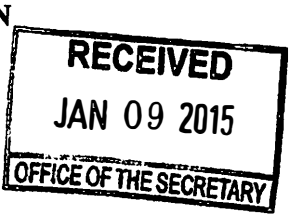
UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION



ADMINISTRATIVE PROCEEDING
File No. 3-16033

In the Matter of

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

Kaiser.

DIVISION OF ENFORCEMENT'S REPLY BRIEF IN FURTHER SUPPORT OF ITS MOTION *IN LIMINE* TO EXCLUDE OR OTHERWISE LIMIT TESTIMONY OF KAISER'S PROFFERED EXPERTS, ALLAN KLEIDON AND MICHAEL KUNKEL

January 8, 2014

Division of Enforcement
Securities and Exchange Commission
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I. INTRODUCTION

The Division moved to exclude testimony by two experts tendered by respondent Kaiser: Michael Kunkel, who analyzed and reviewed a hard drive that purportedly was used to backup a "network shared drive" at AirTouch in the second half of 2012, and Allan Kleidon, who reviewed movements in the price for shares of AirTouch's common stock and concluded that shareholders suffered few or no losses in connection with Kaiser's accounting fraud.[1] Kaiser's opposition argues that despite Kunkel's review and consideration of the hard drive, it is privileged and thus non-disclosable, and that Kleidon's analysis of shareholder loss is directly relevant to the question of whether or not AirTouch's announcement of its intention to restate 100% of its reported revenue for a given quarter was, in fact, material.

These arguments are meritless. No matter how Kaiser may try to spin it now, Kunkel reviewed the *entire* hard drive. Federal Rule of Civil Procedure 26(a)(2)(B)—which the hearing officer instructed the parties will apply in this case—required Kaiser to disclose everything his expert, Kunkel, considered. Kaiser's failure to disclose the data that Kunkel considered in forming his opinion renders Kunkel's report inadmissible. Similarly, while Kaiser may try and twist the language in Kleidon's report to suggest otherwise, his report relates solely to loss causation—an element of private securities litigation that is irrelevant to SEC enforcement actions. His opinions are thus irrelevant and excludable.

[1] While the opposition to the Division's motion was filed on behalf of all respondents to this matter, two of the three respondents—AirTouch and Kanakubo—have settled in principle and the matter has been stayed as to Kanakubo and a stay has been jointly requested as to AirTouch. As a result, this reply addresses the arguments in the opposition as coming from Kaiser alone, and likewise the proposed expert testimony from Michael Kunkel and Allan Kleidon being offered in support solely of Kaiser's defense.

II. ARGUMENT

A. Kunkel's Report and Proposed Testimony Should Be Excluded

1. Kaiser's refusal to comply with Rule 26 mandates exclusion of Kunkel's report

The hearing officer's order of September 26, 2014 specifically stated that expert reports "should be as specific and detailed as those presented in federal district court pursuant to Federal Rule of Civil Procedure 26." Kaiser contends that the hearing officer's instruction regarding the applicability of Rule 26 in this matter "can[not] and does [not] impose expert discovery obligations" beyond those found in the Commission's Rules of Practice or precedent. Opp. Br. at 5. Yet Kaiser cites no legal authority in support of this bald proposition. Rather, Kaiser simply notes he "respectfully" disagrees with the hearing officer's applicability of Rule 26. *Id.*

Rule 26(a)(2)(B) lists six requirements for expert reports. The second requirement states the report "must contain . . . the facts or data considered by the witness in forming them." FED. R. CIV. P. 26(a)(2)(B)(ii). "The inclusion of the requirement to produce 'facts or data' is broadly interpreted to require disclosure of *any material considered by the expert that contains factual ingredients*; it is not limited to the facts or data relied on by the expert." *JJI Int'l, Inc. v. Bazar Group, Inc.*, No. 11-206ML, 2013 WL 3071299, at *4 (D.R.I. Apr. 8, 2013) (citing *Chevron Corp. v. Shefftz*, 754 F. Supp. 2d 254, 263 (D. Mass. 2010)) (emphasis added). Kaiser plainly should have disclosed the hard drive to the Division, as it was considered by Kunkel in connection with the preparation of his report.

Perhaps recognizing that Rule 26 does, in fact, apply to this matter, Kaiser attempts to scale back the statements Kunkel made in his report—and thus limit the scope of what Kunkel "considered" during his forensic analysis—in order to argue that the Division should not have access to the same data that Kunkel reviewed. But nowhere in his opposition does Kaiser say

that Kunkel did not review or see any other files in the hard drive. Rather, Kaiser states, rather obliquely but tellingly, that Kunkel's "forensic analysis *centered* on the eight instances" of a particular file on the drive. Opp. Br. at 6 (emphasis added). Kaiser could not say more because Kunkel's own report makes clear that Kunkel reviewed and considered the *entire* drive when reaching his opinions. As Kunkel himself described, he connected the drive to a "forensic workstation computer for examination" and reviewed the hard drive's "folder structure." Kunkel Report ¶¶ 4, 7. While Kunkel does discuss the search results for a particular file, he in no way limits the data he considered to those searches alone. *See id.* ¶ 6.

Thus, Kaiser's argument by analogy that the SEC is asking the hearing officer to require the disclosure of an entire library just because the expert "reviews a single book" misses the mark. Opp. Br. at 6. Kunkel did not just check out a "single book;" he went through the entire card catalogue and searched every shelf in the library to locate eight different books. Accordingly, Kaiser must now disclose to the Division everything that Kunkel reviewed in that "library"—that is, the entire hard drive. *See JJI Int'l*, 2013 WL 3071299, at *4 (quoting *Fialkowski v. Perry*, No. 11–5139, 2012 WL 2527020, at *3 (E.D. Pa. June 29, 2012)) ("Rule 26(a)(2)(B) requires "*any information furnished to a testifying expert that such an expert* generates, *reviews, reflects upon, reads, and/or uses* in connection with the formulation of his opinions, *even if such information is ultimately rejected*." (emphasis added)).

