UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 2197/January 9, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16033

In the Matter of AIRTOUCH COMMUNICATIONS, INC., HIDEYUKI KANAKUBO, and JEROME KAISER, CPA	: : : : : :	ORDER ON MOTIONS IN LIMINE

The parties in this matter have filed three motions in limine, oppositions to same, and replies to the oppositions. They have also registered objections to documentary evidence. I address the parties' pleadings below.

1. *AirTouch's hard drive*. In a prehearing order, I explained that the parties' experts' reports "should be as specific and detailed as those presented in federal district court pursuant to Federal Rule of Civil Procedure 26." Respondents Hideyuki Kanakubo and Jerome Kaiser retained Michael Kunkel as an expert.[1] Mr. Kunkel "manag[es] computer forensic investigations." Kunkel Report at 1. Airtouch provided Mr. Kunkel with an external hard drive that had purportedly "been used as a backup for AirTouch's network shared drive." *Id.* at 2. According to a letter from Roger L. Scott, AirTouch's counsel, to Peter Altman, counsel for the Division, the drive was provided under a "joint defense agreement . . . with extremely limited parameters." Div. Mot. in Limine at Ex. A. In his letter, Mr. Scott asserted that Mr. Kunkel was instructed to search the hard drive for instances of a file titled "Letter of Agreement 073012.pdf." *Id*.

In December 2014, Mr. Kunkel examined the hard drive. Kunkel Report at 2, 3. He subsequently issued an expert report concerning whether users of AirTouch's network could access a document titled "TMCell – Letter of Agreement 073012.pdf." *Id.* at 2. After Respondents submitted Mr. Kunkel's report, the Division moved to exclude it.

[1] This proceeding is currently stayed as to Mr. Kanakubo while the Commission considers his offer of settlement. *See AirTouch Comm'ns., Inc.*, Admin. Proc. Rulings Release No. 2170, 2014 SEC LEXIS 5017 (Dec. 29, 2014).

The Division alleges that AirTouch has refused to produce the drive except under conditions the Division finds unacceptable. Div. Mot. in Limine at 11-12. Among AirTouch's conditions is that the Division hire an independent, outside expert "acceptable to AirTouch" to conduct a limited examination of the hard drive. *Id.* at Ex. A. The Division further asserts that it is entitled to review the materials Mr. Kunkel reviewed in reaching his conclusion without the proposed limitations. *Id*. at 11-12.

AirTouch responds that it is willing "to make the hard drive available to the Division subject to reasonable terms." Resp. Opp'n at 5. It states that:

> Because the hard drive at issue contains large volumes of privileged and confidential data, AirTouch simply wants to ensure that Division staff is not given carte blanche to peruse the entire contents of the drive, including the substance of privileged communications, merely because Mr. Kunkel analyzed the forensic characteristics of a single, non-privileged document.

Id. AirTouch maintains that the Division should be required to "retain an external expert not employed by the Division." *Id*. at 7.

The Federal Rules of Civil Procedure do not apply in this proceeding. As noted, I nonetheless directed that the parties should follow the requirements of Federal Rule 26 in submitting their expert reports. Rule 26(a)(2)(B) requires that an expert's report list "the facts or data considered by the witness in forming them." In order to effectuate this rule, "[a] testifying expert must disclose and therefore retain whatever materials are given him to review in preparing his testimony." *Fidelity Nat. Title Ins. Co. of New York v. Intercounty Nat. Title Ins. Co*., 412 F.3d 745, 751 (7th Cir. 2005). Given the disclosure obligation, the Rule trumps any claim of privilege. *See* Advisory Committee Note to 1993 Amendments.

Given the foregoing and taking AirTouch at its word, I order the following. Within seven days, AirTouch shall fully disclose the limitations it imposed on Mr. Kunkel with respect to his review of the hard drive. At the same time, AirTouch shall file a proposed protective order with terms consistent with the limitations imposed on Mr. Kunkel. By January 30, 2015, Mr. Kunkel shall provide the external hard drive to the Division for its inspection in a manner consistent with the limitations imposed on Mr. Kunkel. In the event Mr. Kunkel has not retained the hard drive, AirTouch shall deliver it to the Division by the same date and under the same conditions. The Division shall permit a representative designated by AirTouch to observe the Division's examination of the hard drive. The Division is not required to "retain an external expert not employed by the Division."

