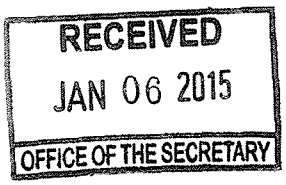
UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION



ADMINISTRATIVE PROCEEDING
File No. 3-16033

In the Matter of

AIRTOUCH COMMUNICATIONS, INC., HIDEYUKI KANAKUBO, AND JEROME KAISER, CPA,

Respondents.

DIVISION OF ENFORCEMENT'S OPPOSITION TO RESPONDENT JEROME KAISER'S MOTION *IN LIMINE* TO EXCLUDE EVIDENCE RELATING TO COMPANY CAR AND CREDIT CARD USAGE

January 5, 2015

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I. INTRODUCTION

Respondent Jerome Kaiser has moved to exclude evidence regarding his misuse of his company's credit card and his taking of a company car without the board's permission. There is no reason to exclude this evidence. This case involves accounting fraud, and a scheme by Kaiser not only to inflate the revenues of AirTouch Communications, Inc. ("AirTouch"), but also to hide his fraud from the company's key gatekeepers, including its board.[1] When the outside directors of the company discovered that $1.2 million of revenue had been improperly recorded by management in the third quarter of 2012, the audit committee chair, Steve Roush, initiated an internal investigation. As a result of that investigation, the company announced its intent to restate its quarterly results.

As part of the investigation, audit committee chair Roush looked into several aspects of Kaiser's stewardship as the company's CFO, including his use of the company's credit card. Roush, a CPA and former auditor, discovered that Kaiser had used the card to charge for things like flights to Hawaiian islands while on vacation. Then, the board discovered Kaiser had taken a company car with him following his resignation, and the board specifically instructed him to return the car. Kaiser ignored the board's demand, and kept the car.

Both the Division and Kaiser have listed Roush and the other two outside directors of AirTouch, Larry Paulson (the chairman of the board) and James Canton (the compensation committee chair), as witnesses. They will be testifying about their investigation of Kaiser and his role in the improperly reported revenue. They will also be testifying, based on their extensive dealings with him, about how they questioned Kaiser's misuse of company property and about his stewardship of the company as its CFO. Because the Division's case alleges that Kaiser

[1] This matter has been stayed against the other individual respondent in this matter, Hideyuki Kanakubo, pending the Commission's review of his offer of settlement.

engaged in a scheme to defraud several gatekeepers, including the board, this is all relevant. It is also relevant to the sanctions the Division will be seeking, including barring Kaiser from serving as an officer or director of a public company. Therefore it is admissible evidence and should not be excluded.

II. FACTUAL BACKGROUND

A. Jerome Kaiser's Alleged Fraud

The fraudulent conduct at issue began when Kaiser, in his capacity as CFO, caused AirTouch to recognize $1.2 million as revenue in the third quarter of 2012 for inventory shipped to a South Florida warehouse owned by a company called "TM Cell." The evidence will show that Kaiser knew there was no basis to recognize that revenue, but reported it anyway. Indeed, AirTouch and TM Cell had signed a written contract that expressly stated TM Cell was not buying any of AirTouch's products, but was only storing the product until AirTouch actually sold it to one of its customers. The evidence will also show that Kaiser fraudulently induced a large investor to loan AirTouch $2 million of desperately needed capital, by touting the inventory shipments to TM Cell as evidence of AirTouch's growing business and hiding the written contract during the investor's due diligence process.

B. Kaiser's Concealment of Facts from the Board and Auditors

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. That is, in addition to causing the company to improperly report $1.2 million in revenue in the third quarter and misleading a large investor to provide a much-needed bridge loan, Kaiser also masked the terms of AirTouch's business relationship with TM Cell from the company's three key gatekeepers: the outside directors of its board, the company controller and the outside independent auditor.

The evidence will show that at numerous board meetings before and after the filing of the quarterly report, Kaiser never told the outside directors of AirTouch that TM Cell was not an actual purchaser of AirTouch's product, but just a way-station for AirTouch's inventory. Kaiser also instructed AirTouch's controller to book revenue for the shipments to TM Cell without informing her of the written TM Cell-AirTouch contract that absolved TM Cell from paying for the inventory until AirTouch actually sold the product. In fact, after receiving an email from TM Cell's CEO attaching that signed contract, Kaiser *deleted* that contract from the email when he forwarded it to the controller. And, finally, even though AirTouch's auditors explicitly asked for *all* documents associated with AirTouch's relationship with TM Cell, Kaiser never gave the auditors the written contract and never told them that TM Cell was not obligated to pay AirTouch any money until after AirTouch actually sold the product to a real AirTouch customer.[2]

C. The Internal Investigation and Restatement

In early 2013, the outside directors of AirTouch learned that the company had not collected a dime from TM Cell, and questions arose about the true nature of AirTouch's relationship with TM Cell. Steve Roush, the chair of AirTouch's audit committee, commenced an internal investigation in January 2013. During that investigation, Kaiser continued to hide the

[2] The TM Cell-AirTouch contract stated that TM Cell could issue purchase orders "under this [A]greement," because if an AirTouch customer actually bought the products in TM Cell's warehouse, then that customer would pay TM Cell, which would then pay AirTouch (after taking its warehousing fee). The contract could not have been more clear about TM Cell's payment obligation to AirTouch. It stated that TM Cell "shall not be obligated to pay AirTouch until the Products have been received by [the actual customer] and TMCell has received full payment therefor," and that if the "customer" ended up not paying "for any reason whatsoever," then it would be AirTouch's "responsibility" to collect the payment for the product from the customer. *See* Respondents' Expert Report of Michael Kunkel, Ex. B, ¶¶ 3, 6.

contract with TM Cell and, later, when the contract came to light, he denied having read it (even though he had received it from TM Cell and directed AirTouch's CEO to sign it).

On February 7, 2013, AirTouch reported its intent to restate its financial results for the third quarter of 2012 due to the $1.2 million in improperly recognized revenue. On April 3, 2013, Division staff contacted Kaiser about the Division's investigation of the company. He resigned from AirTouch the very next day.

D. Kaiser's Resignation and the Board's Continued Investigation

Roush, as the audit committee chair, oversaw the internal investigation relating to the improper recognition of revenue associated with TM Cell. *See, e.g.*, Ex. H (Hr'g Ex. 11) (Jan. 28, 2013 Roush draft memo to audit committee, updated April 4, 2013, regarding internal investigation); Ex. I (Hr'g Ex. 12) (Jan. 28, 2013 Roush draft memo to audit committee, updated April 4 and 15, 2013, regarding internal investigation).[3] The evidence will show that during the board's investigation, Roush discovered several instances of misconduct by Kaiser, which, among other things, demonstrated serious material weaknesses in the internal controls for the company's finances under Kaiser's supervision.

Roush's findings from the internal investigation appear in several memos he drafted in April 2013, some of which Kaiser seeks to exclude from the hearing:

- After he resigned, Kaiser transferred title of a company car—a "7 Series" BMW—to his own name, without the knowledge or authorization of the outside directors, including James Canton, the chair of the compensation committee. Roush referred to these findings in four exhibits Kaiser has moved to exclude.