Kaiser thus should have disclosed the external hard drive that his proffered expert analyzed. He did not. When the Division demanded disclosure of the hard drive, Kaiser stated that the Division did not need to review the entire hard drive, and now argues that the Division should explain or justify why it seeks access to the hard drive Kunkel reviewed. *See* Opp. Br. at 7. But as noted in the Division's moving brief, Rule 26(a)(2)(B) embodies self-executing

disclosure requirements that are designed to facilitate an opposing party's preparation for trial. *See* SEC Br. at 9-10. That is, Rule 26(a)(2)(B) itself explains why the Division seeks access to the data Kunkel considered, and no further explanation is required or warranted.

2. Any privilege over the hard drive cannot trump Rule 26 disclosure requirements

Kaiser also fails to rebut the point made by the Division in its moving brief that, as a matter of law, Rule 26 disclosure requirements trump any privilege associated with facts or data that were provided to an expert for consideration. *See* SEC Br. at 10. Kaiser instead cites one case where a court limited a civil discovery request to inspect a computer hard drive. *See* Opp. Br. at 6 (citing *Thielen v. Buorgiorno USA, Inc.*, No. 106-CV-16, 2007 WL 465680, at *2 (W.D. Mich. Feb. 8, 2007). However, the *Thielen* court simply found that allowing a wholesale review of the hard drive would impose an "undue burden" on the owner of the computer hard drive because it would constitute, in effect, a fishing expedition by one party during non-expert, fact discovery. *Id.* Rule 26(a)(2)(B) was not even at issue in that case. Here, Kaiser tendered a report from an expert who considered an entire hard drive in rendering an opinion on the existence of a file on that hard drive. In doing so, Kaiser assumed the obligation imposed by Rule 26(a)(2)(B) to provide the Division with the full set of data considered by that expert.

When Kaiser did offer to disclose the hard drive, he did so based on unreasonable conditions, including demanding that the Division hire an independent expert and that AirTouch serve as a buffer between that expert and Division counsel in order to protect AirTouch's

purported legal privilege.[2] The Division rejected such limitations because they are unfounded. Even if there were a privilege that protected the hard drive's contents, the Rule 26 disclosure requirements mandate that the hard drive be disclosed now that Kaiser's expert has reviewed and considered those contents. *See* SEC Br. at 10-11.

In an effort to resolve this dispute, the Division offered to use a Commission employee or contractor who does not work within the Division in connection with its review of the hard drive. Indeed, doing so is consistent with SEC practices, which allow non-Division staff or staff not involved in a particular matter to review potentially privileged material independent of the team handling a case. *See* Ex. D (July 2013 email chain between counsel regarding document production issues and Commission's document review policies). Kaiser has rejected this sensible compromise, and continues to demand that the SEC hire and pay a non-Commission consultant or expert, with whom the Division staff would have limited ability to communicate about the drive. *See* Ex. E (Dec. 2014-Jan. 2015 email chain between counsel regarding hard drive). In light of all of the foregoing, Kunkel's report must now be excluded from the hearing.[3]

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[2] AirTouch has not articulated the basis for its assertion of legal privilege over documents on the hard drive, nor has it addressed whether these documents actually fall within the category over which AirTouch *waived*, during the Division staff's investigation, any claim to legal privilege—*i.e.*, documents and/or communications that relate to AirTouch's decision to file a Form 8-K regarding its Form 10-Q for the third quarter of 2012.

[3] Kaiser's additional argument that the Division elected not to subpoena the hard drive during the investigation (Opp. Br. at 2-3) does not cure his disclosure failure. By tendering an expert report, Kaiser assumed the burden of disclosing all facts or data considered by his expert, irrespective of whether it was produced previously. In any case, AirTouch's counsel specifically told the Division staff that "AirTouch did not have a server based network system and all emails and files were stored to the officers' and employees' personal computers," and that "[o]nce a month an outside IT consultant, Rick Buddine . . . would arrive at AirTouch's offices to back up all of the information on the personal computers of the AirTouch officers working from the Newport Beach office. That back up is stored on two hard drive devices, both of which have been delivered by Mr. Buddine to AirTouch." Ex. D. AirTouch declined the Division staff's

3. Kunkel's report does not negate proof that Kaiser concealed the AirTouch-TM Cell contract from key gatekeepers

Kaiser's suggestion that Kunkel's report must be admitted because it rises to the level of "exculpatory evidence" that "demolish[es] the linchpin of the Division's case" is likewise unavailing. Opp. Br. at 1, 3. To be sure, Kunkel has no knowledge regarding Kaiser's concealment of the critical AirTouch-TM Cell contract, and Kaiser's claim otherwise finds no support in his expert's report. At bottom, all Kunkel can testify about the file is that it exists on a hard drive. Kunkel Report ¶ 5. Kunkel does not purport to know, for example, any particulars about how the file ended up in the folders where he found them (*id.* ¶ 8); whether anyone knew where the file was saved (*id.* ¶ 4); whether anyone viewed the file; whether the board members or auditors had access to the purported "network shared drive" (*id.*); or who deleted the file in December 2012 (*id.* ¶ 9). That Kunkel "will provide highly probative exonerating evidence" (Opp. Br. at 4) for Kaiser strains credulity.

