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.

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OFFICE OF THE SECRETARY

DIVISION OF ENFORCEMENT'S MOTION *IN LIMINE* TO EXCLUDE OR OTHERWISE LIMIT TESTIMONY OF RESPONDENTS' PROFFERED EXPERTS, ALLAN KLEIDON AND MICHAEL KUNKEL

December 23, 2014

Division of Enforcement
Securities and Exchange Commission
John W. Berry
Amy Jane Longo
Peter I. Altman
Los Angeles Regional Office
444 South Flower Street, Suite 900
Los Angeles, CA 90071

I. INTRODUCTION

Respondents Hide Kanakubo and Jerome Kaiser have tendered three experts to testify in this case, two of whom are the subject of this motion by the Division of Enforcement: (1) Allan Kleidon, who intends to testify about how much the AirTouch shareholders lost from the respondents' fraud, and (2) Michael Kunkel, who plans to testify about his "forensic" search of a computer hard drive that respondents have refused to provide to the Division.

Kleidon's opinions about shareholder loss are not relevant in SEC enforcement actions. As Kleidon himself states, he intends to opine that "a necessary condition" of a shareholder losing money from a fraud is proof that the stock price was "inflated." With that premise in mind, he then analyzes the stock price of the corporate respondent, AirTouch Communications, Inc. ("AirTouch"), to "conclude" that "there is no evidence" that any "shareholder losses" were caused by the fraud. He even offers to calculate—to the penny—what he thinks the "maximum potential" shareholder losses were. The problem, however, is that the Division is not required to prove loss causation, shareholder losses or damages to establish the respondents' liability. Therefore, as a matter of law, Kleidon's opinions are irrelevant and should be excluded.

The opinions of the other expert, Kunkel, rest entirely on his review of the computer hard drive of the corporate respondent, AirTouch. But the Division has never had access to this drive, and the respondents have refused to disclose it without imposing several conditions, including their demand that the Division hire an "independent" third party to examine the drive. Their refusal is based on their claim that the drive has privileged material. However, by tendering an expert whose opinion is based only on a forensic examination of the drive, they have waived any privilege that may apply. In any event, expert disclosure rules require the party offering an expert to disclose any information the expert considered. Because the respondents have refused to do so, the Division asks the hearing officer to exclude Kunkel's proposed expert testimony.

II. BACKGROUND

A. The Respondents' Accounting and Investor Fraud

This case involves accounting fraud and the defrauding of a large investor of AirTouch. AirTouch was a penny-stock manufacturer of wireless routers. On July 30, 2012, its CEO and CFO—respondents Kanakubo and Kaiser—caused the company to enter into a contract with a Florida-based company, TM Cell, to warehouse AirTouch's routers while AirTouch tried to sell them to an actual customer. Under that written contract, which Kanakubo signed and Kaiser had seen, AirTouch had to pay warehousing fees to TM Cell, but TM Cell did not owe AirTouch a penny, unless an actual AirTouch customer bought the routers in the warehouse.[1] Although no customer ever bought these routers in the third quarter of 2012, Kanakubo and Kaiser caused the shipment of the routers to TM Cell to be recorded as a sale.

AirTouch's quarterly report for the third quarter of 2012 (on SEC Form 10-Q) was filed on November 14, 2012. In that report, which both Kanakubo and Kaiser certified, under oath, was accurate, the company recorded $1.2 million in revenues for merely shipping product to the TM Cell warehouse. This was 100% of the reported revenue for the quarter and the largest quarterly revenue ever reported by the company.

Meanwhile, Kanakubo and Kaiser desperately needed to raise capital, given AirTouch's chronic and worsening liquidity situation. To induce a large shareholder to loan the company money, they misrepresented the nature of AirTouch's warehouse arrangement with TM Cell, even telling the investor that a large Mexican telecommunications company had actually bought the routers sitting in TM Cell's warehouse—which was flatly untrue. Comforted by these false claims, the investor ultimately lent the company $2 million in bridge financing.

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[1] A copy of this contract is attached as Exhibit B to Kleidon's report. *See* Kleidon Report, Ex. B.