[3] With this opposition, the Division has included Hearing Exhibits 11, 12, 155 and 156, marked and attached as Exhibits H, I, J and K, respectively. Respondents have not moved *in limine* to bar any of these exhibits from the hearing.

See Resp. Br. Exs. B (Hr'g Ex. 202), C (Hr'g Ex. 203), E (Hr'g Ex. 206), F (Hr'g Ex. 210); *see also id.* Ex. G (Hr'g Ex. 119).

- Credit card account statements showed that Kaiser appeared to have used company credit cards for personal expenses. Examples of this included using the card to purchase inter-island flights in Hawaii while on vacation with his wife, and numerous charges for gasoline and food in Fresno, California, where his son lived. (AirTouch was headquartered over 250 miles from Fresno, in Newport Beach.) These findings are found in two exhibits Kaiser has moved to exclude. *See id.* Ex. D (Hr'g Ex. 204); *see also id.* Ex. B (Hr'g Ex. 202).
- Unbeknownst to the outside directors and James Canton, the chair of the compensation committee, Kaiser received a "bonus" of $15,000 for his work in obtaining the $2 million bridge loan. This finding is in another Roush-authored memo regarding his investigation of Kaiser. *See* Ex. K (Hr'g Ex. 156) (April 22, 2013 Roush memo).
- Kaiser also received payments for "accrued vacation," according to what appeared to be an unwritten and inconsistent policy unknown to the board or its compensation committee, and despite the company's serious cash flow problems. This finding is in another Roush memo. *See* Ex. J (Hr'g Ex. 155) (April 22, 2013 Roush memo).
- Kaiser had "piles of unfiled documents that he kept under lock and key" that were unknown to the board and inaccessible to company controller. Roush noted this in one of his investigative memos that Kaiser seeks to exclude. *See* Resp. Br. Ex. A (Hr'g Ex. 165).

E. The Outside Directors' Views about Kaiser's Misconduct

In Kaiser's motion, he focuses exclusively on the evidence of his misuse of the company credit card and his unauthorized taking of the company car. But, as seen above, the board's investigative findings were not limited to that misconduct. The outside directors looked into both of these issues—the credit card and the car—in connection with their investigation of Kaiser after he left the company. Both the Division and Kaiser have listed all of the outside directors as witnesses for the hearing.

When the Division staff took investigative testimony from Roush, the company had not yet produced the documents that Kaiser now hopes to exclude.[4] In fact, the Division staff did not learn about the board's investigation of Kaiser's credit card misuse and his taking of the car until after the staff had taken investigative testimony of Kaiser, Hideyuki Kanakubo (the CEO and co-respondent), Paulson (the chairman of the board), and Roush (the audit committee chair), as well as most of the other witnesses.

1. Roush's views of the misconduct

Roush presented his preliminary findings regarding the credit card in a detailed, six page memorandum to the two other outside directors. *See id.* Ex. D (Hr'g Ex. 204). In that memo, Roush—a licensed CPA with decades of experience as an auditor—found that numerous charges "appear[ed] very suspect in nature" and "strongly appear[ed] to be personal in nature such as double fill up of gas on the same day, restaurant charges on weekends and holidays, movie tickets, etc[.]" *Id.* He also found that Kaiser's use of the company credit card "had strange patterns such as frequency or to vendors in amounts that seemed inordinate based on the size of

[4] AirTouch produced documents during the Division staff's investigation on a rolling basis. The documents listed as Exs. A through F in Respondents' brief come from the personal (non-AirTouch) email accounts of the outside directors, and were not produced by AirTouch until 2014.

AirTouch's operations." *Id.* When Roush told Kaiser that Roush had "looked at credit card statements" and "noted what appeared to be some personal use of the cards," Kaiser, according to an email from Roush to the other outside directors, said that the company CEO (Kanakubo) had "reviewed his [credit card] statement monthly." *Id.* Ex. B (Hr'g Ex. 202). But, as Roush noted in the memo, "[b]ased on discussions with Sylvia [Chan, the controller] and then Hide [Kanakubo] [that] does not appear that was [the] case." *Id.*

Roush also had direct communications with Kaiser about his taking of the company car. In one of Roush's memos, he noted that Kaiser claimed the company "owe[d]" the car to him "for all of the hard work and fact he ha[d] not been paid in addition to fact he is legally entitled to it" because of a letter from Kanakubo. *See id.*; *see also id.* Exs. F (Hr'g Ex. 210); *id.* Ex. G (Hr'g Ex. 119).

2. Paulson's demand letter to Kaiser on behalf of the board

In an email Kaiser hopes to exclude, Paulson expressly told Kaiser, on behalf of the other outside directors, that the board did "not acknowledge the legitimacy of [his] transfer of company property, the BMW automobile[,]" adding that the "board would not have approved this transfer[.]" *Id.* Ex. C (Hr'g Ex. 202). Paulson also instructed him to "immediately" return the car. *Id.* Kaiser never did.

3. Canton's testimony about the company credit card and car

Only two witnesses who testified during the Division's investigation gave testimony after the issues concerning the board's investigation of Kaiser's misuse of the credit card and the taking of the company car became known to the staff. One was James Canton, the compensation committee chair.[5] Canton testified that as additional facts came to light in 2013, the outside

[5] The other witness who gave testimony after these documents were produced was Daniel Donahue, the company's outside counsel from Greenberg Traurig.

directors began to question Kaiser's veracity. As to the misuse of the credit card, Canton explained:

> We [the board] found a number of irregularities on the credit cards which we could not substantiate. We asked him to substantiate. He ignored [us].

Ex. L (Canton Inv. Tr.) at 66:6-8.[6] Canton was similarly unhappy about Kaiser's taking of the car, testifying that Kaiser "walked away with a car, expensive BMW," which the outside directors "did not know" about. *Id.* at 66:9-10. Kaiser claimed that the CEO had authorized him, as part of his compensation package, to take the car, and presented a letter from the CEO supposedly documenting that arrangement. *See* Resp. Br. at 3; *see also id.* Ex. G (Hr'g Ex. 119). But Canton, the chair of the board's compensation committee, testified that he had "never seen that document." Ex. L (Canton Inv. Tr.) at 66:16. As he further testified:

> None of the board members had seen that before. [It] [s]urfaced mysteriously at the end. We thought that that was indicative of not an honest portrayal. It was not—it was indicative of a lack of transparency.

Id. at 66:23-67:2.

Canton also testified about issues regarding Kaiser's "overall conduct of leaving the state of financial chaos of numerous relationships," including unpaid bills and the poor "status of the records." *Id.* at 67:5-15. He eventually concluded that the investigation showed that Kaiser was not fit to be a public company CFO:

> That's not the conduct of a competent CFO for a private level and public company. And he was not forthcoming in helping us address all of the outstanding contracts, relationships that came out of the woodwork afterwards.

