

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 86573 / August 5, 2019

ADMINISTRATIVE PROCEEDING
File No. 3-19311

In the Matter of

SITO MOBILE, LTD.,

Respondent.

**ORDER INSTITUTING CEASE-AND-DESIST
PROCEEDINGS PURSUANT TO SECTION
21C OF THE SECURITIES EXCHANGE ACT
OF 1934, MAKING FINDINGS, AND
IMPOSING A CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission (“Commission”) deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 (“Exchange Act”) against SITO Mobile, Ltd. (“SITO” or “Respondent”).

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the “Offer”), which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission’s jurisdiction over Respondent and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order (“Order”), as set forth below.

III.

On the basis of this Order and Respondent’s Offer, the Commission finds¹ that:

Summary

1. These proceedings arise out of expense abuses at SITO by two former SITO executives, Gerard (“Jerry”) Hug and by Kurt Streams, CPA.

¹ The findings herein are made pursuant to Respondent’s Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

2. From the time he became CEO in August 2014 until his resignation in February 2017, Hug expensed over \$100,000 worth of personal charges on SITO's corporate charge card often by disguising them as legitimate business expenses. He regularly used the corporate card to pay for airfare for family trips, sporting tickets, designer clothes, and resort stays.

3. From 2014 until his resignation as CFO in early 2017, Streams improperly used over \$200,000 of SITO funds to pay for his living expenses. Streams charged SITO for most of his personal meals, commuting costs, his Netflix and Amazon Prime subscriptions, pet groomers, designer sunglasses, and family vacations. Streams also improperly withdrew cash from a SITO account to pay for personal expenses.

4. Because of SITO's insufficient internal accounting controls, these improper and unauthorized payments were not accurately recorded in the company's books and records. As a result, SITO's annual reports and definitive proxy statements materially understated the compensation paid to Hug and Streams in the form of personal benefits.

5. As a result of the conduct described herein, SITO violated Sections 13(a), 13(b)(2)(A), 13(b)(2)(B), and 14(a) of the Exchange Act, and Rules 12b-20, 13a-1, 14a-3, and 14a-9 thereunder.

Respondent

6. **SITO Mobile, Ltd.**, a Delaware corporation with its principal place of business in Jersey City, New Jersey, provides mobile data advertising based on location data derived from mobile devices. SITO's common stock is registered with the Commission pursuant to Section 12(b) of the Exchange Act and trades on the NASDAQ Capital Market.

Related Individuals

7. **Gerard "Jerry" Hug**, age 52, is a resident of Weehawken, New Jersey. After originally joining SITO in 2011, he served as CEO and director of the company from November 2014 until his resignation on February 17, 2017.

8. **Kurt Streams**, age 57, is a resident of Fairfield, Connecticut. He was SITO's CFO from November 2013 until his resignation on March 10, 2017, and COO from December 2016 until his resignation. Streams is a CPA and maintained his CPA license in New York from 2009 until it lapsed.

Streams's and Hug's Expenses

9. From 2013 through 2016, SITO maintained an employee handbook which outlined several policies, including procedures for reimbursement when employees, including officers, incurred SITO-related business expenses. To be eligible for reimbursement, employees had to obtain supervisor approval and submit a completed Travel and Expense Reimbursement Form with original receipts. SITO executives, including Hug and Streams, also agreed in their employment

contracts to abide by the company's policies and procedures for reimbursement of documented and reasonable business expenses.

10. From 2014 through 2017, Streams used the debit card chargeable to a corporate account and issued to him by SITO to charge over \$200,000 in personal expenses.

11. For example, Streams used this corporate account to pay for coffee on the way to work, daily lunches in and around SITO's offices, weekend meals at restaurants around his home, as well as extravagant personal trips to Punta Cana in the Dominican Republic, Park City, Utah, and Marina Del Rey, California. On a monthly basis, SITO's accounting personnel sent Streams a spreadsheet detailing his use of the SITO debit card and asked him to provide a general ledger code for each of his charges. On his spreadsheet of charges, Streams repeatedly coded as business expenses his use of the SITO debit card to pay his personal expenses. In violation of company policy, Streams submitted no or limited expense documentation related to his expenditure of SITO corporate funds.

12. From 2014 through early 2017, Hug used the charge card issued to him by SITO to pay for a wide array of personal expenses totaling over \$100,000.