Kanakubo and Kaiser made sure that the AirTouch's board, controller and auditors never found about the TM Cell warehouse contract. For example, TM Cell had emailed both of them the signed TM Cell-AirTouch contract, along with a TM Cell purchase order issued under that contract.[2] But when AirTouch's controller asked Kaiser for the documents regarding the TM Cell shipments, Kaiser forwarded her the email from TM Cell, but deleted the key contract, leaving only the purchase order attached. By early 2013, these key gatekeepers finally found out about the contract and the true nature of AirTouch's arrangement with TM Cell. All quickly understood that revenue recognition was not proper under the terms of the contract.

So, on February 7, 2013, AirTouch reported that it intended to restate its financial results for the third quarter of 2012 because it had improperly recognized the $1.2 million as revenue—that is, every penny of the reported revenue for the quarter was a fiction. Eventually, the company went out of business, and the investor never saw a dime of the $2 million his family had lent the company after being duped by the respondents.

B. Kleidon's Proposed Irrelevant Testimony about "Shareholder Losses"

The respondents have proposed to proffer Allan Kleidon as an expert, and filed his report on December 16, 2014. Although 100% of the company's third quarter revenue in 2012 was wrongly reported—a fact that AirTouch has acknowledged publicly by stating its intention to restate—the respondents have asked Kleidon to opine about how little money the stockholders

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[2] Kanakubo and Kaiser have claimed that revenue recognition was proper because TM Cell had sent a purchase order for the routers to AirTouch. The signed contract that accompanied the purchase order in the email provided that TM Cell could issue purchase orders "under this [A]greement," because if a customer actually bought the routers, the customer would pay TM Cell, which would then pay AirTouch (after taking its warehousing fee). But the contract could not have been more clear about TM Cell's payment obligations 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 Telmex the customer. *See* Kleidon Report, Ex. B, ¶¶ 3, 6.

lost by looking at how the stock reacted to the news of the quarterly report in November 2012 and the restatement announcement in February 2013.

Given what Kleidon says in his report, it is clear why the respondents hope to introduce his opinions at trial. They want to show that the shareholders were not harmed by the fraud because they suffered little or no losses as a result. Sections I through IV of Kleidon's report merely contain statements of his qualifications, assignment, background and a summary of his opinions. *See* Kleidon Report, pp. 1-4. His "analysis" supporting his first proposed set of opinions is found in Section V of his report. *See id.*, pp. 4-22. In Kleidon's "overview" of that section, he explains his underlying premise, namely that "a necessary condition for an investor to suffer a loss due to the alleged misstatements is that the stock price be inflated relative to its 'true' value during the relevant period." *Id.* at ¶ 9. He then proceeds to offer his analysis of the stock price inflation, and focuses his analysis in Sections V.C and V.D, respectively, on November 14, 2012 (when AirTouch issued its third quarter 2012 financial results, which had to be restated), and February 7, 2013 (when AirTouch disclosed its intention to restate those results). *See id.*, pp. 10-19, pp. 19-22. His summary of this analysis reveals its true intent—Kleidon performed his price inflation analysis so he could "conclude" that there is "no evidence" of "shareholder loss:"

> The conclusion from the analysis in Sections V.C and V.D is that there is no evidence of material misstatements concerning third quarter 2012 revenues that inflated AirTouch's stock price. Since stock price inflation is a necessary condition for a shareholder purchasing AirTouch stock to suffer a loss related to the alleged misstatements, *I conclude that there is no evidence of shareholder loss caused by the alleged misstatements.*

Id., ¶ 13 (emphasis added).

The only other opinion Kleidon hopes to offer is found in Section VI of his report. There he is even more explicit that his opinion is about shareholder loss. In that part of the report,

Kleidon states he was "asked by counsel to calculate the maximum potential losses to AirTouch shareholders caused by the alleged misstatements." *Id.*, ¶ 38. He then offers to calculate what he claims is the "maximum potential loss" suffered by the shareholders as a result of the respondents' fraud. *Id.*; *see also id.*, ¶ 4 (4th bullet).

C. Kunkel's Proposed Testimony about AirTouch's Undisclosed Hard Drive

The respondents have also proposed to proffer Michael Kunkel as an expert to testify about AirTouch's computer hard drive. They also filed his report on December 16, 2014. The apparent purpose of Kunkel's proposed testimony is to offer the opinion that an electronic copy of the July 30, 2012 contract between TM Cell and AirTouch was on the AirTouch computer network and "accessible to anyone with access" to that network." Kunkel Report, ¶ 5. However, Kunkel does not offer any opinions as to whether the controller, the auditors or the board ever saw the contract or tried to access it. Indeed, Kunkel never talked to any of these people. And he does not claim that Kaiser never deleted the contract from the email he forwarded to the company controller.