Nevertheless, Kaiser uses Kunkel's report as a vehicle to suggest that AirTouch's former controller, Sylvia Chan, in particular, "could have located" the AirTouch-TM contract and, among other things, "provided it to the company's auditors." *Id.* at 3. But the evidence will show that Kaiser affirmatively hid the contract from Chan and lied to her. Indeed, when Kaiser received the AirTouch-TM Cell contract by email, he forwarded that email to Chan, *but deleted* the contract from the email before sending the email to her—a fact Kaiser does not deny. *See* Ex. F (Hr'g Exs. 125 & 126) (July 31, 2012 emails). And, in her investigative testimony, Chan described numerous instances where Kaiser rebuffed her attempts to see the "term sheet" referenced in the purchase order from TM Cell. *See, e.g.*, Ex. G (Chan Inv. Tr.) at 102:19-103:4

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subsequent offer to have an independent "taint team" from the Commission review the hard drives in order to preserve any applicable legal privileges. Instead, AirTouch searched the hard drives itself and represented that it had produced all relevant documents.

(when Chan asked for the contract, Kaiser told her, "'What's the deal? Why do you need to know? . . . wait until the[auditors] ask [for the contract].... You don't need to – they don't need to confirm [AirTouch's revenue figures]'").[4]

The evidence likewise shows that the board members, including—most notably—audit committee chair Steve Roush, did not see or even know about the AirTouch-TM Cell contract until after the board commenced its internal investigation in January 2013, two months after AirTouch reported revenue associated with its shipments to TM Cell during the third quarter of 2012. Likewise, the auditors never saw or even knew about the contract until Roush sought their opinion as to whether revenue should have been recorded in the third quarter. When they finally saw that contract, the auditors quickly agreed that AirTouch should never have recognized revenue for the TM Cell transaction.

The evidence is thus clear. Kaiser concealed the agreement from Chan, the board, and the auditors, and the fact that it may exist on a hard drive does nothing to change Kaiser's rampant deception of these key gatekeepers. Kunkel's report does not exculpate Kaiser on this issue.

B. Kleidon's Report and Proposed Testimony Should Be Excluded

The Division also moved to exclude Allan Kleidon's testimony because his opinions concern the extent of the shareholder loss caused by Kaiser's accounting fraud—a matter wholly irrelevant to the Division's proof of Kaiser's securities law violations. SEC Br. at 7-9. In opposing the Division's motion, Kaiser explicitly concedes that "loss causation is not a required

[4] Notably, when Kaiser deleted the critical AirTouch-TM Cell contract in the email he forwarded to Chan, the company controller, he did not delete the TM Cell purchase order that formed the initial (but improper) basis for recognizing revenue in the third quarter of 2012. Once the board and the auditors finally saw the contract in January 2013, it was quickly decided that those revenues should never have been recorded.

element of the Division's claims." Opp. Br. at 8. But Kaiser maintains that Kleidon's testimony should nonetheless be admitted because: (1) his report pertains to "materiality, not loss causation" (*id.*); and/or (2) parts of his report, at least, pertain to materiality rather than loss causation. Kaiser also contends that Kleidon's loss causation testimony can be admitted not for liability, but for the limited purpose of determining the scope of relief—a use the Division itself proposed. *See* SEC Br. at 9.

If Kleidon's testimony is admitted at all, it should only be admitted for the limited purpose of determining remedies. Contrary to Kaiser's depiction, the crux of Kleidon's proposed testimony pertains to the concededly irrelevant question of the losses caused by Kaiser's fraud. And as Kaiser concedes, his fourth opinion (*see* Kleidon Report, ¶¶ 38-39) pertains solely to loss causation. Because the issue of shareholder loss caused by Kaiser's fraud pervades all of his opinion, his testimony should be excluded in its entirety as to liability.

1. Kaiser disregards the extent to which Kleidon's report turns on the causality of shareholder losses

Kaiser argues that Kleidon "discusses a lack of evidence of shareholder loss merely as one indicator" of the alleged absence of materiality, and that the Division has "cherry-pick[ed]" parts of Kleidon's report that do not fairly represent the whole. Opp. Br. at 8. But the Division's references to Kleidon's reports were to the sections entitled "Overview of Analysis" and "Conclusions," where Kleidon summarizes his opinions and specifically characterizes them as grounded in the question of whether shareholders suffered losses due to inflation in AirTouch's stock price from the misrepresentations the Division has charged. Kleidon Report ¶¶ 9-13, 37; *see also* SEC Br. at 8. For example, in the "Conclusions" portion of the section of his report titled "Analysis," Kleidon sets forth the following ultimate conclusion:

> I conclude that there is no evidence of material misstatements *that caused stock price inflation* concerning the Company's reported revenues for third quarter 2012.

Kleidon Report ¶ 37 (emphasis added); *see also id.* ¶¶ 8, 22 (no evidence of misstatements "that inflated AirTouch's stock price"). It is not the case that the Division "ignores the vast majority" of Kleidon's Report, as Kaiser contends. Opp. Br. at 9. Rather, Kleidon's references to the alleged immateriality of Kaiser's accounting fraud can be understood only in the context of his fundamental opinion that since the misstatements caused no artificial stock price inflation, they were actually harmless. *See* Kleidon Report ¶¶ 9, 13, 22, 25, 28, 30-31, 36-37.

This causation-related conclusion renders the whole of his opinion irrelevant. *See, e.g. Elliott v. CFTC*, 202 F.3d 926, 934 (7th Cir. 2000) (had issue been preserved for appeal, court of appeals might have excluded testimony as erroneously admitted, given that cross-examination had "exposed [expert's] opinion—and therefore his ultimate conclusion—as unreliable"). The fact that Kaiser's fraud resulted in artificial stock price inflation that harmed AirTouch's shareholders is precisely what the Division—unlike private civil plaintiffs—need not prove. *See* SEC Br. at 7-8 (citing cases).[5]

2. There is no basis to admit Kleidon's fourth opinion, quantifying purported shareholder losses, as to Kaiser's liability

Kaiser appears to concede that Kleidon's fourth and final opinion—which simply quantifies the "maximum potential loss ... caused by the alleged misstatements"—pertains exclusively to loss causation. Opp. Br. at 10; Kleidon Report at ¶¶ 38-39. Indeed, this section of Kleidon's report makes no reference to "materiality." Kleidon Report at ¶¶ 38-39.

