 educational background. Defendant attended Brown and
2 Princeton Universities, and he possesses a Ph.D. in electrical
3 engineering. Defendant admitted these facts at the original
4 criminal trial. Defendant also prepared and signed important
5 corporate documents in which he promoted himself by referring to
6 his academic achievements and his impressive title.

7 Moreover, Wolff, like many other corporate fraud defendants,
8 seeks to portray himself as unsophisticated or unable to
9 understand matters of finance and accounting.⁹ The government is
10 entitled to present evidence that defendant was indeed bright
11 enough to understand events around him, particularly the wrongful
12 nature of the roundtrip deals. Proof of defendant's superb
13 academic credentials, percipient observations of his intellectual
14 skills, and direct evidence of his personal involvement in the
15 fraudulent transactions are all probative evidence to establish
16 defendant's subjective knowledge and intent regarding the charged
17 conduct.

18 Defendant offers no explanation as to why such truthful,
19 accurate information about him could be unduly prejudicial. To
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21 ⁹ In the trial of the former CEO of WorldCom, his
22 attorneys elicited testimony from Bernard Ebbers that he worked
23 in such fields as "a bouncer, basketball coach, and milkman
24 before getting into the telecommunications business," and that
25 "he was unfamiliar with the details of accounting." See
26 MSNBC.com, "Jury Convicts Ebbers on All Counts in Fraud Trial"
27 (Mar. 15, 2005) (Declaration of AUSA Wilner at Ex. 8).

28 Similarly, a news report on the trial of former Enron
CEO Kenneth Lay observed that Lay advanced "what is known in
legal circles as the 'idiot' or 'ostrich' defense."
BusinessWeek, "Ken Lay's Audacious Ignorance" (Feb. 6, 2006)
(Declaration of AUSA Wilner at Ex. 9).

1 the contrary, defendant Wolff used his professional title on the
2 fraudulent quarterly reports that Homestore filed with the SEC
3 and false management representation letters issued to Homestore's
4 auditors. The fraudulent quarterly reports form the very basis
5 of the criminal charges in Counts Three and Four of the
6 Indictment. Those counts allege that defendant Wolff caused
7 false statements to be filed with the SEC in violation of the
8 securities laws. Similarly, Counts Ten and Twelve allege that
9 the letters to Homestore's auditors constituted lying to auditors
10 in violation of federal law.

11 The key documents that establish Wolff's criminal conduct --
12 the papers that are, essentially, the scene of the financial
13 crimes charged in the indictment -- refer to him as "Dr. Wolff"
14 or "Stuart H. Wolff, Ph.D." This evidence will necessarily be
15 admitted at trial and submitted to the jury. Given that
16 defendant will be identified on crucial records as "Dr. Wolff,"
17 the government should fairly and consistently be able to identify
18 him verbally in the same manner.

19 None of this evidence is so sensational, pejorative, or
20 unduly prejudicial to merit preclusion at trial, which is all the
21 more true in a bench trial. Referring to defendant Wolff's
22 impressive education and title is relevant to challenge defendant
23 Wolff's assertion that he didn't know about or couldn't
24 understand the roundtrip deals. The government should be
25 permitted to refer to thee facts.

1 **IV. CONCLUSION**

2 For the reasons set forth above, defendant's motion to
3 preclude reference to his title and education should be denied.
4

5 Dated: November 7, 2008

Respectfully submitted,

6 THOMAS P. O'BRIEN
Acting United States Attorney

7
8 CHRISTINE C. EWELL
Assistant United States Attorney
Chief, Criminal Division
9

10 /s/

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

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13 Attorneys for Plaintiff
United States of America
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1 **DECLARATION OF MICHAEL R. WILNER**

2 I, MICHAEL R. WILNER, do hereby declare as follows:

3 I have personal knowledge of the following facts and, if
4 called upon as a witness, I could and would competently testify
5 to these facts.

6 1. I am an Assistant United States Attorney with the
7 Office of the United States Attorney for the Central District of
8 California. I am presently assigned to present the government's
9 case in United States of America v. Stuart H. Wolff, CR 05-398-
10 GAF. I have also represented the government in the related
11 prosecutions of other former executives and employees of
12 Homestore.com, and the original Wolff criminal trial.