Putting those problems aside, Kunkel's opinion is based entirely on his review of a "hard drive" that he received from AirTouch. *See id.*, ¶ 4. In his report, he explains that he "received an external hard drive via messenger" from the company's counsel. *Id.* Kunkel also states that he was "informed" that "this hard drive had been used as a backup for AirTouch's network shared drive." *Id.*

Kunkel says he forensically examined this hard drive after "connect[ing]" it "to a forensic workstation for examination." *Id.* Kunkel also states that he "was requested to search" the hard drive for copies of the TM Cell-AirTouch contract. *Id.*, ¶ 6. Specifically, he says he examined this "forensic evidence" (*id.*, ¶ 5) to search the drive "for instances of a file titled 'TMCell - Letter Agreement 073012.pdf.'" *Id.*, ¶ 6. As a result of his searches of the drive, he reached the

apparent conclusion that the file was "saved to the AirTouch network shared drive" and remained on that drive "from at least August 20, 2012 through November 27, 2012 (and likely beyond that date)." *Id.*, ¶ 5.

The Division has never had access to the AirTouch hard drive that Kunkel searched. Therefore, immediately upon receiving the Kunkel expert report, Division counsel promptly asked respondents' counsel for access to the drive. In response, counsel for the company stated that "AirTouch is not willing simply to provide a copy of the drive to your office" because they claimed the drive "contains significant amounts of privileged information." Counsel informed the Division that the company would only provide the drive under three conditions: (1) that the drive be given to "an expert ... acceptable to AirTouch" who could not share the information with Division staff; (2) that this person would have "similarly limited access" to the drive as Kunkel; and (3) that the Division must "draft a protective order" regarding these "parameters." In response to the Division's correspondence refusing to accept these conditions, respondent's counsel reiterated its demands. Respondent's counsel explained that AirTouch would only turn the hard drive over to a "reputable, independent expert" and that they "will not and cannot agree to turn over the drive to anyone who does not meet this condition." (Emphasis in original.)[3] Not surprisingly, the Division did not accept these conditions.

III. ARGUMENT

The proposed expert testimony of both Kleidon and Kunkel should be excluded. The Division recognizes that hearing officers tend to be more inclusive, rather than exclusive, in admitting evidence in administrative hearings. That being said, when appropriate, administrative law judges should exclude expert testimony that is either irrelevant or unreliable. *See Vernazza*

[3] The parties correspondence regarding this matter is attached as Exhibit A to this motion (Dec. 18, 2014 Division letter; Dec. 19, 2014 respondent's letter; Dec. 22, 2014 Division letter; and Dec. 23, 2014 respondent's letter).

v. SEC, 327 F.3d 851, 861 (9th Cir. 2003) (affirming ALJ's exclusion of expert testimony from attorney witness as factually irrelevant); *Elliott v. CFTC*, 202 F.3d 926, 934 (7th Cir. 2000) (noting that Circuit Court "might" have agreed that the admission of expert testimony by ALJ was error, but for the fact that the ALJ did not rely on the opinion). Rule 320 of the Commission Rules of Practice give hearing officers wide latitude in determining the admissibility of evidence. Thus, hearing officers "have broad discretion in determining whether to admit or exclude evidence, and 'this is particularly true in the case of expert testimony.'" *In re Pagel, Inc.*, 48 S.E.C. 223, 1995 SEC Lexis 988, at *15, *aff'd, Pagel, Inc. v. SEC*, 803 F.2d 942 (8th Cir. 1986) (*quoting Hamling v. U.S.*, 418 U.S. 87, 108 (1974)); *see also, e.g., In re IMS/CPAS & Assoc.*, Rel. No. 8031, 76 S.E.C. Docket 504, 2001 WL 1359521, at *10 (Nov. 5, 2001) (holding that ALJ "did not commit error" in excluding expert testimony under Rule 320).

