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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.

RESPONDENT JEROME KAISER'S REPLY IN SUPPORT OF MOTION IN LIMINE TO EXCLUDE EVIDENCE RELATING TO COMPANY CAR AND CREDIT CARD USAGE

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I. INTRODUCTION

These proceedings involve allegations that Respondent Jerome Kaiser provided misleading information to AirTouch stockholders, and an AirTouch investor, in two narrow instances. Specifically, the Division of Enforcement (the "Division") alleges, in the Order Instituting Proceedings, that "[t]his matter involves . . . fraudulent financial disclosures and omissions . . . in [AirTouch's] voluntarily filed Form 10-Q for the third quarter of 2012, and in fraudulent statements and omissions to an investor in connection with a $2 million loan made to the company in the fall of 2012." OIP ¶ 1. The Hearing Officer is charged with determining whether those allegations are true, and whether Respondent Jerome Kaiser violated the anti-fraud provisions of the federal securities laws in connection therewith. In the event the Hearing Officer determines there has been a violation of the federal securities laws, the Hearing Officer is charged with determining the appropriate sanction. The scope of relevance for the sanction goes slightly beyond the charged violation of federal securities laws to include the respondent's "repeat offender" status and the likelihood that misconduct will recur. *See, e.g.*, *SEC v. Patel*, 61 F.3d 137, 141 (2d Cir. 1995).

Despite the narrow range of issues to be determined in these proceedings, the Division's opposition to Mr. Kaiser's motion in limine makes clear that the Division desires to turn the hearing in this matter into a wide-ranging referendum on Mr. Kaiser's performance as a CFO for AirTouch, including matters that have not previously been adjudicated and have nothing at all to do with the purported violations of the federal securities laws, such as Mr. Kaiser's company car and credit card usage.

The undisputed facts relevant to this Motion are as follows:

- When he started his employment with the company in 2010, Mr. Kaiser received a written offer of employment which made clear that upon his termination, he was

to receive the company car he was then using. He was also given the use of a company credit card;

- Throughout his tenure at the company, in an open and notorious fashion, he used his company car and those credit card expenses that were appropriate for payment were paid;
- When Mr. Kaiser was terminated, pursuant to the terms of his employment agreement, he proceeded in an open and notorious fashion to transfer the ownership of the company car to himself personally;
- After the fact, the head of the company's audit committee Mr. Roush raised a question regarding whether in fact Mr. Kaiser was entitled to receive the company car and whether some of the expenses that had been paid were appropriate to have been paid;
- By his own admission, Mr. Roush did not draw any conclusions regarding either the company car or the company credit card use;
- The Division did not make any effort to further investigate the propriety of Mr. Kaiser's behavior vis-à-vis the car or the credit cards;
- As a result, there has been no adjudication of these issues.

The Division now seeks to expand the scope of this hearing beyond the alleged violations of securities laws to try to prove that Mr. Kaiser improperly took ownership of company property. The Division would then ask the Hearing Officer to infer that taking improper ownership of company property is tantamount to a "concealment fraud." Next, the Division would ask the Hearing Officer to infer that these acts of taking ownership of company property are so similar to the concealment fraud charged in the OIP that they help prove that Mr. Kaiser

intended to commit the concealment fraud alleged in the OIP. This entire line of reasoning is not only specious—these facts do not support an inference that anything was concealed—but also if allowed, will result in a substantial increase in hearing length as the parties will be forced to adjudicate whether each of hundreds of Mr. Kaiser's expenses was appropriate or not. The Division says that these matters are relevant to a determination of Mr. Kaiser's "scienter and state of mind in engaging in a fraudulent scheme, which included deceiving the company's board." Opp. at 11. As an initial matter, the Division does not satisfactorily explain how Mr. Kaiser's use of his company car—which was provided to him pursuant to an agreement with the company—and use of company credit cards worked any sort of "deception" on the company's board. And in any event, the Division's allegation in the OIP that Mr. Kaiser deceived the company's board is limited to its assertion that Mr. Kaiser withheld information from the board regarding one particular subject: AirTouch's sales to a company called TM Cell. Evidence purporting to show that Mr. Kaiser somehow misled the board with respect to other, completely unrelated matters would have no bearing on the Hearing Officer's consideration of the Division's allegations that Mr. Kaiser withheld information from the board concerning TM Cell.