2. *Allan Kleidon's expert report*. Respondents Kanakubo and Kaiser retained Allan W. Kleidon, Ph.D., "to assess whether there is any evidence of material misstatements that inflated the stock prices of AirTouch Communications, Inc. . . . during the relevant period." Kleidon Report at 1. The Division objects to Dr. Kleidon's report insofar as he purported to address "loss causation and damages." Div. Mot. in Limine at 7. The Division concedes that Dr. Kleidon's opinion is relevant to the issue of "the scope of relief to be awarded." *Id.* at 9.

In response, Respondents concede, as they must, that "loss causation is not a required element of the Division's claims." Resp. Opp'n at 8. They assert, however that Dr. Kleidon's report bears on materiality, which is an element. *Id*. Given the parties' concessions, the Division's motion to exclude Dr. Kleidon's report is denied. I will disregard Dr. Kleidon's report to the extent it addresses loss causation and the Division need not examine Dr. Kleidon in relation to loss causation.

3. *Mr. Kaiser's company car and company credit card usage*. Respondent Kaiser moves to exclude evidence, references to evidence, testimony, or argument concerning use of his company car and company credit card. Mr. Kaiser notes that these matters are not alleged in the Order Instituting Proceedings (OIP) and asserts they are irrelevant. Kaiser Motion at 1. He also argues that addressing these matters will be a waste of time because doing so will result in a mini-trial about his expenditures. *Id*. at 5-6. Finally, Mr. Kaiser disputes whether these matters would properly constitute character evidence. *Id*. at 6-9.

The Division responds that AirTouch's internal investigation revealed concerns about Mr. Kaiser's possible use of his company credit card for personal use. Div. Opp'n at 4-5. It also states that AirTouch's board demanded that Mr. Kaiser return the company car but he refused. *Id*. at 7. On the merits, the Division argues that the evidence is relevant to Mr. Kaiser's "fraudulent intent in his dealings with AirTouch's board." *Id*. at 12. The Division also asserts that its witnesses can express their opinion of Mr. Kaiser's truthfulness based on their interactions with him. *Id*. at 14. The Division argues that Mr. Kaiser's credit card usage and retention of a company car are relevant to the sanctions that might be imposed. *Id*. at 10.

For the reasons that follow, I grant Mr. Kaiser's motion, in part. The Division may present testimonial evidence about AirTouch's internal investigation into AirTouch's accounting, and its witnesses may opine about Mr. Kaiser's truthfulness and the basis for those opinions. The Division may not, however, affirmatively present evidence about Mr. Kaiser's company car or credit card usage. In the event Mr. Kaiser's testimony puts his credit card usage at issue, I will entertain a motion to allow the Division to present rebuttal evidence about the credit card usage.

With respect to whether Mr. Kaiser should have returned his company car after he resigned, the arguments presented show that this issue boils down to a dispute between AirTouch and Mr. Kaiser about the terms of his employment. This dispute is not relevant to this proceeding. Evidence about Mr. Kaiser's refusal to return his company car is thus excluded. *See* 17 C.F.R. § 201.320 (irrelevant evidence is inadmissible).

With respect to Mr. Kaiser's credit card usage, the Division fails to connect Mr. Kaiser's allegedly improper credit card use in a meaningful way to the conduct alleged in the OIP. Relying on Federal Rule of Evidence 404(b), the Division posits that Mr. Kaiser's alleged use of his company credit card for personal use constitutes "evidence of [his] fraudulent intent."[2] Div.

[2] Although the Federal Rules of Evidence do not apply in this proceeding, they provide useful guidance in determining whether to admit evidence and the weight to give that evidence.

Opp'n at 12. Specifically, it says this case is "about a scheme to defraud, and one common element of fraudulent schemes involving public companies is misleading or withholding information from key gatekeepers at a company, like the board." *Id*. at 13; *see id*. at 2 ("The Division has charged Kaiser with making fraudulent misrepresentations and with engaging in a fraudulent scheme to hide the truth about AirTouch's true finances"). The Division thus believes that Mr. Kaiser's alleged misuse of his credit card is relevant because that alleged misuse also relates to a scheme to hide matters from the Board. *See id*. at 18.