A. Kleidon's Testimony Should Be Excluded As Irrelevant

Kleidon's proposed testimony regarding shareholder losses caused by the respondents' fraud should be excluded in its entirety because it is not relevant. Although this case is about a public company's accounting fraud committed by its highest level officers, the Division does not have to prove that the AirTouch shareholders lost any money to establish their liability. That is because it is well established that, unlike private shareholder lawsuits, loss causation and damages are not "required elements" in an SEC enforcement action. *SEC v. Goble*, 682 F.3d 934, 943 (11th Cir. 2012) ("Because this is a civil enforcement action brought by the SEC, reliance, damages, and loss causation are not required elements."); *see also SEC v. Pirate Investor LLC*, 580 F.3d 233, 239 (4th Cir. 2009) ("Unlike private litigants, the SEC need not prove the additional elements of reliance or loss causation."); *SEC v. Blavin*, 760 F.2d 706, 711 (6th Cir. 1985) ("Unlike private litigants seeking damages, the Commission is not required to prove that any investor actually relied on the misrepresentations or that the misrepresentations

caused any investor to lose money."); *SEC v. Lee*, 720 F. Supp. 2d 305, 325 (S.D.N.Y. 2010) ("Unlike private litigants, who must comply with the PSLRA, the SEC is not required to prove investor reliance, loss causation, or damages in an action for securities fraud.") (quotations omitted).

That topic, however, is precisely what the respondents are asking Kleidon to testify about. As his report makes clear, Kleidon's entire analysis hinges on his opinion that "a necessary condition" for showing shareholder "loss" is proof that there was "stock price inflation." Kleidon Report, ¶¶ 9, 13. He then proceeds for more than 12 pages in Section V of his report to try and prove that there was no stock price inflation in reaction to the disclosures in November 2012 when the Form 10-Q was issued or in February 2013 when the restatement was announced. *See id.*, pp. 10-22. The goal of his lengthy analysis, as he makes clear in his "Overview of Analysis" (*id.*, pp. 5-7), is to allow him to "conclude that there is no evidence of shareholder loss." *Id.*, ¶ 13. In the next and final section of his report, Section VI, Kleidon again makes no attempt to hide the purpose of his proposed opinions. There, the only thing he intends to testify about is his quantification of the "maximum potential shareholder losses"—which is what he says respondents' counsel "asked" him to do. *Id.*, ¶ 38.

Nothing could be more irrelevant in an SEC enforcement case. Respondents cannot argue that loss causation or shareholder damages are relevant to their liability, because the law is so clear that these are not elements in an SEC enforcement action alleging securities fraud. *See, e.g.*, *Goble*, 682 F.3d at 943; *Pirate Investor*, 580 F.3d at 239; *Blavin*, 760 F.2d at 711; *Lee*, 720 F. Supp. 2d at 325. Therefore, all of Kleidon's opinions are irrelevant to the respondents' liability, and should be excluded in their entirety.

At most, Kleidon's proposed opinion as to how much the respondents' fraud caused the shareholders' losses bears only on the scope of relief to be awarded in this case. *See, e.g., SEC v. Razmilovic*, 822 F. Supp. 2d 234, 260 n.22 (E.D.N.Y. 2011), *rev'd on other grounds*, 738 F.3d 14 (2d Cir. 2013) (recognizing that while "SEC is not required to prove the element of loss causation in order to establish liability," expert testimony regarding loss causation might be relevant to disgorgement). Accordingly, if Kleidon's testimony is to be admitted, it should be admitted only for the limited purpose of addressing how much the hearing officer should award in disgorgement or penalties.

B. Kunkel's Testimony About An Undisclosed Hard Drive Should Be Excluded

Kunkel's proposed expert testimony should also be excluded because the company has refused to provide the Division with access to the hard drive that he examined to reach his conclusions. Parties tendering expert testimony must disclose the information that the expert considered—not simply relied upon—in reaching his or her opinions. The September 26, 2014 prehearing order in this case specifically states that all expert reports in this matter "should be as specific and detailed as those presented in federal district court pursuant to Federal Rule of Civil Procedure 26." In turn, Rule 26(a)(2)(B)(ii) provides that expert reports "must contain ... the facts or data considered by the witness in forming them." FED. R. CIV. P. 26(a)(2)(B)(ii). The disclosure requirement is "self-executing and does not countenance selective disclosure." *JJI Int'l, Inc. v. Bazar Group, Inc.*, No. 11-206ML, 2013 WL 3071299, at *4 (D.R.I. Apr. 8, 2013). Given these clear disclosure requirements, courts have regularly held that data underlying an expert report must be produced to the other side. *See, e.g., Klein v. Fed. Ins. Co.*, No. 7:03-CV-102-D, 7:09-CV-094-D, 2014 WL 6885973, at *3 (N.D. Tex. Dec. 8, 2014) (ordering submission of amended expert report containing "all exhibits that will be used to summarize or support [the] expert opinions").