Id. at 67:16-20. In the end, the outside directors did not pursue further action against Kaiser relating to the car, his credit card usage, or any of the other issues identified in their investigation

[6] The excerpt of Canton's cited investigative testimony is attached as Exhibit L to this brief.

because the company lacked the financial means to pursue litigation against Kaiser. *See id.* at 71:25-72:12.

III. ARGUMENT

A. Evidence Of Kaiser's Misconduct Is Directly Relevant To The Appropriate Sanctions Against Kaiser

In moving to exclude the evidence of Kaiser's misuse of a company credit card and of his theft of a company car, Kaiser does not even address the relevancy of this evidence to the sanctions that the Division would seek in this case if he is found liable. Rather, his entire motion focuses only on whether or not this evidence is relevant to his liability.

There should be no question that this evidence is relevant and admissible regarding the sanctions the Division seeks in this case. Sanctions are imposed if they are in the "public interest," and if "the sanction will have a deterrent effect." *In re S.W. Hatfield, CPA*, Exchange Act Rel. No. 73763, 2014 WL 6850921, at *9 (Dec. 5, 2014) (Commission opinion); *see also In re Raymond James Financial Servs., Inc., et al.*, Initial Decision Rel. No. 296, 2005 WL 2237628, at *63 (Sept. 15, 2005); *In re David F. Bandimere and John O. Young*, Initial Decision Rel. No. 507, 2013 WL 5553898, at *76 (Oct. 8, 2013). In making that determination, hearing officers and the Commission consider a number of factors, but the assessment of these factors "'is a flexible one, and no one factor is dispositive.'" *Hatfield*, 2014 WL 6850921 at *9 (quoting *In re Michael C. Pattison*, Exchange Act Rel. No. 67900, 2012 WL 4320146, at *8 (Sept. 20, 2012) (Commission opinion)); *see also In re Toby G. Scammell*, Advisers Act Rel. No. 3961, 2014 WL 5493265 at *5 (Oct. 29, 2014) (Commission opinion). These factors include:

> the egregiousness of the respondent's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the respondent's assurances against future violations, the respondent's recognition of the wrongful nature of his or her conduct, and the likelihood that the respondent's occupation will present opportunities for future violations.

Hatfield, 2014 WL 6850921 at *9; *see also Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979); *SEC v. Lybrand*, 281 F. Supp. 2d 726, 730 (S.D.N.Y. 2003). Under this holistic approach, evidence that Kaiser abused his fiduciary obligations as the steward of a public company through the misuse of company assets for personal benefit is clearly relevant to an assessment of whether sanctions against Kaiser will further the public interest.

Indeed, evidence of Kaiser's misuse of company property and defiance of the board are particularly relevant to the determination of whether he should be barred from serving as a public company officer or director. The Commission may bar an individual "if the conduct of that person demonstrates *unfitness* to serve as an officer or director of any such issuer." *Scammell*, 2014 WL 5493265 at *5 (emphasis added); *see also SEC v. Levine*, 517 F. Supp. 2d 121, 144-46 (D.D.C. 2007) (listing factors to consider in determining "fitness," including "the complexity of the scheme and the defendant's use of stealth and concealment"). It is therefore highly relevant and probative whether Kaiser misused or took company property, and ignored directives from the board in doing so. All of this can and should be taken into account when determining whether Kaiser is fit to serve as a public company officer or director in the future.

The evidence of Kaiser's internal control violations is also relevant to the amount of the civil penalty that he could be ordered to pay. When determining whether to impose penalties, the Commission has adopted a broad set of factors, including not only the extent of the illegal activity at issue and the level of harm inflicted by that conduct, but also any "other acts" by the respondent and "other matters as justice may require." *In re Sandra K. Simpson*, Exchange Act Rel. No. 34-45923, 2002 WL 987555, at *17 n.58 (May 14, 2002) (Commission opinion) (citing 15 U.S.C. § 78u-2(c)). Evidence relating to Kaiser's misuse of his company credit card and his

taking of a company car despite board demands to return it are clearly relevant to this assessment of the appropriate remedy, and thus should be admitted, at a minimum, for that purpose.

B. The Evidence Is Also Relevant To Kaiser's Liability

The evidence that AirTouch's outside directors evaluated Kaiser's use of company property, and questioned him on these topics, is directly relevant to the case against him. The evidence should be admitted as affirmative evidence of his scienter and state of mind in engaging in a fraudulent scheme, which included deceiving the company's board. *See* FED. R. EVID. 404. It should also be admitted as impeachment evidence. *See* FED. R. EVID. 608.

1. The evidence of Kaiser's "other acts" is admissible under Rule 404(b)

"The Rules of Evidence, and specifically Rule 404 regarding character evidence, do not apply in this proceeding[.]" *In re Thomas C. Gonnella*, Admin. Proceeding Rel. No. 1579, 2014 SEC LEXIS 2349, at *6 (July 2, 2014) (Order On Motions *In Limine*); *see also In re AirTouch Communications, Inc., et al.*, Admin. Proceeding Rel. No. 1851, 2014 SEC LEXIS 3628, at *6 (Sept. 26, 2014) ("Evidence that is irrelevant, immaterial, or unduly repetitious is inadmissible; all other evidence is presumptively admissible."). Nevertheless, Kaiser argues that the "policy rationale" of exclusion under Federal Rule of Evidence 404 should be applied here. Resp. Br. at 7. Even if that were true—and it is not—the evidence Kaiser seeks to exclude is admissible under Rule 404.

Although, as Kaiser points out, Rule 404 of the Federal Rules of Evidence generally prohibits "character" evidence (*see* Resp. Br. at 6-7), evidence of Kaiser's inappropriate use of his credit card usage or his unauthorized taking of the company car is admissible under Rule 404(b) as evidence of "other acts." Rule 404(b)(2) states that evidence of a "crime, wrong or other act" can be admissible to prove "motive, opportunity, [or] intent." FED. R. EVID. 404(b)(2). Evidence of other acts may be admitted under that rule if: "(1) the evidence tends to prove a

material point; (2) the prior act is not too remote in time; (3) the evidence is sufficient to support a finding that the defendant committed the other act; and (4) (in cases where knowledge and intent are at issue) the act is similar to the offense charged." *U.S. v. Flores–Blanco*, 623 F.3d 912, 919 (9th Cir. 2010). If these prongs are satisfied, then the evidence should be admitted as long as it satisfies the requirements of Rule 403 for relevance and probative value. *See U.S. v. King*, 200 F.3d 1207, 1215 (9th Cir. 1999) ("Rule 403 thus remained the only obstacle to the admission of this evidence."). The evidence at issue satisfies all elements for admissibility under Rule 404(b)(2), and Kaiser, even though he is the movant with the burden, does not even try to specifically address each of these elements in his motion.

a. The evidence proves a material point—Kaiser's scienter and motive

This evidence clearly satisfies the first prong, as it is evidence of Kaiser's fraudulent intent, and particularly his fraudulent intent in his dealings with AirTouch's board. To prove he committed fraud and engaged in a fraudulent scheme under Section 10(b) of the Securities Exchange Act of 1934 and Section 17(a) of the Securities Act of 1933, the Division will have to prove that Kaiser acted with *mens rea*—with actual knowledge or recklessness (for Sections 10(b) and Sections 17(a)(1)), and negligence (for Section 17(a)(2) and (a)(3)). *See Aaron v. SEC*, 446 U.S. 680, 701-02 (1980). Moreover, this case concerns a fraudulent scheme, and so evidence of acts of withholding information from key gatekeepers at a company—like its auditors, its board and its controller—is critical. *See, e.g., SEC v. Guenther*, 212 F.R.D. 531 (D. Neb. 2003) (finding that defendants' concealment of earnings manipulation through lies to board of directors established scienter); *Kyung Cho v. UCBH Holdings, Inc.*, 890 F. Supp. 2d 1190, 1202 (N.D. Cal. 2012) (alleged acts of concealment supported strong inference of scienter); *see also, generally, Cady, Roberts & Co.*, 40 S.E.C. 907, 913 (1961) (Commission opinion).