As explained in detail below, Mr. Kaiser's company car and credit card usage are relevant neither to his liability for purported violations of the federal securities law nor to the range of potential remedies that may be ordered by the Hearing Officer. Allowing this proceeding to devolve into a series of mini-trials on the appropriateness of hundreds of credit card charges would do nothing but waste the time of the Hearing Officer and the parties, adding days to the hearing and distracting from the real issues to be determined.

Because matters involving Mr. Kaiser's company car and credit card usage are irrelevant to any issue in this proceeding, and because introducing them will yield nothing but an expensive

and time-consuming distraction, Mr. Kaiser respectfully requests that the Hearing Officer exclude any reference to them at the hearing.

II. ARGUMENT

A. Mr. Kaiser's Company Car And Credit Card Usage Are Irrelevant To A Determination Of Liability.

The Division's assertion that evidence of Mr. Kaiser's company car and company credit card usage is relevant to establish his liability does not stand up to scrutiny.

1. These Matters May Not Be Introduced As Character Evidence.

The Division concedes that evidence of Mr. Kaiser's company car and credit card usage are inadmissible under Federal Rule of Evidence 404 as character evidence to prove that Mr. Kaiser acted in accordance with a particular trait on a particular occasion. Opp. at 11. Instead, the Division argues that the evidence is admissible as evidence of "other acts" pursuant to Rule 404(b) and the Ninth Circuit's four-prong test set forth in *U.S. v. Flores-Blanco*, 623 F.3d 912, 919 (9th Cir. 2010). Under the *Flores-Blanco* test, all four prongs must be satisfied to admit this type of evidence, yet none of the factors are met here.

a. The evidence does not prove a material point.

First, the Division fails to establish that evidence of Mr. Kaiser's company car and credit card usage proves a material point. The Division argues that evidence on these issues somehow establishes that Mr. Kaiser had "fraudulent intent in his dealings with AirTouch's board." Opp. at 12. However, the Division does not and cannot adequately explain how Mr. Kaiser's retention of his company car, in reliance on the promises made by the company in his offer of employment, reveals any intent to mislead the board or withhold or conceal information from the board, let alone to withhold information from the board concerning the unrelated matter of AirTouch's sales to TM Cell. The Division seems to find it significant that Mr. Kaiser allegedly

"ignore[d] the board's instructions" to return the car but offers only a conclusory statement that this action demonstrates his intent to deceive the board. *Id.* at 14. Similarly, the Division does not and cannot adequately connect Mr. Kaiser's credit card use with any intent to defraud the board. Mr. Kaiser has neither lied to nor misled the board or anyone else about his credit card usage, and the Division cites no evidence to the contrary. Moreover, the cases cited by the Division involve inapposite circumstances, in which the evidence of other acts concerned either the same scheme before the factfinder or a prior, substantially similar scheme. Here, the matters of Mr. Kaiser's company car and credit card usage are independent from and irrelevant to the allegations in this proceeding involving reported revenue and representations to an investor relating to TM Cell.

b. The purported "other act" is too remote in time.

The second *Flores-Blanco* factor requires that the evidence of the purported "other act" not be too remote in time from the misconduct that is actually at issue. Although the Division blithely asserts that the board investigated the credit card and company car issues "at the same time" that the board was considering issues relating to the restatement of the company's third quarter 2012 revenues, Opp. at 15, the reality is that "the company announced its intent to restate the Form 10-Q in February 2013," *id.*, but the board did not begin looking into the credit card and company car issues until months later. *See* Exhibit A to Motion (preliminary findings regarding credit card usage, dated April 17, 2013).

c. The evidence offered by the Division is insufficient to support a finding that Mr. Kaiser deceived the AirTouch board.

The third prong of the *Flores-Blanco* test requires that the evidence of the "other acts" be sufficient to support a finding that the "other acts" occurred. Here, the Division asserts that the evidence it seeks to introduce—preliminary observations by the company's board before Mr.