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[5] Kaiser also argues that since the Division submitted the expert report of David Tabak, which concerns AirTouch's stock price movement in relation to Kaiser's accounting fraud, the Division cannot contest the relevance of Kleidon's Report as to liability. However, if Kleidon's Report is excluded as to liability, the Division will agree to withdraw the Tabak Report as to liability.

Given that this aspect of Kleidon's opinion appears to relate exclusively to shareholder loss, at a minimum, this opinion is unquestionably irrelevant to Kaiser's liability. At most, this portion of his testimony should be confined to the question of remedies. Courts have found that irrelevant portions of experts' reports may be excluded *in limine* under Federal Rule of Evidence 702, though other portions are admitted for other purposes. *See, e.g., Van Der Valk v. Shell Oil Co.*, No. SACV 03–565–JVS (JTLx), 2004 WL 5486643, at *1 (C.D. Cal., Nov. 15, 2004) (granting motion *in limine* in part to exclude aspects of testimony, finding that "[p]ortions of Plaintiffs' Experts' reports are, indeed [] irrelevant"); *Cook v. Rockwell Int'l*, 580 F. Supp. 2d 1071, 1164 (D. Colo. 2006) (excluding portions of expert's testimony as irrelevant). Therefore, because Kaiser does not appear to contend that the portion of Kleidon's report purporting to quantify shareholder loss pertains to materiality (or liability) (Kleidon Report ¶¶ 38-39), the Division's motion should, at a minimum, be granted as to this portion of his opinion and proposed testimony.

III. CONCLUSION

For the reasons set forth above, as well as in the Division's moving brief, the Division respectfully requests that the hearing officer exclude all of the proposed opinion testimony of Kunkel because Kaiser has refused to provide the Division access to the hard drive that Kunkel examined and searched. The Division also respectfully requests that the proposed opinion testimony of Kleidon not be admitted as to the issue of Kaiser's liability, because it bears only on

the issue of loss causation, which is not an element to be proven in this case, and that, at a minimum, his fourth opinion, found in paragraphs 38-39 of his report, be excluded as to liability.

Dated: January 8, 2014

Respectfully submitted,

DIVISION OF ENFORCEMENT
SECURITIES AND EXCHANGE COMMISSION

/s/ John W. Berry

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Counsel for the SEC's Division of Enforcement

EXHIBITS

Exhibit	Description
D	Email correspondence ending July 16, 2013 between Division staff and counsel for AirTouch Communications, Inc.
E	Email correspondence ending January 7, 2015 between Division staff and counsel for all respondents
F	Hr'g Exs. 125 and 126 (July 31, 2012 Emails)
G	Excepts of transcript of investigative testimony of Sylvia Chan (October 29, 2013)

EXHIBIT D

Altman, Peter

From: Altman, Peter
Sent: Tuesday, July 16, 2013 2:35 PM
To: [redacted]
Subject: RE: smail - AirTouch Communications, Inc. (LA-4275)

Dan,

I write with respect to the subpoena dated April 30, 2013 (the "April Subpoena") issued to your client, AirTouch. After I agreed on May 1 to a staged production of documents responsive to the April Subpoena, I set July 3 as the date by AirTouch was to produce all documents responsive to the April Subpoena. This deadline was noted in my email to you on June 14 and reiterated in my letter to you on June 26.

In response to your email on July 2, which responded to my June 14 email and June 26 letter, I sent you an email on July 3 regarding the April Subpoena (see below). After I did not receive a response to my July 3 email, I called you on July 10. During that call, you told me that your client was evaluating whether to (a) provide the staff with two external hard drives containing ESI (including emails) maintained by AirTouch or (b) review the ESI on the external hard drives and produce responsive documents to the staff. You mentioned during our call that you expected to hear your client's decision on this issue either later in the day on July 10 or very soon thereafter.

Unfortunately, six days have now passed and I have not heard from you. What is the status? As you noted during our July 10 call (and as made clear in my July 26 letter), your client must produce all documents (including ESI) in its possession, custody or control that are responsive to the April Subpoena or it will face subpoena enforcement. Please let me know if, how and when your client plans to proceed with respect to these hard drives by the close of business tomorrow, July 17.

In addition, during our July 10 call, you told me that a production of hard copy documents was forthcoming that would otherwise complete your client's response to the April Subpoena. When can we expect to receive those documents? Based on the representations you made during our call, I was under the impression that we would have received them already.

Thank you.

Peter

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Attorney, Division of Enforcement
U.S. Securities and Exchange Commission
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Tel: (323) 965-3871 || E-mail: AltmanP@sec.gov

From: Altman, Peter
Sent: Wednesday, July 03, 2013 11:39 AM
To: [redacted]
Subject: smail - AirTouch Communications, Inc. (LA-4275)

Dan,

Thank you for your email.

The SEC's Centralized Processing Unit ("CPU") can process the data on the two external hard drives you referenced in your email below. The size of the PST files will not be an issue for the CPU. The CPU employs data loading contractors who will run keyword searches for documents and communications responsive to the requests in our subpoenas. If you provide us with a list of email addresses that may have sent or received privileged communications, we will instruct the CPU contractors to apply those search terms to the PSTs and quarantine the results. The members of the Enforcement Staff working on the investigation will not have access to the quarantined database. An independent "taint team" from the SEC will have access to the quarantined database and will review the filtered documents to confirm whether or not they are actually subject to legal privilege. In light of the fact that the CPU is going to handle data processing and searches, we ask that you ship the hard drives to the CPU on or before July 10 (the date referenced for your planned production of other materials responsive to the April Subpoena). If you have any additional questions about the CPU, please let me know.