Under this framework, the respondents' refusal to disclose the data Kunkel "considered" is meritless. First of all, the whole point of the Rule 26(a)(2)(B) disclosure requirements is to provide full disclosure so that the opposing party can test and rebut the expert's analysis and opinions. *See Gay v. Chandra*, No. 05-CV-0150, 2009 WL 2868398, at *2 (S.D. Ill. Sept. 4, 2009) (Rule 26(a) infractions prevented opposing party from "properly prepar[ing] for trial and for cross-examination of this expert witness"). That is all that the Division wants to do here. The respondents offered Kunkel as an expert, but now object to disclosure of the material he considered. In his report, Kunkel clearly states that he forensically searched and examined the company's backup hard drive. He then hopes to offer the results of his "searches" to support his conclusion. The Division is entitled to see this underlying data—the hard drive—to test the accuracy and reliability of his opinions.

Second, the company's refusal to produce the hard drive due to the alleged privileged nature of some of its contents is a red herring. When an expert considers data that is privileged when rendering his opinion, then that privilege is waived. Indeed, courts have held that the disclosure requirements of Rule 26(a)(2)(B) "were meant to trump all claims of privilege, mandating production of all information furnished to the testifying expert for consideration in the formulation of [the expert's] opinions, regardless of privilege." *Fialkowski v. Perry,* No. 11–5139, 2012 WL 2527020, at *3 (E.D. Pa. June 29, 2012) (quoting *Synthes Spine Co., L.P. v. Walden*, 232 F.R.D. 460, 463 (E.D. Pa. 2005). If a party could present expert testimony based on privileged material without disclosing the material because of the privilege, then the party would be impermissibly using the privilege as both a "sword and a shield." And that is exactly what the respondents are doing here. Kunkel undisputedly considered the company hard drive when reaching his conclusions. The respondents cannot now argue that Kunkel should be allowed to

testify based on his review of this hard drive, while also not allowing the Division access to the drive. *See, e.g., CP Kelco U.S. Inc. v. Pharmacia Corp.*, 213 F.R.D. 176, 179 (D. Del. 2003) ("It would be manifestly unfair to allow a party to use the privilege to shield information which it ... deliberately [used] ... to arm its expert for testimony .... Having chosen to use the information offensively, any privilege [defendant] ... is, and remains, waived.").

Third, even if there were no waiver here—and there clearly is—exclusion is still warranted. Courts routinely exclude expert testimony when a party refuses to disclose the materials the party's expert considered. *See, e.g., Cudd Pumping Servs. v. Coastal Chem. Co.*, No. 11–1913, 2014 WL 6633116, at *3 (W.D. La. Nov. 20, 2014) (precluding testifying expert from offering opinion at trial based on his analysis of data not disclosed); *Gay*, 2009 WL 2868398, at *2 (excluding expert testimony based on, *inter alia*, failure to disclose information expert considered in forming opinions to be expressed at trial); *Fund Commission Serv., II, Inc. v. Westpac Banking Co.*, No. 93 Civ. 8298, 1996 WL 469660, at *4 (S.D.N.Y. Aug. 16, 1996) (precluding use of expert evidence based on failure to produce expert discovery documents requested specifically by opposing party).

Here, the "conditions" AirTouch has demanded for providing the Division the drive are contrary to the spirit of mandatory disclosure under Rule 26(a). Respondents' counsel has not cited any authority to support the imposition of these conditions. Most troubling is their requirement that the Division locate and pay for an "independent" third party; the company will not produce the drive if the Division elects to use its own forensic staff to analyze the drive. But this requirement of "independence" would defeat the whole purpose of disclosing the hard drive. Whoever examines the drive for the Division must be able to communicate with Division counsel to help the Division craft its response to Kunkel's expected testimony. That is the whole

point behind the expert disclosure rules. Moreover, there is no authority for respondents' demand that it be able to approve the Division's expert to ensure he or she is "reputable." Whoever the Division picks to review the does not have to pass the respondents' self-serving "reputable" test, whatever that is.