Kaiser was ever given a chance to respond—is sufficient to satisfy this prong, because all "that matters is that the outside directors . . . thought Kaiser had been dishonest." Opp. at 16. If the Division were correct, the Hearing Officer could simply take preliminary questions raised by the board and conclude, without any backup documentation, that those questions themselves somehow establish Mr. Kaiser's wrongdoing. That cannot be the law.

Mr. Kaiser disputes any assertion that he improperly retained his company car or that he improperly used his company credit card. There has been no adjudication or finding that Mr. Kaiser engaged in improper conduct. The Division asserts that Steven Roush—the board member, and chair of the audit committee, who reviewed some of Mr. Kaiser's credit card statements—shared "preliminary findings" with the other board members that some of the charges "appear" either "personal in nature" or "suspect in nature." Opp. at 6. Roush also explained that these findings were not conclusive because he had not obtained Mr. Kaiser's explanations. Exhibit D (Division's proposed Trial Exhibit 204) at 6. Should he be required to do so, Mr. Kaiser is prepared to present evidence demonstrating that the board's initial concerns regarding his credit card usage were misplaced. For example, the Division's opposition brief refers no less than four times to the fact that Mr. Kaiser supposedly "used the card to charge for things like flights to Hawaiian islands while on vacation." Opp. at 1. However, that travel booking was necessitated when Mr. Kaiser had to rearrange his vacation travel plans after they were disrupted as a result of work obligations.

The Division also points to a dispute between the board members and Mr. Kaiser concerning whether he should retain possession of his company car after he left the Company. On one side of the dispute, Mr. Kaiser retained possession of the car pursuant to his offer of employment with the Company. Exhibit G (Division's proposed Trial Exhibit 119) ("In the case

of termination, ... [y]ou will also receive at no cost to you the company vehicle that you are driving at the time of your termination."). On the other side of the dispute, board member James Canton said he had never seen the employment offer and board member Larry Paulson demanded the car back. Opp. at 7-8.

The Division mischaracterizes these matters as "misconduct." On pages 6 to 8 of its opposition, the Division presents facts indicating, first, that Roush made preliminary findings about Mr. Kaiser's credit card usage—findings that Roush characterized as inconclusive—and second, that there was a dispute between the board members and Mr. Kaiser about his company car. On page 9, without offering further analysis, the Division immediately leaps to its conclusory designation of these matters as "misuse of a company credit card" and "theft of a company car."

The Division, however, did not and cannot produce any evidence that Kaiser stole a company car. The Division did not and cannot produce any evidence that Kaiser fraudulently used his company credit card. The Division's entire argument in its opposition is predicated on its improper assumption of misconduct.

d. The purported "other acts" are not similar to the misconduct that is actually alleged.

Finally, the Division also fails to satisfy the fourth prong, which requires the "other act" to be similar to the offense charged. The Division argues unconvincingly that Mr. Kaiser's dispute with the board over his company car and Mr. Roush's preliminary and unsubstantiated observations concerning Mr. Kaiser's credit card usage are "sufficiently similar" to the allegations that he "misled and withheld information from the board" about the reported revenue related to TM Cell. Opp. at 17. The Division bases its argument solely on two Ninth Circuit cases, both of which exemplify a degree of similarity between the offense charged and the "other

act" sought to be introduced that is not achieved here. In *United States v. King*, 200 F.3d 1207 (9th Cir. 1999), the court found sufficient similarity between two fraudulent schemes:

> In both situations, King sought to profit from delays in the international banking system. He withdrew money from BofA before the bank could discover that his checks were worthless; similarly, he contracted with the Barbados Postal Service to deliver his bulk mailing before it could discover that his check was dishonored. Thus, the Barbados transaction is similar enough to the charged offenses to be admissible.

Id. at 1214. In *United States v. Sarault*, 840 F.2d 1479 (9th Cir. 1988), the court explained:

> The basis for each scheme was the creation of an assetless offshore bank used to underwrite legitimate business transactions. In both instances Sarault was involved in schemes to take people's money and provide them with something worthless. In the Baker transaction, this was a worthless guarantee. In the Trust Fund transaction, it was worthless insurance. In both instances Sarault worked as counsel for AC & I and was supposed to confirm that AC & I actually had assets. But in both cases AC & I actually was assetless.