With respect to the other issues you raised in your email regarding the April Subpoena, my June 14 email and June 26 letter set forth the Staff's position on our past discussions and correspondence. In light of certain events to date, the Staff must, however, note its disagreement at this stage that any concerns regarding potential spoliation were mitigated either by the back-ups conducted by Mr. Buddine or the return of computer equipment and/or memory devices by former AirTouch employees.

With respect to the issues you raised in your email regarding the May Subpoena, the Staff appreciates Mr. Roush's efforts to date and requests that he provide contact information for any additional AirTouch employees he is able to locate during his ongoing search for documents.

Thank you.

Peter

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From: DonahueD@gtlaw.com [mailto:D[redacted]
Sent: Tuesday, July 02, 2013 12:25 PM
To: Altman, Peter
Subject: AirTouch

Peter,

This will respond to your letter of June 26, 2014 ad follow up our telephone conversation of June 28, 2013.

I have been out of the office and overlooked your email of June 14, 2013 and for that I apologize.

Concerning the second paragraph of your June 14th email, I distinctly recall your agreement that AirTouch could limit its response to Items 5, 8, 10, 12, 22 and 23 of the April Subpoena until further notice. Our request was based on our observation that the April Subpoena was overbroad and encompassed a great number of documents that did not seem relevant to the staff's inquiry. In my letter to you dated May 23, 2013, I confirmed that "during our telephone conversation on May 1, 2013, you agreed on behalf of the staff that the Company could, until further notice from the SEC staff, limit its production pursuant to the Subpoena to Items 5, 8, 10, 12, 22 and 23 of Item C to the Subpoena." I don't recall you objecting to the characterization of our agreement reflected in my May 23 letter until your June 14 email. We acknowledge that the staff reserved the right to reinstate the request for the remainder of the documents, however I want to avoid any inference that my client had been delinquent in providing the balance of the documents in the April Subpoena.

Concerning your request for the remainder of the information subject to the April Subpoena, based on input provided by AirTouch we believe that AirTouch should be able to make a full production no later than Wednesday, July 10, 2013, expect for any responsive information located on the hard drives discussed further below.

Concerning the third paragraph of your June 14th email, I agree that you never agreed to modify the request in the May Subpoena and it was not my intent to suggest such. I was simply referring to the fact that in your June 3rd email you asked us to get you certain contact information for certain AirTouch personnel. I will try and be more careful with my language in the future. In any event, AirTouch has the completed its production in response to the May Subpoena except for a complete contact list of officers, directors and employees. AirTouch has provided the requested information for all directors, officers and certain key employees, however Mr. Roush, an outside director with no previous familiarity with AirTouch's files who is conducting the search on behalf of AirTouch, has not been able to locate a complete employee list. Mr. Roush has assembled the following list of contact information for the remaining AirTouch employees:

[redacted]

Concerning the fourth paragraph of your June 14th email, while it is true that a few persons at AirTouch took their personal computers upon their resignations, that was largely a function of there being no one at AirTouch to monitor the situation. The AirTouch officers and employees all left with a matter of a few weeks. Those parties who left with AirTouch personal computers within a few weeks of leaving either returned the computers to AirTouch or provided memory devices onto which the stored data had been downloaded for return to AirTouch. In any event, any risks presented by the matter of the personal computers is largely mitigated by the fact that the personal computers of the officers of AirTouch were the subject of monthly back-ups and the hard drives containing that back-up are in the possession of AirTouch and have not been subject to any known risk of spoliation, however, ,and as described below, searching those hard drives presents their own issues.

AirTouch believes that is has provided to the staff all documents and information responsive to Items 5, 8, 10, 12, 22 and 23 of the April Subpoena, with the exception of information located on the two physical hard drives hard drives in the possession of AirTouch. As we have previously advised the staff, AirTouch did not have a server based network system and all emails and files were stored to the officers' and employees' personal computers. Once a month an outside IT consultant, Rick Buddine, whose contact information has previously been provided to you, would arrive at AirTouch's offices to back up all of the information on the personal computers of the AirTouch officers working from the Newport Beach office. That back up is stored on two hard drive devices, both of which have been delivered by Mr. Buddine to AirTouch. Those hard drives contain over 1.5 terabytes of information (the equivalent of over 300 million pages) and the data is contained in multiple PST files that are difficult to search. The client does not have the manpower to conduct the search. W are told it would take several days to conduct a search and, as we have advised the staff, AirTouch has no officers or employees at this time. We have contacted litigation support firms who have quoted $50,000 to conduct the searches using key words, which the company is unable to pay. You have asked that the client deliver the hard drives to the staff and that the staff will conduct the searches directly. You mentioned you will confirm that the staff has the capability to conduct the searches and would actually do so, and you were also going to provide us with the conditions or parameters of the proposed search. We look forward to receiving your response. You may want to speak to Rick Buddine if you have any questions concerning the hard drives and their ability to be searched.

Dan

Daniel K. Donahue
Greenberg Traurig, LLP | [redacted]

GT GreenbergTraurig

EXHIBIT E

Altman, Peter

From: [redacted]
Sent: Wednesday, January 07, 2015 8:49 AM
To: Altman, Peter; [redacted]
Cc: Berry, John W.; Longo, Amy
Subject: RE: SEC v. AirTouch et al--production of AirTouch drive
Attachments: 287344739_v 1_Protective Order re hard drive.doc

[redacted]

As is set forth both in the brief and in our prior correspondence on this matter, any expert to receive access to the drive would need to be *independent* of the SEC, i.e. a third-party outside contractor. We can provide access to the drive as soon as we agree on a protective order and your office identifies who you intend to retain. To that end, we have yet to receive any comment on the draft protective order circulated last Tuesday, December, 30, 2014. A copy is attached for your convenience.