13 2. I submit this declaration in support of the
14 government's opposition to defendant's in limine to exclude
15 evidence of defendant's education and title during the trial in
16 this matter.

17 **Compliance with This Court's Scheduling Order**

18 3. On September 11, 2008, AUSA Michael Raphael and I
19 participated in a telephone call with Mark Stancil, an attorney
20 representing defendant Wolff. As required by this Court's
21 scheduling order, the parties met and conferred regarding the
22 government's proposed motion. The parties could not come to an
23 agreement regarding the issue raised in this motion.

24 **Documents Identifying Defendant Wolff as "Dr. Wolff" or**
25 **"Stuart H. Wolff, Ph.D."**

26 4. Attached at Exhibit 1 is a true and correct copy of
27 excerpts from Homestore's proxy statement on Schedule 14A filed
28

1 with the SEC on April 17, 2001. This document is government
2 trial exhibit 5. In the proxy statement, defendant is identified
3 as "Dr. Wolff" and "Stuart H. Wolff, Ph.D."

4 5. Attached at Exhibit 2 is a true and correct copy of
5 excerpts from Homestore's quarterly report on Form 10-Q for the
6 second fiscal quarter of 2001 filed with the SEC on August 14,
7 2001. This document is government trial exhibit 3. In the
8 quarterly statement, defendant is identified as "Dr. Wolff."

9 6. Attached at Exhibit 3 is a true and correct copy of
10 excerpts from Homestore's quarterly report on Form 10-Q for the
11 third fiscal quarter of 2001 filed with the SEC on November 14,
12 2001. This document is government trial exhibit 4. In the
13 quarterly statement, defendant is identified as "Dr. Wolff" and
14 "Stuart H. Wolff, Ph.D."

15 7. Attached at Exhibits 4-6 are true and correct copies of
16 excerpts from management representation letters that Homestore
17 sent to PricewaterhouseCoopers dated March 30, May 15, and
18 August 9, 2001. These documents are government trial
19 exhibits 701-703, respectively. Defendant signed the management
20 representation letters as "Stuart H. Wolff, Ph.D."

21 8. Attached at Exhibit 7 is a true and correct copy of
22 excerpts from an analyst report from Prudential Securities
23 (entitled "Homestore.com Is Building a Fortress - We Are
24 Initiating Coverage With a Strong Buy Rating") dated March 26,
25 2001. This document is government trial exhibit 1121. In the
26 analyst report, defendant is identified as "Dr. Wolff" and his
27 engineering/scientific background is mentioned.

1 **Review of Transcripts From Original Trial**

2 9. In preparation for this brief, I reviewed an electronic
3 database containing all 40 days of transcripts from the original
4 criminal trial. My review of those transcripts reveals that the
5 government used the phrase "Ivy League" on only one occasion --
6 during the government's opening statement. The government used
7 the phrase "smartest guy in the room" twice during its closing
8 argument.

9 10. Defendant's attorneys used the phrase "smartest guy in
10 the room" four times in closing. I also note that, during
11 defendant's direct examination, he testified at great length
12 about his educational background and scientific experience before
13 joining Homestore.

14 **News Articles**

15 11. Attached at Exhibit 8 is a true and correct copy of a
16 news article regarding the Ebbers/WorldCom corporate fraud trial
17 obtained from MSNBC.com, "Jury Convicts Ebbers on All Counts in
18 Fraud Trial" (Mar. 15, 2005).

19 12. Attached at Exhibit 9 is a true and correct copy of a
20 news article regarding the Lay/Enron corporate fraud trial
21 obtained from BusinessWeek, "Ken Lay's Audacious Ignorance"
22 (Feb. 6, 2006).

23 **Jury Trial Waiver**

24 13. Shortly before the parties filed pretrial motions in
25 this case, defense counsel and I discussed the issue of defendant
26 waiving his right to a jury trial. On November 7, 2008 (after
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1 the filing of the present motion), defendant filed a notice with
2 the Court formally requesting a bench trial in this case.

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I declare under penalty of perjury under the laws of the
United States of America that the foregoing is true and correct.

Executed on November 7, 2008, in Los Angeles, California.

/s/

MICHAEL R. WILNER