13. For example, Hug charged a total of over \$7,000 to the SITO charge card account for his fiftieth birthday party and over \$4,000 for his child's sixteenth birthday party. For both birthday parties, Hug subsequently directed SITO's accounting department to book all related costs as business expenses.

14. Generally, Hug submitted no or limited expense documentation to justify charges on his SITO corporate card. Like Streams, each month SITO's accounting personnel sent Hug a spreadsheet which detailed his charges to the SITO charge card and asked Hug to provide a general ledger expense code for each charge. On his spreadsheet of charges, Hug repeatedly coded his personal charges to the SITO charge card as legitimate business expenses.

15. During this period, Streams reviewed the expenses charged to the SITO charge card account, including those incurred by Hug. Streams was the only SITO employee who reviewed the general ledger coding for his own expenses to the company-issued debit card in his possession. Because Streams knowingly or recklessly mischaracterized his own personal expenses as corporate expenses and further approved Hug's and his own improper expense reimbursements, SITO's books and records were false and inaccurate.

False and Misleading SEC Filings, Certifications, and Representations

16. Hug's and Streams's expenses were not disclosed as personal benefits or perquisites in the Summary Compensation Tables in SITO's proxy statements for the fiscal years 2014 and 2015, as required. In fact, SITO disclosed no perks or personal benefits for any of its executives in its SEC filings.

17. SITO used these proxy statements to solicit annual shareholder votes to elect directors, including Hug for the fiscal years 2015 and 2016. The proxy statements also solicited non-binding advisory votes from shareholders on executive compensation, including for Hug's and Streams's compensation for 2015.

18. SITO's annual reports incorporated the above proxy statements by reference with respect to executive compensation required to be reported in the annual reports. Consequently, those annual reports also materially understated Hug's and Streams's compensation.

19. Hug and Streams signed SITO's annual reports on Form 10-K for fiscal years 2014 and 2015, and also for the transitional period on Form 10-KT in 2015 when the company changed to a calendar year-end from a fiscal year ended September 30.

20. Each of these annual reports included certifications required by the Sarbanes-Oxley Act ("SOX") which were signed by Hug and Streams indicating that, based on their knowledge, the reports did not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statement made, in light of the circumstances under which such statements were made, not misleading. Their SOX certifications also falsely certified that they had disclosed any fraud by management to the audit committee and the company's auditor, whether or not material. Hug and Streams also signed management representation letters that were provided to SITO's auditors with respect to audits of SITO's 2014 and 2015 financials, in which they falsely stated that they had no knowledge of management fraud.

SITO Uncovers Expense Abuses by Hug and Streams and Institutes Remedial Measures

21. SITO's board of directors became aware of unjustified business expenses by Hug after the audit committee initiated a review of his charge card transactions. Hug resigned in February 2017. After Hug's resignation, SITO undertook an internal investigation of the use of the company's charge and debit cards, as well as certain cash withdrawals, by engaging a law firm and an accounting firm. In March 2017, SITO disclosed that its ongoing investigation had identified the misappropriation of SITO funds by both Hug and Streams and simultaneously announced Streams's resignation.

22. In the annual report on Form 10-K for fiscal year 2016, filed shortly after the revelation of the expense abuses, SITO disclosed that it identified "significant deficiencies" in the areas of executive expenses and executive payroll as part of its evaluation of internal control over financial reporting.

23. Respondent SITO undertook remedial efforts, including (i) replacing Streams and Hug; (ii) eliminating all debit cards and the use of petty cash, and only allowing cash withdrawals up to \$500 after its finance and human resource departments have approved the business rationale for the withdrawal; (iii) requiring all credit card users to submit monthly reconciliations with supporting documentation and valid business reasons for charges, summaries of which are to be reviewed by SITO's board of directors; (iv) creating a travel and entertainment policy and

purchasing third-party expense review software; and (v) creating a formal expense budget approved and reviewed against actual expenses incurred by SITO's board.