Sincerely,
Roger

Roger Scott
Associate
[redacted]

GT GreenbergTraurig

From: [redacted]
Cc: Berry, John W.; Longo, Amy
Subject: RE: SEC v. AirTouch et al--production of AirTouch drive

Roger and Kevin,

Based on the opposition brief filed last night regarding the Kunkel report, it appears that, if we can agree on the scope of access to the drive, the respondents would be amendable to our having an individual who works for (or is a contractor for) a division of the Securities & Exchange Commission other than the Division of Enforcement review the drive. Opp. Br. 7.

Please confirm as soon as possible whether this is correct.

Thank you.

Peter

From: [redacted]
Sent: Tuesday, December 30, 2014 11:02 AM
To: Altman, Peter; [redacted]
Cc: Berry, John W.; Longo, Amy; [redacted]
Subject: RE: SEC v. AirTouch et al--production of AirTouch drive

Peter-

Following on our correspondence last week, attached please find a draft protective order for your review. Please advise whether you approve of the language, and the name and company of your consultant.

Sincerely,
Roger

Roger Scott
Associate
Greenberg Traurig, LLP [redacted]

GT GreenbergTraurig

From: Scott, Roger (Assoc-OC-LT-Labor-EmpLaw)
Sent: Tuesday, December 23, 2014 12:07 PM
To: 'Altman, Peter'; [redacted]
Subject: RE: SEC v. AirTouch et al--production of AirTouch drive

Peter-

In response to your letter yesterday, and your and Amy's voicemail this morning, please see the attached correspondence.

Sincerely,
Roger

Roger Scott
Associate
[redacted]

GT GreenbergTraurig

From: Altman, Peter [redacted]
Sent: Monday, December 22, 2014 2:22 PM
To: Scott, Roger (Assoc-OC-LT-Labor-EmpLaw); [redacted]
Cc: Berry, John W.; Longo, Amy; Piazza, Mike (Shld-OC-LT); Hoting, Shaun (Assoc-OC-LT); [redacted]

[redacted]
Subject: RE: SEC v. AirTouch et al—production of AirTouch drive

Roger and Mark, please see the attached letter.

Peter

From: [redacted]
Sent: Friday, December 19, 2014 5:12 PM
To: Altman, Peter
Cc: Longo, Amy; Berry, John W.; [redacted]
Subject: SEC v. AirTouch et al--production of AirTouch drive

Mr. Altman-

Please see the attached response to your December 18, 2014 letter to Mr. Mermelstein.

Sincerely,
Roger

Roger Scott
Associate
Greenberg Traurig, LLP | 3161 Michelson Drive | Suite 1000 | Irvine, CA 92612
Tel 949.732.6524
[redacted] | [redacted]

GT GreenbergTraurig

EXHIBIT F

From: Mario Ego-Aguirre <[redacted]>
Sent: Tuesday, July 31, 2012 12:53 AM
To: Carlos Isaza [redacted]
Cc: 'Frank Cheng' [redacted]
Subject: Revised PO and Fulfillment and Logistics Agreement
Attach: 120730 - Fulfillment and Logistics Agreement.pdf; 120730 - Revised PO 810700.pdf

Carlos,

Attached pls find a signed copy of the agreement and a copy of the revised purchase order.

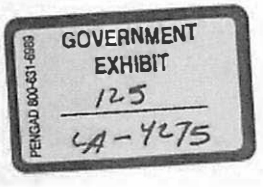
Best regards,

Mario Ego-Aguirre

[redacted]

- Inventory on Hand
- Direct Distribution
- Affordable Prices
- Strategically Located

tmcell



AIRTOUCH

AirTouch Communications, Inc.
[redacted]

July 27, 2012

To: TM Wireless Communication SVCS

Re: Fulfillment and Logistics Agreement

Dear Mr. Cheng:

This letter sets forth the mutual understanding of the principal terms of the Fulfillment and Logistics agreement between TM Wireless Communication Svcs ("TMCell") and AirTouch, Inc., a California corporation ("AirTouch"), solely for logistics for the resale to Telmex and/or assigned customers from AirTouch.

1. Appointment; Term. Effective on the date this letter has been signed by both parties, AirTouch hereby appoints TMCell as a non-exclusive Fulfillment and Logistics provider of its wireless communications products, including SmartLinX™ (the "Products"), for a term of 180 days. Either party may terminate this agreement at any time, for any reason or no reason, upon thirty (30) days' prior written notice to the other party.

2. End User License. TMCell shall distribute the Products solely with a copy of AirTouch's end user license agreement accompanying the Products ("End User License") as provided by AirTouch. TMCell shall not reverse engineer, decompile, disassemble or otherwise derive source code from the Products.

3. Orders and Acceptance. TMCell may initiate purchases under this agreement by submitting written purchase orders to AirTouch. No purchase order will be binding upon AirTouch until accepted by AirTouch in writing. TMCell's purchase orders are subject to purchase orders by Telmex and/or any other customer that may be assigned from time to time by AirTouch. In the event Telmex or any of the customers does not fulfill the purchase orders and/or cancels the orders, TMCell shall have the right to return these products to AirTouch and obtain a full credit equal to the original purchase amount with no offsets or deductions of any kind.

4. Delivery and Shipping. AirTouch shall deliver all Products to TMCell's warehouse located at an 8800 NW 23rd St, Miami, FL 33172. AirTouch shall be solely responsible including but not limited to all shipping, insurance, duties and custom clearance charges.

5. Resale to Telmex and/or assigned customers by AirTouch. TMCell shall store the merchandise until shipment of the Products and shall invoice AirTouch for storage of the products, in/out control, invoicing, stock reconciliation, at 1.5% of the invoice value for the first 30 days and an additional 1% for each additional 30 days. Based on the purchase orders issued by Telmex and/or assigned customers by AirTouch, AirTouch shall be responsible for all fees and charges to ship to Telmex and/or assigned customers by AirTouch (including but not limited to freight, duties, packing, custom clearance.) In the event that there are any additional charges or fees in the clearance of the shipment, shipment charges, acceptance of the product to our warehouse (including but not limited to customs, duties, clearance charges, local freight charges etc..), TMCell will pay for these

SEC-AIRTOUCH-E-0019501

incidental charges first on behalf of AirTouch and will than rebill or invoice AirTouch for these incidental charges and fees. AirTouch shall pay these invoices promptly within 10 days from receipt of such invoices or TMCell may deduct these charges and fees at its sole discretion from any amounts due to AirTouch.