The problem with this line of argument is that the Division does not allege that Mr. Kaiser actually hid his credit card charges from anyone. Instead it assumes he did so and implicitly asks that I join it in making that assumption. I am not willing to entertain that assumption.

Furthermore, as Mr. Kaiser has argued, his use of his company credit card is collateral to the main issue presented in this matter. If I were to permit the parties to present evidence of whether Mr. Kaiser's credit card usage was legitimate, the hearing in this matter would degenerate into a "collateral mini-trial" about a matter that is only peripherally related to the questions at issue. Going down that road would be a waste of time and resources. Given the foregoing and considering the fact that allegations related to Mr. Kaiser's credit card use were not included in the OIP, I exclude extrinsic evidence on this point.[3] *See United States v. White Horse*, 316 F.3d 769, 776 (8th Cir. 2003) ("[T]rial court[s] retain[] wide discretion to exclude evidence that would result in a 'collateral mini-trial' because both sides characterize the event at issue differently.").

It is true that evidence of Mr. Kaiser's character for truthfulness may be at issue in this proceeding. *See* Div. Opp'n at 14. If the Division shows that such evidence is relevant and if the Division's witnesses have a negative opinion of Mr. Kaiser's opinion for truthfulness, the parties may explore the basis for that opinion. The Division, however, may not present extrinsic evidence on this matter. *Cf*. Fed. R. Evid. 608(a).

Relatedly, the Division is correct that evidence concerning AirTouch's Board's investigation of the company's accounting will inevitably touch on Mr. Kaiser's credit card use and other matters related to his "stewardship as CFO" of AirTouch. Div. Opp'n at 15. In this regard, the Division may present testimony that touches on Mr. Kaiser's credit card usage to the extent doing so is necessary to place the Board's investigation in context.

The Division also argues that Mr. Kaiser's credit card usage is relevant to possible sanctions. In this respect, when the allegations in an OIP concern corporate filing deficiencies, the Commission permits consideration of matters not alleged in an OIP when the uncharged matters are of the same type as those alleged in the OIP. *See Calais Resources Inc*., Exchange Act Release No. 67312, 2012 SEC LEXIS 2023, at *29 n.40 (June 29, 2012); *Gateway International Holdings, Inc*., Exchange Act Release No. 53907, 2006 SEC LEXIS 1288, at *24

[3] The Division relies on Federal Rules of Evidence 404(b) and 608. Div. Opp'n at 11, 20. These "rules are designed to prevent distracting mini-trials on collateral matters," *Boggs v. Collins*, 226 F.3d 728, 744 (6th Cir. 2000), such as whether Mr. Kaiser's credit card usage was proper.

& n.30 (May 31, 2006). Uncharged matters are also relevant when those matters concern misconduct during the proceeding at issue. *Robert Bruce Lohmann*, Exchange Act Release No. 48092, 2003 SEC LEXIS 3171, at *17 n.20 (June 26, 2003). And "[d]emonstrated misconduct found in other proceedings before [the Commission], before the courts, or before the securities industry's self-regulatory bodies weighs heavily in the balance."[4] *Int'l S'holders Servs. Corp*., Exchange Act Release No. 12389A, 1976 SEC LEXIS 1480, at *18 n.19 (June 8, 1976). On the other hand, "[s]uspected misconduct that has never even been alleged, let alone found, is quite another" matter. *Id*.

Considering these principles and assuming that I sustain the allegations, I am bound by *International Shareholders Services* to exclude evidence of whether Mr. Kaiser's credit card use was proper. His allegedly improper use of a company credit card is not alleged in the OIP and does not fit within any of the exceptions noted above. Furthermore, excluding the evidence will prevent a hearing-within-a-hearing about a collateral issue.

4. *The parties' general objections to documentary evidence*. The parties have registered various objections to their opponents' documentary evidence. I defer ruling on the parties' objections until such time as the evidence in question is presented during the hearing in this matter and the parties renew their objections.

James E. Grimes
Administrative Law Judge

[4] The Commission additionally considers a respondent's continuing employment in the securities industry in assessing the risk of future violations. *J. Stephen Stout*, Exchange Act Release No. 43410, 2000 SEC LEXIS 2119, at *56-57 & n.64 (Oct. 4, 2000).