Therefore, Kaiser's willingness to withhold material information from the board is directly relevant to this case. That Kaiser abused his position of trust as the CFO of AirTouch by—without the knowledge of the outside directors—using a company credit card for his own personal use, and that he then took the company car despite the board's demand that he return it, reveals his state of mind and motives in how he dealt with the board. *See U.S. v. Verduzco*, 373 F.3d 1022, 1028 (9th Cir. 2004) (for first prong, other act evidence must tend to support element of alleged misconduct or refute affirmative defense); *U.S. v. DeSalvo*, 41 F.3d 505, 509 (9th Cir. 1994) (finding it "apparent" that evidence of a defendant's subsequent uncharged lies furthering her Medicare fraud scheme showed her "knowledge that the Medicare claims she previously submitted were false, a necessary component of the crimes she was charged with").[7]

While Kaiser acknowledges that evidence can be admitted to prove "motive" and "intent," he argues that his misuse of the company credit card and car has "no bearing on any putative motive or intent to defraud investors." Resp. Br. at 7. But he ignores the fact that this case is not just a misrepresentation case. It is also 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. *See, e.g., SEC v. Kearns*, 691 F. Supp. 2d 601, 618 (D.N.J. 2010) (denying motion to dismiss allegations of inherently deceptive conduct where SEC alleged defendant "affirmatively misled [the company's] auditors by assuring them that there were no allegations of fraud, that there were no billing irregularities, and

[7] *See also* 3 J. WEINSTEIN AND M. BERGER, WEINSTEIN'S EVIDENCE, ¶ 701[02], at 701-721 ("if the knowledge, rational connection, and helpfulness requirements are met, lay witnesses may give their opinion of the mental state of others") (collecting cases); *U.S. v. McDonald*, 576 F.2d 1350, 1356 (9th Cir. 1978) (developer's subsequent statements on land deals implied knowledge of previously fraudulent conduct); *U.S. v. Bibo-Rodriguez*, 922 F.2d 1398, 1399 (9th Cir. 1991) (despite differences in method, evidence of subsequent drug smuggling could be admitted to show prior knowledge and intent).

that the auditors had received all relevant information"). That Kaiser was so willing to lie to his board, or outright ignore the board's instructions, about his misuse of company property demonstrates his fraudulent state of mind in carrying out his deceptive scheme.

Moreover, both parties have listed the outside directors as witnesses for the hearing, and all of them addressed Kaiser about the board's investigation into his conduct in 2013, including with respect to his credit card misuse and taking of his company car. Kaiser ignores this critical point in his motion. Roush memorialized his preliminary findings in several detailed memos, Paulson demanded the car's return, and Canton has already offered testimony on these matters. It is widely recognized that lay witnesses may express their opinion on the mental state of others where that issue is relevant. *See, e.g., Winnant v. Bostic*, 5 F.3d 767, 772 (4th Cir. 1993) (in action for deceptive trade practices, lay opinion testimony on what defendant knew and intended was admissible where the witnesses based their opinions on prior dealings with defendant); *Brunswick Corp. v. E.A. Doyle Mfg. Co.*, 770 F. Supp. 1351, 1364 (E.D. Wis. 1991) (witnesses' opinions about defendant's state of mind admissible since it was based on their extensive dealings with defendant). The outside directors can both testify about their views as to: the veracity and trustworthiness of Kaiser; whether they believed him when he told them he did not know about the TM Cell-AirTouch warehouse contract; and/or whether they trusted him with the company's finances. They can express those views based on their interactions with Kaiser, including their discussions with him about his misuse of the company credit card and his taking of the company car. *See U.S. v. Heard*, 709 F.3d 413, 422-23 (5th Cir. 2013) (business associate who had worked with defendant for three years, had conversations with defendant about

government official that defendant bribed, and had invited official to golf tournament, permitted to offer lay opinion that defendant wanted a favorable recommendation from official).[8]

b. The "other acts" are close in time to the alleged fraud

The evidence is also temporally proximate and thus satisfies the second prong for Rule 404(b)(2) admissibility. Clearly, the fact that the board investigated the improper accounting of AirTouch's 2012 results and, thus, Kaiser's oversight of that accounting, will be part of the record. At the same time the board investigated those issues, the board also investigated Kaiser's misuse of the credit card and taking of the car, as well as the company's many unpaid bills, the poor record keeping, the undisclosed contracts and relationships—all of which occurred under Kaiser's stewardship as CFO. The evidence Kaiser seeks to exclude is evidence of what the board members discovered through an investigation that was prompted by the accounting fraud that is at the heart of this case. Therefore, even though this all happened in the spring of 2013—a few months after the company announced its intent to restate the Form 10-Q in February 2013 and after the Form 10-Q was filed in November 2012—it was at the same time the board conducted its investigation, and thus sufficiently close in time to those two events to satisfy admissibility under Rule 404(b)(2). Indeed, courts have found "other acts" to be sufficiently close in time when separated by a far longer period than the acts alleged here. *See, e.g., U.S. v. Rude*, 88 F.3d 1538, 1550 (9th Cir. 1996) (finding acts occurring seven or eight years apart to be sufficiently proximate in time); *U.S. v. Ross*, 886 F.2d 264, 267 (9th Cir. 1989) (same, for acts 12 years apart).

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[8] *See also U.S. v. Wantuch*, 525 F.3d 505, 515 (7th Cir. 2008) (witness who directly participated in conversation may give lay opinion as to participants' understanding of words used); *U.S. v. Estrada*, 39 F.3d 772, 773 (7th Cir. 1994) (*per curiam*) (holding that a participant in a conversation may testify as to his understanding of the conversation to satisfy Rule 701(a)'s requirement that the testimony be rationally based on the witness's perceptions).

c. The evidence is sufficient to support a finding that Kaiser committed the "other acts"

The evidence at issue also undoubtedly satisfies the test's third prong, which requires that the evidence is sufficient to show that the "other acts" occurred. Kaiser argues that introducing the evidence will "waste time" because he "will be obliged to defend himself" regarding "questions raised but unproven" about the credit card and company car. Resp. Br. at 5-6. But it does not matter whether each and every credit card charge was improper; nor does it matter whether Kaiser thought he had authorization to take the company car. What matters is that the outside directors—who are identified as witnesses for both sides—thought Kaiser had been dishonest in his capacity as AirTouch's CFO. *U.S. v. DeSalvo*, 41 F.3d 505, 509 (9th Cir. 1994) ("the promotional videotape itself [which showed the defendant making various allegedly fraudulent statements] provides sufficient evidence that the subsequent act was in fact committed").