6. Payment. TMCell shall pay for Products in 90 days in accordance with the payment terms invoiced by AirTouch. However, TMCell shall not be obligated to pay AirTouch until the Products have been received by Telmex and TMCell has received full payment therefor, at which time then TMCell shall pay AirTouch for the Products within 10 days thereafter. In the event that Telmex and/or assigned customer from AirTouch does not pay for any reason whatsoever, it will be the responsibility of AirTouch to collect the outstanding payment from Telmex and/or assigned customer from AirTouch.

7. WARRANTY DISCLAIMER. AIRTOUCH HEREBY DISCLAIMS ANY WARRANTIES ON THE PRODUCTS, EXPRESS, IMPLIED, OR STATUTORY, INCLUDING WITHOUT LIMITATION ANY WARRANTY OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, OR NON-INFRINGEMENT. Any warranty will run directly from AirTouch to Telmex and/or any assigned customer from AirTouch.

8. Confidential Information. "Confidential Information" means any information disclosed by one party to the other pursuant to this Agreement which is marked "Confidential," "Proprietary," or in some similar manner. Each party shall treat as confidential all Confidential Information of the other party, and shall not use such Confidential Information except to exercise its rights or perform its obligations under this Agreement and shall not disclose such Confidential Information to any third party. This paragraph will not apply to any Confidential Information which is generally known and available, or in the public domain through no fault of the receiver.

9. Indemnification. AirTouch shall defend, or at its option settle, or pay any damages awarded in any claim, suit or proceeding brought against TMCell on the issue that the Products infringe any copyright, trade secret or trademark of any third party, subject to the limitations set forth herein; but only if TMCell notifies AirTouch promptly in writing of such claim, suit or proceeding and gives AirTouch sole control of any defense or settlement negotiations, and, at AirTouch's expense, gives AirTouch proper and full information and assistance. If AirTouch believes that the Products may be subject to injunction, then AirTouch may, at its option and expense: (i) procure for TMCell a license to continue distributing the Products; (ii) replace the Products with other comparable products; or (iii) modify the Products.

10. LIMITATION OF LIABILITY. AIRTOUCH'S LIABILITY UNDER THIS AGREEMENT, REGARDLESS OF THE FORM OF ACTION, WILL NOT EXCEED THE AMOUNTS PAID BY TMCELL TO AIRTOUCH UNDER THIS AGREEMENT. NEITHER PARTY WILL BE LIABLE FOR ANY SPECIAL INDIRECT, CONSEQUENTIAL OR INCIDENTAL DAMAGES ARISING OUT OF THIS AGREEMENT, WHETHER OR NOT SUCH PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES, AND NOTWITHSTANDING ANY FAILURE OF ESSENTIAL PURPOSE OF ANY LIMITED REMEDY.

We look forward to a mutually beneficial relationship.

Very truly yours,

AIRTOUCH, INC.

By:_____
Hide Kanakubo, Chief Executive Officer

Agreed to and accepted this
30th day of July, 2012

TM Wireless Communication Svcs

By:_____
Frank Cheng, Chief Executive Officer

tmcell

TM Wireless Communications Services, Inc. dba tm cell

[redacted]

PURCHASE ORDER 810700

Invoice Date: 07/30/2012

Page: 1

Vendor:
Account Number: AIRT01
Name: AIRTOUCH COMMUNICATION INC.
Address: [redacted]
ISAZA
[redacted]

Ship To:
Name: tm ((w [redacted])) dba tm cell
Address: [redacted]

Incoterms	Order Number	Delivery Date	Payment Terms
	810700	07/30/2012	NET 90

Item Number	Description	Unit	Quantity	Price	Total Excl
AT-U250	AIRTOUCH SMARTLINX U250 TELEFONE GATEWAY	EA	20000.00	87.00	1740000.00
*	PARTIAL DELIVERIES ALLOWED				
*	1ST SHIPMENT WILL CONSIST OF 8,000 UNITS				
*	PMT TERMS ACCORDING TO TERM SHEET				
*	HOMOLOGATION CERTIFICATE FOR COUNTRY OF				
*	DESTINATION IS REQUIRED				

SubTotal:	1740000.00
Total Tax:	0.00
Order Total:	1740000.00

SEC-AIRTOUCH-E-0019504

From: Jerome Kaiser <[redacted]>
Sent: Tuesday, July 31, 2012 12:59 AM
To: 'Sylvia Chan' <[redacted]
Subject: TMCell Purchase Order
Attach: 120730 - Revised PO 810700.pdf

From: Mario Ego-Aguirre [[redacted]
Sent: Monday, July 30, 2012 5:53 PM
To: Carlos Isaza
Cc: 'Frank [redacted]
Subject: Revised PO and Fulfillment and Logistics Agreement

Carlos,

Attached pls find a signed copy of the agreement and a copy of the revised purchase order.