Id. at 1486. In both cases, the similarity of the other act to the offense charged is significantly greater than the similarity of the matters of Mr. Kaiser's company car and credit card usage to the allegations actually at issue in this proceeding.

The Division argues that this evidence is relevant to establish "motive, opportunity [or] intent." Opp. at 11. However, motive evidence is typically reserved for situations where the "other act" evidence demonstrates the motive to commit the instant act. For example, this could arise when evidence of a gambling debt demonstrates a motive to steal money. Here, the Division has not articulated a motive for securities fraud, let alone established that Mr. Kaiser's retention of the company car somehow proves a motive to falsify a Sarbanes Oxley certification to the effect that the Company's financial statements are true and accurate.

Similarly, "opportunity" evidence is typically reserved for situations where the "other act" evidence shows a capacity or a technical skill to perpetrate a scheme. For example,

evidence that a perpetrator picked a lock in the past may be relevant in a burglary case. Here, the Division has not articulated any theory by which improper retention of the company car bears on Mr. Kaiser's opportunity to falsify a certification.

Finally, "intent" evidence is typically reserved for situations where one is charged with a knowledge-based offense to show that the perpetrator had the requisite knowledge or intent. For example, when a defendant is charged with knowingly possessing illegal drugs, the fact that he had previously been convicted of possession of illegal drugs tends to prove that he knew the drugs he possessed were illegal. Here, the Division has not proved, let alone even articulated any nexus between the charged securities fraud and the "other acts."

The Division nonetheless asserts that these matters are admissible because they are "inextricably intertwined" with the alleged securities law violations. Opp. at 17. But the beginning and end of the Division's explanation is the conclusory assertion that because Mr. Kaiser "also hid his improper personal charges on a company credit card, and refused to return company property (the car) after the board demanded it, [this] is *clearly* part of the 'story' of his fraudulent scheme." *Id.* at 18 (emphasis added). The Division declines to describe precisely how these matters are "clearly part" of the story of the allegations concerning revenue reporting, aside from the fact that the board considered both issues (albeit months apart). Indeed, that the Division offers what it believes to be a "coherent and comprehensible" story in the Order Instituting Proceedings, without mentioning matters relating to Mr. Kaiser's credit card usage and company car, deflates the Division's argument for relevancy on this theory.

2. These Matters Are Irrelevant To Truthfulness.

Next, the Division argues that these matters are admissible on cross-examination for impeachment purposes under Federal Rule of Evidence 608 on the theory that they are probative of Mr. Kaiser's truthfulness. Opp. at 20. Yet the Division is unable to demonstrate how these

matters are probative of Mr. Kaiser's truthfulness. Mr. Kaiser retained his company car pursuant to his employment agreement. That one or more board members nevertheless objected to Mr. Kaiser's action does not reflect poorly on his truthfulness. That Mr. Kaiser did not accede to a demand that he return the car, contrary to the terms specified in the agreement, also does not indicate untruthfulness. Similarly, the Division seems to equate without justification Mr. Kaiser's credit card usage with evidence of prior fraudulent activity. Opp. at 20-21. Yet there has been no determination of fraud against Mr. Kaiser. There is only Mr. Roush's observation of certain charges that "appear to be personal in nature" without any determination as to whether the charges were for business or personal use and if the latter, whether Mr. Kaiser inappropriately asked the Company to pay the expenses. The Division's contortion of these matters into "a willingness to hide the truth" (Opp. at 21) is inaccurate and unsupported.

B. Mr. Kaiser's Company Car and Credit Card Usage Are Irrelevant To A Determination Of Remedies.

Finally, the Division wrongly asserts that "there should be no question that this evidence is relevant and admissible regarding the sanctions the Division seeks in this case." Opp. at 9. Under the so-called "holistic approach" espoused by the Division, Opp. at 10, the Hearing Officer would be free to consider evidence of any sort of alleged wrongdoing whatsoever—whether related to the underlying violations of the federal securities laws or not—in determining the scope of appropriate sanctions. Yet in every decision cited by the Division in support of its argument that the Hearing Officer may consider evidence of Mr. Kaiser's company car and credit card usage in connection with a determination of sanctions, the adjudicator considered evidence relating *only* to the underlying securities violations in determining appropriate remedies. *See* Opp. at 9-10.