In addition, while the company has said it will only give the Division "similarly limited access" as Kunkel, there is nothing in Kunkel's report that states he had "limited access" to the drive. Quite the opposite, his report explains that he attached the drive to a workstation and searched the entire drive for a specific file. *See* Kunkel Report, ¶¶ 5-7. Indeed, Kunkel's detailed description of the "folder structure" he observed on the hard drive suggests he considered more than simply search results for the particular file. *Id.*, ¶ 7. As it stated in its correspondence with respondents, the Division has no objection to having its access to the drive match the access that was given to Kunkel. But since Kunkel received the drive "via messenger," connected it to one of his workstations and searched the entire drive for one file, that access was clearly not limited. *See id.*, ¶¶ 4, 5-7.

IV. CONCLUSION

Therefore, the Division respectfully requests that the hearing officer exclude all of the proposed opinion testimony of Kleidon as irrelevant, because it bears only on the issue of loss causation, which is not an element to be proven in this case. At a minimum, his proposed testimony should be admitted only for the limited purpose of assessing the appropriate relief, such as disgorgement, that could be awarded against the respondents.

The Division also respectfully requests that the hearing officer exclude all of the proposed opinion testimony of Kunkel because the respondents have refused to provide the Division access to the hard drive that Kunkel examined and searched, and any privilege

associated with that drive was waived when the respondents elected to have Kunkel testify about his review of that drive.

Dated: December 23, 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

EXHIBIT A

(correspondence regarding AirTouch hard drive)

(Dec. 18, 2014 Division letter
Dec. 19, 2014 respondent's letter
Dec. 22, 2014 Division letter
Dec. 23, 2014 respondent's letter)

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
LOS ANGELES REGIONAL OFFICE
444 S. FLOWER STREET
SUITE 900
LOS ANGELES, CALIFORNIA 90071

December 18, 2014

VIA EMAIL

Mark Mermelstein, Esq.
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Los Angeles, California 90017-5855

Re: *In the Matter of AirTouch Communications, Inc., et al.*
Admin. Proc. File No. 3-16033

Dear Mark:

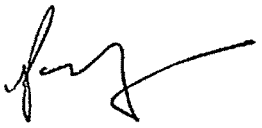
We write with respect to the report of Michael Kunkel dated December 16, 2014, submitted on behalf of Respondents Hideyuki Kanakubo and Jerome Kaiser in the above-referenced matter. Mr. Kunkel purports to have conducted a forensic analysis of a "hard drive" that "had been used as a backup for AirTouch's network shared drive," provided to Mr. Kunkel by Greenberg Traurig, LLP, on December 15, 2014. Kunkel Report, ¶ 4. Mr. Kunkel's analysis provides the basis for a purported expert opinion.

Judge Grimes' order of September 26, 2014 states that all expert reports in this matter "should be as specific and detailed as those presented in federal district court pursuant to Federal Rule of Civil Procedure 26." Federal Rule of Civil Procedure 26(a)(2)(B)(ii) provides, in relevant part, that expert reports "must contain . . . the facts or data considered by the witness in forming them." The data Mr. Kunkel analyzed plainly falls within this description and must be disclosed. *See Klein v. Fed. Ins. Co.*, No. 7:03-CV-102-D, 7:09-CV-094-D, 2014 WL 6885973, at *3 (N.D. Tex. Dec. 8, 2014) (ordering submission of amended expert report containing "all exhibits that will be used to summarize or support [the] expert opinions").

Without the underlying data, Mr. Kunkel would have been unable to render any opinion whatsoever. In turn, absent disclosure, the Division has no way to understand or test the accuracy of Mr. Kunkel's opinions, and thus will be prejudiced in its ability to cross examine Mr. Kunkel at trial. *See Cudd Pumping Svcs. v. Coastal Chem. Co.*, No. 11–1913, 2014 WL 6633116, at *3 (W.D. La. Nov. 20, 2014) (precluding testifying expert from offering opinion at trial based on his analysis of data not disclosed).