In any event, even if this evidence is also being admitted to show that Kaiser, in fact, made improper personal credit card charges and stole the company car—which would be a perfectly legitimate purpose to admit such evidence—it is more than sufficient to prove that to have been the case. A party offering Rule 404(b)(2) "other act" evidence does not have to prove that these other acts occurred by a preponderance of the evidence. As the Supreme Court has made clear, the evidence can be admitted "if there is *sufficient* evidence to support a finding" by the fact-finder that the defendant committed the other act. *Huddleston v. U.S.*, 485 U.S. 681, 685 (1988) (emphasis added). The evidence satisfies this lower standard. With respect to the car, the evidence shows that Kaiser transferred title to the company car into his name, the board instructed him to return it, and he refused to comply. As for the credit card, the evidence shows repeated expenses that Roush challenged as "personal" in nature. Kaiser may claim otherwise,

for example, that his Hawaii flights were somehow company-related. But it will not be necessary to go through every item, and the Division does not intend to, despite what Kaiser suggests in his motion. Testimony from the outside directors and Kaiser, and the admission of documents from the relevant time period, will be sufficient for the court to make a determination about these "other acts."

d. The "other acts" are similar to the fraud alleged

Finally, this evidence concerns concealment and misconduct toward the board of AirTouch. As discussed, one key piece of this case, which is alleged in the OIP, is that Kaiser misled and withheld information from the board. *See supra.* Thus, the evidence of misuse of company property is more than sufficiently similar to the misconduct charged. Indeed, courts have found fraudulent acts in entirely separate schemes sufficiently similar to satisfy this standard. *See, e.g., U.S. v. King*, 200 F.3d 1207, 1214 (9th Cir. 1999); *U.S. v. Sarault*, 840 F.2d 1479, 1486 (9th Cir. 1988).

Even if the evidence were not admissible under Rule 404(b)(2), it would still be admissible because it involves conduct that is "inextricably intertwined" with the alleged misconduct. *U.S. v. DeGeorge*, 380 F.3d 1203, 1220 (9th Cir. 2004). That is, if the "other act" is "necessary to ... to offer a coherent and comprehensible story regarding the [alleged misconduct]," then it is admissible independent of Rule 404(b). *Id.* "Acts satisfy the inextricably intertwined doctrine if ... their absence would create a chronological or conceptual void in the story of the crime; or they are so blended or connected that they incidentally involve, [or] explain the circumstances surrounding ... the charged crime." *U.S. v. Senffner*, 280 F.3d 755, 764-65 (7th Cir. 2002).

That is certainly the case here. Kaiser does not challenge the relevancy of the board's investigation of the improper accounting of the third quarter 2012 revenue, and the outside

directors will undoubtedly testify about that investigation. Part of that investigation uncovered Kaiser's misuse of company property (the credit card and the car). Roush's own memos memorialize his preliminary findings about Kaiser together, never attempting to distinguish one set of conduct from the other. In fact, he stated in one memo that his review of Kaiser's credit card statements was "part of" his review of the company's 2012 financial results. Resp. Br. Ex. B (Hr'g Ex. 202). And Canton himself already testified that he sees all of this as inter-related to Kaiser's "overall conduct" in leaving the company in a "state of financial chaos." Ex. L (Canton Inv. Tr. 67:5-7).

Kaiser ignores all of this, arguing, without any explanation, that his misuse of the credit card and taking of the company car is not relevant to the "Division's ability to 'offer a coherent and comprehensible story.'" Resp. Br. at 8. But the "coherent and comprehensible story" of Kaiser's fraudulent scheme is simple—he inflated the company's revenue, and then hid the evidence of that fraud from several people at the company, including the board of directors. That he also hid his improper personal charges on a company credit card, and refused to return company property (the car) after the board demanded it, is clearly part of the "story" of his fraudulent scheme. Also, his misconduct as a CFO does not have to be "part of the transaction"—the TM Cell deal—to be admissible, as Kaiser argues. *Id.* Kaiser's misconduct just needs to help "explain the circumstances" of his fraudulent scheme and his deception of the board. Misusing company property in defiance of the board does exactly that.

2. The evidence is admissible under Rule 403 because it relevant and probative

Because this evidence satisfies Rule 404(b), it is only inadmissible if it violates Rule 403. *See King*, 200 F.3d at 1215. But, as explained above, evidence of Kaiser's concealment of information from the board, and of his refusal to comply with board instructions, are all highly

relevant and probative. *See supra.* Indeed, Kaiser himself is going to call board members as witnesses at his case. Also, merely because this evidence is prejudicial to Kaiser—indeed, damningly so—is no reason for it to be excluded. "Relevant evidence is inherently prejudicial, but it is only unfair prejudice, substantially outweighing probative value, which permits the exclusion of relevant evidence under Rule 403." *U.S. v. Hankey*, 203 F. 3d 1160, 1172 (9th Cir. 2000). Therefore, the evidence is admissible under Rules 404(b) and 403, and the Division ought to be allowed to introduce it in its case-in-chief.

Kaiser argues that this evidence is irrelevant because there is "no mention" in the OIP of his misdeeds regarding the company credit card and car. Resp. Br. at 5. But what the OIP refers to is irrelevant to the question of admissibility. There is simply no requirement that an opening pleading or charging document, like the OIP, has to cite or identify every piece of evidence that a plaintiff or petitioner intends to introduce at trial. *See In re Rita J. McConville*, Exchange Act. Rel. No. 2271, 2005 WL 1560276, at *13-14 (June 30, 2005) (Commission opinion) (approving hearing officer's admission of evidence relating to facts not alleged in OIP and rejecting appeal based on denial of motion to strike because OIP "need not disclose to the respondent the evidence upon which the Division intends to rely"). Indeed, Rule 404 only requires notice in criminal trials; in a civil suit, a party does not have to give the other side advance notice that it plans to introduce Rule 404(b) evidence in a civil proceeding. *See* FED. R. EVID. 404(b)(2) (only requiring notice of intent to offer "other acts" evidence in criminal trials). Therefore, just because the OIP does not include allegations regarding Kaiser's misuse of company property does not mean that evidence of that misconduct cannot be admitted, especially because this case concerns Kaiser's lies to the board.