The Division misstates the Commission's opinion in the matter of *Sandra K. Simpson* when it quotes that opinion for the proposition that the Commission considers "other acts" (in addition to the underlying securities violations) in its determination of civil monetary penalties. Opp. at 10. In reality, the Commission in *Sandra K. Simpson* gave the following explanation of 15 U.S.C. § 78u-2:

> To determine whether civil penalties are in the public interest, *we examine whether the illegal activities involved, among other acts, deliberate or reckless disregard of a regulatory requirement*; the harm caused to another person; the extent to which any person was unjustly enriched; the respondent's prior disciplinary history; deterrence; and other matters as justice may require.

55 S.E.C. 766, 801 n.58 (emphasis added) (citing 15 U.S.C. § 78u-2(c)(1) ("whether the act or omission for which such penalty is assessed involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement")). That is, the Commission's phrase "other acts" refers precisely to the illegal activities at issue. It does not refer to "other acts by the respondent" in addition to the illegal activity at issue, as much as the Division might wish that were so.

The Division similarly ignores longstanding precedent in making the suggestion that the Hearing Officer consider evidence of Mr. Kaiser's company car and credit card usage in determining whether and for how long an officer or director bar is appropriate. Adjudicators generally rely on the *Patel* and/or *Steadman* factors in making this determination. *See John Thomas Capital Mgmt. Grp.*, Initial Decision Release No. 693, 2014 SEC LEXIS 4162, at *98-100 (Oct. 17, 2014) (Foelak, ALJ) (applying the *Patel* and *Steadman* factors); *Joseph P. Doxey*, Initial Decision Release No. 598, 2014 SEC LEXIS 1668, at *74-78 (May 15, 2014) (Elliott, ALJ) (applying the *Patel* and *Steadman* factors); *SEC v. Bankosky*, 716 F.3d 45, 48 (2d Cir. 2013) (affirming continued relevance of *Patel* factors after passage of the Sarbanes-Oxley Act of 2002). The *Patel* factors are (1) the "egregiousness" of the underlying securities law violation;

(2) the defendant's "repeat offender" status; (3) the defendant's "role" or position when he engaged in the fraud; (4) the defendant's degree of scienter; (5) the defendant's economic stake in the violation; and (6) the likelihood that misconduct will recur. *SEC v. Patel*, 61 F.3d 137, 141 (2d Cir. 1995). The *Steadman* factors are (i) the egregiousness of the defendant's actions, (ii) the isolated or recurrent nature of the infraction, (iii) the degree of scienter involved, (iv) the sincerity of the defendant's assurances against future violations, (v) the defendant's recognition of the wrongful nature of his conduct, and (vi) the likelihood that the defendant's occupation will present opportunities for future violations. *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979).

The Division incorrectly asserts that the unresolved dispute between Mr. Kaiser and the board members over his company car or Mr. Roush's preliminary observations of credit card activity rise to the level of conduct demonstrating a person's unfitness to serve. Opp. at 10. But neither of these matters will affect the determination of any of the *Patel* or *Steadman* factors. Despite this precedent, the Division instead advances a new set of nine factors used by one district court. Opp. at 10 (citing *SEC v. Levine*, 517 F. Supp. 2d 121, 144-46 (D.D.C. 2007)).[1] But even then, the factors the Division attempts to employ—the complexity of the scheme and the defendant's use of stealth and concealment—apply to the underlying securities law violations, not to other conduct unrelated to the alleged violations.

III. CONCLUSION

For all the foregoing reasons, and those stated in his opening brief, Mr. Kaiser respectfully requests that the Hearing Officer exclude at the hearing any reference, including

[1] The Commission recently has "opposed the adoption" of this nine-factor test in favor of the *Steadman* factors. *Bankosky*, 716 F.3d at 49.

exhibits, witness testimony and attorney comments, relating to Mr. Kaiser's company car and credit card usage.

Dated: January 8, 2015

Respectfully submitted,

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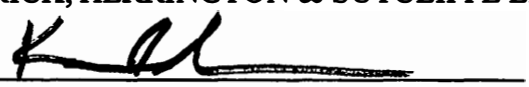
By: 

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