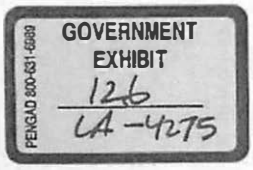
Best regards,

Mario Ego-Aguirre

[redacted]

- Inventory on Hand
- Direct Distribution
- Affordable Prices
- Strategically Located

tmcell



tmcell

TM Wireless Communications Services, Inc. dba tm cell

[redacted]

PURCHASE ORDER 810700

Invoice Date: 07/30/2012

Page: 1

Vendor:
Account Number: AIRT01
Name: AIRTOUCH COMMUNICATION INC.
Address: [redacted]

Ship To:
Name: tm ((wirel [redacted] ba tm cell
Address: [redacted]

Incoterms	Order Number	Delivery Date	Payment Terms
	810700	07/30/2012	NET 90

Item Number	Description	Unit	Quantity	Price	Total Excl
AT-U250	AIRTOUCH SMARTLINX U250 TELEFONE GATEWAY	EA	20000.00	87.00	1740000.00
*	PARTIAL DELIVERIES ALLOWED				
*	1ST SHIPMENT WILL CONSIST OF 8,000 UNITS				
*	PMT TERMS ACCORDING TO TERM SHEET				
*	HOMOLOGATION CERTIFICATE FOR COUNTRY OF				
*	DESTINATION IS REQUIRED				

SubTotal:	1740000.00
Total Tax:	0.00
Order Total:	1740000.00

SEC-AIRTOUCH-E-0032255

EXHIBIT G

UNITED STATES SECURITIES AND EXCHANGE COMMISSION

In the Matter of:)
) File No. LA-04275-A
AIRTOUCH COMMUNICATIONS, INC.)

WITNESS: Sylvia Ngaling Chan Nettles
PAGES: 1 through 269
PLACE: Securities and Exchange Commission
5670 Wilshire Boulevard
Eleventh Floor
Los Angeles, California 90036
DATE: Tuesday, October 29, 2013

The above-entitled matter came on for hearing, pursuant to notice, at 9:15 a.m.

Diversified Reporting Services, Inc.
(202) 467-9200

APPEARANCES:

On behalf of the Securities and Exchange Commission:
RHODA H. CHANG, ACCOUNTANT
PETER I. ALTMAN, ESQ.
Division of Enforcement
5670 Wilshire Boulevard
Eleventh Floor
Los Angeles, California 90036
(323) 965-2616
(323) 965-3871

On behalf of the Witness:
MICHAEL A. PIAZZA, ESQ.
SHAUN A. HOTING, ESQ.
Greenberg Traurig, LLP
3161 Michelson Drive
Suite 1000
Irvine, California 92612
(949) 732-6500

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you repeat it?
Q Yes. During that time period, the four-month time period, I want to know, what was your understanding of what TM Cell was?
A I thought it was a different customer, two different customers.
Q Okay. So it was your understanding that TM Cell has nothing to do with Telmex at the time, right?
A Yes.
Q And did you know during that time period that product shipped to TM Cell will be transferred to Telmex?
A No.
Q No. So was it your understanding that -- at the time, your understanding was that TM will purchase product from AirTouch, and then they would turn around and sell it?
A Yes. They are a company that sell product, and then they purchase it from us, and then are going to sell it.
Q And where did you get that understanding?
A Jerome told me that.
Q Okay. Did you see anything else during that time to substantiate that understanding, to confirm that understanding?
A Okay. When I got the PO from TM Cell, okay,

and I booked a revenue, I saw there's a -- I don't have that, you know, with me, but, however, inside it said that there's a referring to the term sheet. Okay? So I asked Jerome. I said, "What kind of term sheet, you know, are you talking -- you know, are they talking about?," because all the PO is supposed to be, you know, when we will get paid or things like that, and I said, "What kind of term sheet are you talking about?"
Then Jerome said, "This is about how many days we are going to get paid." I said, "Okay. So how many days do we get paid?" And then he said, "It's 90 days." And I said, "Okay. Can I have that term sheet? Because I need to provide it to the auditor. This is one of the thing that we need to provide, you know." And then Jerome said, "Yes. You know, I can give it to you tomorrow. Ask me. Ask me tomorrow."
So I said, "Okay." And then he's somewhere, you know. And then, the next day, I ask him, and he said, "What's the deal? Why do you need to know?" And I said, "I need to give it to the auditor, and the auditor, you know, is going to ask it." He said, "Well, wait until they ask. You know, don't get in too much. Just finish your work. I need to get the Q done." So I said, "Okay."
So I finish it, and then he told me, "Why do

you need to know?" and that "It is a review. It is not an audit. This is only a review. You don't need to -- they don't need to confirm." "They" means the auditor, "No need to confirm. Okay? Finish it, and I don't want to be late, because we will get fined." And I was "It makes sense, because it's a review." Okay? And then he said he's going to talk to the auditor, so I said, "Okay. Fine."
So I finish it, and I gave it to -- I gave the Q to him, because I don't want to get fined, you know. I will be the one that got blamed for not finish up my work on time. And so, at particular, I asked him, "You need to give me the term sheet, what is term sheet," but he told me that is for 90 days. That means the term sheet saying that we will -- we won't get paid, you know, 90 days later. Okay? So I told our auditor. I said, you know, "The TM Cell thing, we won't get paid. It's a net 90."
BY MR. ALTMAN:
Q When did that conversation with Mr. Kaiser take place?
A It is when we filing the Q, because I was preparing the Q. I need the document to give it to Antoine and Chaya for the backup.
Q I think you referenced a couple of different

conversations with Mr. Kaiser during that answer. When was the first time you saw the TM Cell purchase order?
A When?
Q Yes.
A I don't remember the month, but this was the day when I receive it, and then when I book the -- when I'm preparing the packing slip to send out, then I saw the PO have -- inside it said that -- somewhere it said that term sheet, and then I went to talk to Jerome Kaiser.
Q So, the first time you saw a TM Cell purchase order, you noticed that there was a reference to a term sheet on that purchase order?
A Yes.
Q And at that point, you approached Mr. Kaiser about what that term sheet set out?
A Yes.
Q And his explanation was that the term sheet related only to a 90-day payment term?
A He did not say that "only related to." He did not say, "Only." He said, "This one is for 90 days' term."
Q Did he --
A He did not say, "Only."
Q Did he say the term sheet related to anything