3. The evidence is admissible for impeachment under Rule 608(b)

Even if Rule 404 applied in this proceeding, and the company credit card and company car evidence were to be deemed "character" evidence that cannot be introduced in the Division's case-in-chief, it can still be admitted to impeach Kaiser's credibility when he testifies. Although Rule 404(b) "restricts the use of evidence solely for purposes of demonstrating ... proclivity," "[i]t does not proscribe the use of other act evidence as an impeachment tool during cross-examination." *U.S. v. Gay*, 967 F.2d 322, 328 (9th Cir. 1992). As such, evidence inadmissible under 404(b) still "may be used for impeachment purposes." *Id.*

Kaiser, nonetheless, argues that the Division cannot introduce this evidence because it is "extrinsic evidence" that cannot be used to impeach a witness under Rule 608(b). *See* Resp. Br. at 8-9. But he glosses over the important exception to that prohibition in making that argument. Even if evidence is inadmissible under Rule 404, it can be introduced when cross-examining a witness about that witness's untruthfulness. For example, if Kaiser claims, as he undoubtedly will, that he was honest in his dealings with the board, then he can be cross-examined on evidence that he hid his use of the company credit card and took the company car despite the board instructing him to "immediately" return it. *See* FED. R. EVID. 608(b); *accord Gay*, 967 F. 2d at 328 ("Rule 608(b) will permit inquiry into the specific acts ... if those acts related to *crimen falsi*, *e.g.*, perjury, subornation of perjury, false statement, embezzlement, false pretenses."); *see also*, *e.g.*, *Gay*, 967 F. 2d at 328 (allowing evidence of prior civil injunction against defendant because "[e]vidence of prior frauds is considered probative of the witness's character for truthfulness or untruthfulness").

Kaiser himself acknowledges this in his motion, but then argues that evidence of the board questioning his credit card misuse and his taking of the company car is "not 'probative'" of his truthfulness. Resp. Br. at 9. But an officer's taking of company property—contrary to the

board's explicit demand for its return—is not just a "question of contract interpretation rather than dishonesty," as he brazenly argues. *Id.* And using a company credit card for personal use, like trips to Hawaiian islands, is not just inadequate "reporting and documentation." *Id.* Taking company property without permission or disclosure is, at worst, theft and, at a minimum, evidence of a willingness to hide the truth from the company's directors, just as Kaiser did. It is therefore highly probative of his truthfulness, and highly relevant to the charges against him. *See, e.g., U.S. v. Jones*, 900 F.2d 512, 520-21 (9th Cir. 1990) (evidence of prior intentional false statements is probative of untruthfulness where defendant charged with making false declarations before grand jury alleges that her false statements were the result of faulty memory).

IV. CONCLUSION

For all the reasons stated, the Division respectfully requests that the hearing officer deny Respondent Kaiser's motion *in limine*, and allow the Division to introduce any evidence, including testimony, documents, or argument, relating to Kaiser's company car and company credit card usage.

Dated: January 5, 2015

Respectfully submitted,

DIVISION OF ENFORCEMENT
SECURITIES AND EXCHANGE COMMISSION

/s/ John W. Berry

John W. Berry (323) 965-3890
Amy Jane Longo (323) 965-3835
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Securities and Exchange Commission
Los Angeles Regional Office
444 South Flower Street, Suite 900
Los Angeles, CA 90071
(323) 965-3908 (*facsimile*)

Counsel for the SEC's Division of Enforcement

EXHIBITS

Exhibit	Description
H	Division Hr'g Ex. 11 (Jan. 28, 2013 Roush draft memo to audit committee, updated April 4, 2013, regarding internal investigation)
I	Division Hr'g Ex. 12 (Jan. 28, 2013 Roush draft memo to audit committee, updated April 4 and 15, 2013, regarding internal investigation)
J	Division Hr'g Ex. 155 (April 22, 2013 Roush draft memo to audit committee, regarding $15,000 bonus)
K	Division Hr'g Ex. 156 (April 22, 2013 Roush draft memo to audit committee, regarding accrued vacation)
L	Excepts of transcript of investigative testimony of James Canton (March 11, 2014)

EXHIBIT H

Draft 1/28/2013

Updated 4/4/2013

Memorandum

CONFIDENTIAL; NOT FOR FURTHER DISTRIBUTION

To: The Audit Committee of the Board of Directors of AirTouch Communications, Inc.

From: J. Steven Roush, Chair of the Audit Committee

Re: Investigation of TM Cell relationship

Date: January 29, 2013

Background:

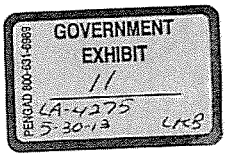
During our Board of Directors call on 1/18/2013 the Board questioned why AirTouch was not collecting on its accounts receivable from TM Cell. At December 31. 2012, $851,620 of the total receivable of $1,750,000 was past due. The initial explanation from management was that delays in TM Cell receiving purchase orders from Telmex was causing the delays in our payments. This explanation caused an immediate concern on my part as to the validity of recording our original sales to TM Cell.

Investigation:

I requested copies of all documentation relating to TM Cell. The original purchase order from TM Cell dated 7/30/2012 for 20,000 U250 units for a total of $1,740,000

Copies of all invoices :

7/31/2012	$696000	8000 units	
8/31/2012	348000	4000	
9/30/2012	196620	2260	
total 3rd quarter	$1240620	14620 units	
10/31/2012	499380	5740	
11/30/2012	373143	4289	
11/30/2012	61857	711	
12/31/2102	(425000)	5000	credit memo issued -product sold to Super Log



SEC-LA4275
Tr. Ex. 0011 - 00001

AP No. 3-16033
Plaintiff Exhibit No. 0011

December 31, 2013 $1750000 20000

I then interviewed Hide(CEO) and Jerome(CFO) inquiring as to any written or verbal side agreements pertaining to payment terms. On 1/25/2013 Jerome arranged a call with Tom Quan(VP Sales) and Carlos Isaza(salesman) asking them similar questions. I spoke again on 1/26 with Tom and Carlos. They mentioned a fulfillment agreement which I had not seen. Tom forwarded to me for review.

Conclusion:

After reviewing the Fulfillment and Logistics Agreement between AirTouch and TM Cell dated 7/27/2012, in particular item 6 "Payment" it was very clear that TM Cell was not obligated to pay AirTouch until TM Cell had sold product to and collected from a third party. Accordingly I have concluded that AirTouch should not have recorded revenues from TM Cell until they had sold through and collected on the sale from third parties.(Fin 10 FASB ASC 605-15-25-1(d)

This would mean reversing $1240620 out of the 3rd quarter reported revenues as well as related costs.

There is also $509380(net of the $425000 credit already recorded) of 4th quarter revenues that need to be reversed.

Next steps:

1. Get Audit Committee approval-done

2. Inform Anton & Chia (auditors)-done

3. file Form 8-k-done

4. file amended Form 10-Q for quarter ended 9/30/2012

5. draft language for material weakness description

6. inquire further into the reasons for and causes of this set of circumstances-done

As a follow up to my intial investigation, I wanted to ensure that no other revenue recognition issues were evident and performed the following:

1. Obtained print out of all sales for the year ended 12/31/2012

2. Inquired of Jerome as to whether there were any service and distribution agreements for the customers below:

Celluphone Inc-yes

Get Wireless-No

Super Log-No

Teledynamics No

Unicell Ghana-No

I read the Celluphone agreement noting that there were no sell through provisions

3. I examined sales invoices over $25,000 noting terms of title transfer to ensure recording in the proper quarter. The documentation for a 6/29/2012 Teldynamics sale ($170,000) was not clear but there was evidence that the product was shipped on 6/28/2012 and terms appeared to be FOB shipping point thus properly recorded.