Please deliver a copy of this hard drive to our offices by close of business tomorrow, December 19, 2014.

Regards,



Peter Altman

cc: Jim Kramer, Esq.
Amy Longo, Esq.
John Berry, Esq.

GT GreenbergTraurig

Roger Scott
[redacted]

December 19, 2014

VIA E-MAIL

Peter Altman
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AltmanP@sec.gov

Re: *In the Matter of AirTouch Communications Inc., et al*
Admin. Proc. File No. 3-16033

Dear Mr. Altman:

We received your December 18, 2014 letter to Mark Mermelstein demanding that his office produce copy of a backup drive owned by our client AirTouch Communications, Inc. ("AirTouch") (the "Drive"). The Drive contains significant amounts of privileged information, in addition to information wholly irrelevant to this matter. As a result, AirTouch is not willing simply to provide a copy of the drive to your office.

By way of background, the Drive was provided to Mr. Mermelstein's expert, Michael Kunkel, pursuant to a joint defense agreement, and with extremely limited parameters. Specifically, Mr. Kunkel was instructed to search the hard drive for instances of the file titled "Letter of Agreement 073012.pdf", and to analyze forensic evidence concerning the instances of that file found on the Drive. Mr. Kunkel's report does not purport to express any opinion on, or otherwise address, the existence or contents of any other individual electronic files contained on the Drive. Thus, as is clear from Mr. Kunkel's report, the "facts or data" considered by Mr. Kunkel in forming his opinion consist solely of the existence, and dates of existence, of the file titled "Letter of Agreement 073012.pdf."

To allow your expert to make a similar analysis and render an opinion, AirTouch is willing to provide similarly limited access to the Drive by an expert retained by the Division but acceptable to AirTouch, subject to an appropriate protective order pursuant to which the Division and your expert would agree that the expert may not provide Division staff or anyone else with any of the files on the Drive save for the file titled

ALBANY
AMSTERDAM
ATLANTA
AUSTIN
BOCA RATON
BOSTON
CHICAGO
DALLAS
DELAWARE
DENVER
FORT LAUDERDALE
HOUSTON
LAS VEGAS
LONDON*
LOS ANGELES
MEXICO CITY+
MIAMI
MILAN**
NEW JERSEY
NEW YORK
NORTHERN VIRGINIA
ORANGE COUNTY
ORLANDO
PHILADELPHIA
PHOENIX
ROME**
SACRAMENTO
SAN FRANCISCO
SEOUL~
SHANGHAI
SILICON VALLEY
TALLAHASSEE
TAMPA
TEL AVIV^
WARSAW~
WASHINGTON, D.C.
WESTCHESTER COUNTY
WEST PALM BEACH
* OPERATES AS GREENBERG TRAURIG MAHER LLP
+ OPERATES AS GREENBERG TRAURIG S.C.
** STRATEGIC ALLIANCE
~ OPERATES AS GREENBERG TRAURIG LLP FOREIGN LEGAL CONSULTANT OFFICE
^ A BRANCH OF GREENBERG TRAURIG, P.A. FLORIDA, USA
OPERATES AS GREENBERG TRAURIG GRZESIAK SP.K.

"Letter of Agreement 073012.pdf". If you agree, please provide a draft protective order for our review.

Please let me know if you have any questions. All rights and remedies are expressly reserved.

Sincerely,

/s/ Roger L. Scott

Roger L. Scott

cc: Jim Kramer
Mark Mermelstein
Amy Longo
John Berry

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
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December 22, 2014

VIA EMAIL

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Re: *In the Matter of AirTouch Communications, Inc., et al.*
Admin. Proc. File No. 3-16033

Dear Roger Scott and Mark Mermelstein:

We write in response to Roger Scott's letter dated December 19, 2014 regarding AirTouch's hard drive, which the company permitted Mr. Kunkel, the proffered expert of respondents Kanakubo and Kaiser, to access in connection with his report dated December 16, 2014.

First, Mr. Scott offered to provide the Division with "similar[] limited access" to the hard drive that Mr. Kunkel received in connection with his December 16th report. Mr. Scott stated that the Division did not need full access to the drive because Mr. Kunkel only offered an opinion regarding "the existence, and dates of existence" of a particular file.

Mr. Kunkel's report makes no mention of any limitations in access to the hard drive. Moreover, Mr. Kunkel's detailed description of the "folder structure" he observed on the hard drive suggests he considered more than simply search results for the particular file. Whatever the case, we should have access to the same data as Mr. Kunkel. Our request plainly complies with Rule 26(a)(2)(B)(ii) and should be complied with immediately. *See* FED. R. CIV. P. 26 advisory committee's note (regarding 2010 Amendments, "the intention is that 'facts or data' be interpreted broadly to require disclosure of any material considered by the expert, from whatever source, that contains factual ingredients").

Second, Mr. Scott requested that the Division draft a protective order for AirTouch's review and comment that would limit, in effect, the Division's ability to review the hard drive. The Division does not object, in concept, to the entry of a protective order regarding its review of the hard drive. However, as AirTouch is claiming the hard drive contains privileged and/or irrelevant information, the burden to draft such a document, and justify its need, falls on

AirTouch, not the Division. We note that counsel to Mr. Kanakubo and Mr. Kaiser – the respondents who submitted Mr. Kunkel's report – did not object to our request. Rather, AirTouch, which has taken no position with respect to Mr. Kunkel's report, objected to our request and now purports to dictate the circumstances associated with the Division's review of the data Mr. Kunkel considered. Thus, if AirTouch wants a protective order in place, it should prepare one for our review. *See, e.g.*, FED. R. CIV. P. 26(c)(1) (the party "from whom discovery is sought may move for a protective order").

Third, Mr. Scott stated that AirTouch would only provide access to the hard drive to "an expert . . . acceptable to AirTouch." This is unacceptable to the Division. We reject the notion that AirTouch have any say in what expert or other individual we select to review the data Mr. Kunkel considered, and Mr. Scott's letter cites no authority supporting the condition it seeks to impose.

As we now know that AirTouch is the custodian of this hard drive, we request that, by 12 noon PST on December 23, 2014, AirTouch provide the Division with the same access to the drive that Mr. Kunkel had in connection with his December 16th report.

Regards,

Peter Altman

cc: Mike Piazza, Esq.
Jim Kramer, Esq.
Amy Longo, Esq.
John Berry, Esq.

GT GreenbergTraurig

Roger Scott
[redacted]

December 23, 2014

VIA E-MAIL

Peter Altman
U.S. Securities & Exchange Commission
Los Angeles Regional Office
11th Floor
5670 Wilshire Boulevard
Los Angeles, CA 90036
AltmanP@sec.gov

Re: *In the Matter of AirTouch Communications Inc., et al*
Admin. Proc. File No. 3-16033

Dear Mr. Altman:

We received your December 22, 2014 letter. As an initial matter, AirTouch, rather than Mr. Kanakubo and Mr. Kaiser, objects to the SEC's request because AirTouch, not Mr. Kanakubo and Mr. Kaiser, hold the privilege for AirTouch's communications. To protect its interest in privileged documents, AirTouch stands by its position that the SEC will only be provided access to the drive consistent with that provided to Mr. Kunkel. Given that the SEC is crafting a rebuttal report, this should be sufficient to address the concerns raised in Mr. Altman's December 18, 2014 letter.

The request that the hard drive be turned over to "an expert . . . acceptable to AirTouch" is simply a request that the SEC's expert be a reputable, independent expert (i.e. not employed by the SEC or other government agency). In order to protect against disclosure of privileged information, we will not and cannot agree to turn over the drive to anyone who does not meet this condition.

Once the SEC has selected an appropriate expert, we will turn over the drive to that expert (not the SEC) to conduct testing. The expert will only be allowed to turn over information about the drive to the SEC consistent with the testing reflected in Mr. Kunkel's report (i.e. the presence of the "Letter of Agreement 073012.pdf" and that document's forensic properties regarding creation, deletion, etc.). If the SEC wishes the expert to provide information beyond this, the expert will provide the requested information to AirTouch first for review. If AirTouch has no objection, then the expert can provide the additional information to the SEC.

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Please identify your expert, and our office, in conjunction with Orrick, Herrington & Sutcliffe, will draft an appropriate protective order for your review. All rights and remedies are expressly reserved.

Sincerely,

/s/ Roger L. Scott

Roger L. Scott

cc: Jim Kramer
Mark Mermelstein
Amy Longo
John Berry