Legal Discussion

SITO Violated Reporting Provisions

Section 13(a) of the Exchange Act and Rules 12b-20 and 13a-1 Thereunder

24. Section 13(a) of the Exchange Act and Rule 13a-1 thereunder require issuers of securities registered pursuant to Section 12 to file with the Commission accurate annual reports. An issuer violates these provisions if it files a report that contains materially false or misleading information. SEC v. Falstaff Brewing Corp., 629 F.2d 62, 72 (D.C. Cir. 1980). Rule 12b-20 requires that these reports contain such further material information necessary to make the required statements made in the reports not misleading. The Commission need not prove scienter to establish a violation of Section 13(a). See SEC v. McNulty, 137 F.3d 732, 740-41 (2d Cir. 1998).

25. As discussed above, SITO violated Section 13(a) of the Exchange Act and Rules 12b-20 and 13a-1 thereunder by materially understating the compensation paid to Hug and Streams when it failed to include the personal benefits and perquisites provided to them.

SITO Violated Books and Records and Internal Controls Provisions Sections 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act

26. Section 13(b)(2)(A) of the Exchange Act requires issuers to make and keep books, records, and accounts which, in reasonable detail, accurately and fairly reflect the issuer's transactions and dispositions of assets.

27. Section 13(b)(2)(B) of the Exchange Act requires those issuers to devise and maintain a system of internal accounting controls sufficient to, among other things, provide reasonable assurances that transactions are recorded as necessary to permit the preparation of financial statements in accordance with GAAP, and to maintain the accountability of assets. Scienter and materiality are not required to violate either provision. See McNulty, 137 F.3d at 740-41; SEC v. World-Wide Coin Inv., Ltd., 567 F. Supp. 724, 749-50 (N.D. Ga. 1983).

28. As discussed above, SITO violated Section 13(b)(2)(A) of the Exchange Act by failing to record the true nature of the expenses as personal benefits and perquisites paid to Hug and Streams in the company's books, records, and accounts.

29. SITO also violated Section 13(b)(2)(B) of the Exchange Act, as discussed above, by failing to implement sufficient internal accounting controls concerning business expenses and cash withdrawals.

SITO Violated Proxy Solicitation Provisions
Section 14(a) of the Exchange Act and Rules 14a-3 and 14a-9 Thereunder

30. Section 14(a) of the Exchange Act regulates solicitation of proxies with respect to any security registered pursuant to Section 12. Rule 14a-3 prohibits solicitation of a proxy without furnishing information specified by Schedule 14A, including executive compensation pursuant to Item 402 of Regulation S-K. Rule 14a-9 prohibits the use of proxy statements that are materially false or misleading. Misstatements and omissions are material under Rule 14a-9 if they would alter the “total mix of information” considered by a shareholder in making a voting decision. TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976). Proxy violations require a showing of negligence. See Beck v. Dobrowski, 559 F.3d 680, 682 (7th Cir. 2009) (citing Gerstle v. Gamble-Skogmo, Inc., 478 F.2d 1281, 1300-01 (2d Cir. 1973)).

31. As discussed above, SITO violated Section 14(a) of the Exchange Act and Rules 14a-3 and 14a-9 thereunder by soliciting proxies in connection with its 2015 and 2016 annual meetings which materially misrepresented and understated the compensation paid to Hug and Streams by failing to report their personal benefits.

32. In determining to accept the Offer, the Commission considered remedial acts promptly undertaken and cooperation afforded the Commission staff as described above.

IV.

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in Respondent SITO’s Offer.

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 21C of the Exchange Act, Respondent SITO shall cease and desist from committing or causing any violations and any future violations of Sections 13(a), 13(b)(2)(A), 13(b)(2)(B), and 14(a) of the Exchange Act, and Rules 12b-20, 13a-1, 14a-3, and 14a-9 thereunder.

B. Respondent acknowledges that the Commission is not imposing a civil penalty based upon its cooperation in a Commission investigation. If at any time following the entry of the Order, the Division of Enforcement (“Division”) obtains information indicating that Respondent knowingly provided materially false or misleading information or materials to the Commission, or in a related proceeding, the Division may, at its sole discretion and with prior notice to the Respondent, petition the Commission to reopen this matter and seek an order directing that the Respondent pay a civil money penalty. Respondent may contest by way of defense in any resulting administrative proceeding whether it knowingly provided materially false or misleading information, but may not: (1) contest the findings in the Order; or (2) assert any defense to liability or remedy, including, but not limited to, any statute of limitations defense.

By the Commission.

Vanessa A. Countryman
Secretary