Conclusion

1. Based on the work performed it appears that all sales except for the TM Cell transaction have been recorded in the proper quarters

2. Based on my interviews and my professional opinion it does not appear to me that there was any intent on any of the parties to inflate revenues. As to Hide(CEO) I am not sure how closely he read the agreement(he signed for AirTouch) nor did he understand the accounting ramifications of the sell through provisions. As to Jerome(CFO) he did not recall how close he read the agreement and he obviously missed the sell through provisions.

As to remedial actions, both the CFO and the controller need to take an AICPA or California continuing education course on revenue recognition. Jerome has also been reminded that he needs to closely review all documents related to sales transactions

EXHIBIT I

Draft 1/28/2013

Updated 4/4/2013

Updated 4/15/2013

CONFIDENTIAL; NOT FOR FURTHER DISTRIBUTION

To: The Audit Committee of the Board of Directors of AirTouch Communications, Inc.

From: J. Steven Roush, Chair of the Audit Committee

Re: Investigation of TM Cell relationship

Date: January 29, 2013

Background:

Memorandum

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I requested copies of all documentation relating to TM Cell. The original purchase order from TM Cell dated 7/30/2012 for 20,000 U250 units for a total of $1,740,000

Copies of all invoices :

7/31/2012	$696000	8000 units
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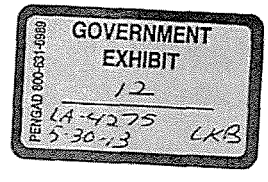

12/31/2102	(425000)	5000	credit memo issued -product sold to Super Log
December 31, 2013	$1750000	20000	

I then interviewed Hide(CEO) and Jerome(CFO) inquiring as to any written or verbal side agreements pertaining to payment terms. On 1/25/2013 Jerome arranged a call with Tom Quan(VP Sales) and Carlos Isaza(salesman) asking them similar questions. I spoke again on 1/26 with Tom and Carlos. They mentioned a fulfillment agreement which I had not seen. Tom forwarded to me for review.

I inquired of Sylvia Chan, Controller of her knowledge of the transaction. She was never provided a copy nor knew of the fulfillment agreement.

Conclusion:

After reviewing the Fulfillment and Logistics Agreement between AirTouch and TM Cell dated 7/27/2012, in particular item 6 "Payment" it was very clear that TM Cell was not obligated to pay AirTouch until TM Cell had sold product to and collected from a third party. Accordingly I have concluded that AirTouch should not have recorded revenues from TM Cell until they had sold through and collected on the sale from third parties.(Fin 10 FASB ASC 605-15-25-1(d)

This would mean reversing $1240620 out of the 3rd quarter reported revenues as well as related costs.

There is also $509380(net of the $425000 credit already recorded) of 4th quarter revenues that need to be reversed.

Next steps:

1. Get Audit Committee approval-done

2. Inform Anton & Chia (auditors)-done

3. file Form 8-k-done

4. file amended Form 10-Q for quarter ended 9/30/2012

5. draft language for material weakness description

6. inquire further into the reasons for and causes of this set of circumstances-done

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Conclusion

1. Based on the work performed it appears that all sales except for the TM Cell transaction have been recorded in the proper quarters

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As to remedial actions the CFO needs to take an AICPA or California continuing education course on revenue recognition. Jerome has also been reminded that he needs to closely review all documents related to sales transactions. The Controller should also be provided with all transaction documentation so that there is a second set of eyes to evaluate accounting ramifications

EXHIBIT J

[No Subject]

[redacted]

From: "J.Steven Roush" [redacted]

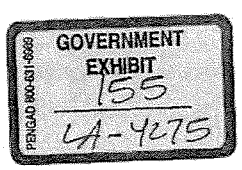
To: Larry Paulson [redacted] Jayme Canton [redacted]

Date: Tue, 23 Apr 2013 09:55:06 -0700

Attachments: AirTouch vacation accrual.docx (11.83 kB)

Today I will try and summarize all Jerome issues in a memo

Steve



CONFIDENTIAL; NOT FOR FURTHER DISTRIBUTION

To: The Audit Committee of the Board of Directors of AirTouch Communications, Inc.

From: J. Steven Roush, Chair of the Audit Committee

Re: Investigation of Vacation Accrual

Date: April 22, 2013 DRAFT

Background:

Hide(CEO) and Jerome(CFO) prior to 6/1/2012 were entitled to 4 weeks and 3 weeks of vacation respectively. Effective 6/1/2012 Hide's vacation was increased

8 weeks and Jerome's to 5 weeks.

I asked Sylvia(Controller) if AirTouch had any written policies on vacation. She needed something to give to the auditors. She responded that policy was employee could carry over up to 2 years but after that would lose

During 2012 vacation accruals were paid out to terminated employees . Accruals were also reduced for some(Wyatt $3800, Nakama $11,644) These were used to offset previous prepaid commissions to Tom and a cash advance to Nakama.

. As to officers, Hide was paid out $41,901 (August 2012-$19,371 October- $22,530) with a remaining accrual(unpaid) at 12/31/2012 of $12,011. Jerome was paid out $18,228 (August -$11,814 and December -$6,414) with a remaining balance(unpaid) at 12/31/2012 of $7,471.

During 2011 Hide and Jerome were the only ones with payouts during the year. Hide $19,934 and Jerome $11,000.

Conclusion:

1. There appears to be no logic as to who among active employees received vacation accrual payouts

2. Considering our cash flow position. management should have forced people, including themselves, to take time off to mitigate cash flow drain.

3. Increase in vacation benefits for both Hide and Jerome required Compensation Committee approval. This was not obtained

Open

1. check 10-K disclosure

2. According to Sylvia, Jerome did not charge vacation for his Hawaii trip. He said he worked the entire time

Jerome bonus

[redacted]

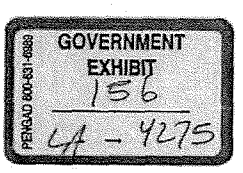
From: "J.Steven Roush" [redacted]

To: Larry Paulson [redacted], [redacted]

Date: Tue, 23 Apr 2013 09:55:53 -0700

Attachments: AirTouch-bonus pay to Jerome.docx (10.51 kB)

[redacted]



CONFIDENTIAL; NOT FOR FURTHER DISTRIBUTION

To: The Audit Committee of the Board of Directors of AirTouch Communications, Inc.

From: J. Steven Roush, Chair of the Audit Committee

Re: Investigation of Jerome Kaiser bonus

Date: April 22, 2013 DRAFT

In course of my other investigations, I came across a memo dated 10/19/2012 from Hide to Sylvia Chan(Controller) . The memo read" On appreciation for his efforts in assisting the company in capital raising efforts on the Kowlowitz and Tang deals, please arrange for a bonus payment of $15,000 to Jerome Kaiser immediately"

The Board of Directors was not aware of this payment. All compensation involving senior officers should have been reviewed and approved by the Compensation Committee

EXHIBIT L

Q To your knowledge, is it a claims made policy?
MR. PIAZZA: You can answer, if you know.
THE WITNESS: I think it is.
BY MR. ALTMAN:
Q How large is the policy?
MR. PIAZZA: No, we're not going there.
THE WITNESS: I don't know. But I can tell you my wife is not happy about the fact that I have to pay for it.
MR. PIAZZA: All right.
MR. ALTMAN: Is that an objection, Counsel?
MR. PIAZZA: It's an objection to the relevance of this line of questioning. How it has anything to do with the conduct that's under investigation is beyond me. And the SEC's interest in D and O insurance is something that I'm not -- I've not come across in other matters, so I do object to it and I'm not going to have him answer these questions. If you want to push it with the court, go ahead. Unless you can give me the relevance.
BY MR. ALTMAN:
Q Going back to the period of time after Mr. Kaiser left AirTouch, did the board conduct any additional investigation into conduct by Mr. Kaiser during his employment?
A Yes.

Q What was the nature of that --
A Informal --
Q -- investigation?
A Informal investigation.
Q Into what matters?
A Credit card spending. We found a number of irregularities on the credit cards which we could not substantiate. We asked him to substantiate. He ignored. He walked away with a car, expensive BMW, which we did not know -- I did not know that he had an arrangement with the company to be -- to receive that car. We thought it was inappropriate and that there was not a legal basis for that.
He cited a document that gave him the right to have that car. I'm head of the comp committee; I've never seen that document. He did not answer requests for the credit cards. Did not return the car. We demanded the car be returned. It was a BMW7. We thought it was inappropriate and not proper that he keep the car. He did not return the car.
His assertion of options granted to him and the compensation package which was -- the car was part of that -- I had never seen before. None of the board members had seen that before. Surfaced mysteriously at the end. We thought that that was indicative of not an

honest portrayal. It was not -- it was indicative of a lack of transparency. And we thought on behalf of the shareholders as well as good board governance, that he should -- that that be invalidated as such.
We sent -- communicated letters regarding that and the overall -- his overall conduct of leaving the state of financial chaos of numerous relationships. We found bills that were not paid, which I would say up until almost a month ago were still surfacing. Parties that he had made agreements on behalf of the company, vendors, lawyers, numerous parties, vendors for equipment, for relationships for services, never paid, never acknowledged to us. And the status of the records in the office, without Sylvia we wouldn't have been able to dig out.
That's not the conduct of a competent CFO for a private level and public company. And he was not forthcoming in helping us address all of the outstanding contracts, relationships that came out of the woodwork afterwards.
Also there were issues that were questionable about contracts and other matters that he had made certain relationships for funds, vendors. One thing after another it just became problematic in terms of record keeping and trying to sort things out. Steve led

the management.
It was no help also. The last matter was -- we asked for help, which I thought was -- he had a responsibility as the former CFO to help us, on behalf of the shareholders, sort out the financial mess. He never did. Never came back. Gave scant communications. Hide did; he did not.
Q Did the board conduct any investigation into a bonus payment that Mr. Kaiser received in October 2012 in connection with capital-raising activities?
A I don't recall that. I believe that there were some conversations. I don't recall any details about it.
Q Do you recall anything about a $15,000 payment that Mr. Kaiser received following the closing of a $2 million loan from an entity associated with Tony Tang's family?
A I remember the transaction. I don't recall the bonus.
Q Do you know how the proceeds of the $2 million loan I just referenced were used by AirTouch management?
A I don't recall specifically. My assumption was it was used for operations.
Q Were any of the proceeds used for salaries?
A My assumption is that they would be used for the various parts of operations. I do not have any

knowledge that they were -- that it was used for anything else other than operations. Some of them salaries, I would expect that they would be.

We -- as the company's resources became thinner, we did ask management to take less salary, to cut back on their salary and as such. That was a conversation around that period of time, after that period of time. But I don't recall if it was used for anything other than operations. And I'd have to have documents in front of me or Steve would have to be here to be able to answer that question.

Q To your knowledge, did Mr. Kaiser receive salary following the time period in which the $2 million loan closed?

A I believe so.

Q To your knowledge, without the proceeds of the $2 million loan, would Mr. Kaiser have received any compensation from AirTouch?

A I don't understand the question.

Q In other words, were there sufficient funds -- assume that $2 million loan never took place.

Were there sufficient funds to pay Mr. Kaiser's salary in AirTouch's accounts otherwise?

A I don't recall that time, that time period. I don't recall.

Q The investigation -- the informal investigations that you referenced that took place following the period when Mr. Kaiser left AirTouch --

A Hmm-hmm.

Q -- was any conclusion reached as to any of those investigations?

A By whom?

Q By the board.

A The board discussed and caused -- there were conclusions. The board discussed and there were conclusions regarding Jerome Kaiser not cooperating in returning the funds associated with what we deemed to be inappropriate purchases on credit cards, a number of them.

Was a conclusion in Jerome Kaiser refusing to return the automobile that we demanded. There was conclusion in Jerome not relinquishing his options that were, we believe, inappropriately given to him.

Q Who gave him the options, to your knowledge?

A I believe he did because the board didn't. A mysterious document showed up that he cited that was prior to the board, the current board put in force, was the story which I questioned the validity of since it was not in my file and I was head of the compensation committee and I would have had to have had that in my

file in order for that to be modified. And I discussed it with the board. We all were in agreement that it was not modified.

Q Any other conclusions reached?

A The state of the financials' record keeping was not consistent with a professional, prudent, or competent CFO.

Q Following -- go on. I'm sorry.

A And then finally the number of -- of contracts and relationships with vendors, suppliers that were not disclosed by him, recorded by him, or satisfied by him on behalf of the company, was unprofessional and not satisfactory. We were -- we were appalled.

Q Did the board consider any litigation against Mr. Kaiser?

A Yes, to get back --

MR. PIAZZA: I'm going to caution the witness not to get into attorney-client communications between the board and board counsel regarding this matter.

THE WITNESS: Okay.

MR. PIAZZA: I think you've answered the question.

THE WITNESS: Yes.

BY MR. ALTMAN:

Q Without getting into the substance of any legal

advice that the board may have received, what subject matter did that proposed or potential litigation relate to?

MR. PIAZZA: If it's in the context of the discussions with counsel, I'm going to instruct you not to answer on the grounds of attorney-client privilege.

THE WITNESS: Okay. The main things that I've already indicated at the period of time after he left we felt were more than requiring us as a board to take actions on; we just didn't have the funds to pursue that. And we -- we -- we're still kind of digging out and finding out what was going on, but we did discuss it.

BY MR. ALTMAN:

Q Following Mr. Kanakubo leaving AirTouch, did the board conduct any investigations of a similar nature as it did with Mr. Kaiser into Mr. Kanakubo's conduct?

A I don't -- I don't recall that there was anything that showed up that was problematic, the way it was with Jerome.

MR. PIAZZA: Counsel, can we take a lunch break at some time?

MR. ALTMAN: Off the record at 12:10.

(A brief recess was taken.)

MR. ALTMAN: Back on the record at 12:21 P.M.

BY MR. ALTMAN: