

November 6, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of
DAVID GEISEN

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Docket No. IA-05-052

ASLBP No. 06-845-01-EA

NRC STAFF REPLY TO OPPOSITION OF DAVID GEISEN
TO NRC STAFF MOTION FOR STAY OF PROCEEDING
OR IN THE ALTERNATIVE FOR A PRECLUSION ORDER

BACKGROUND

On October 27, 2006, the Staff filed a motion to stay this proceeding or, in the alternative, to obtain a preclusion order to prevent Mr. Geisen from relying on evidence or positions at hearing which are not disclosed during discovery.¹ Mr. Geisen responded to the Staff's motion on November 2, 2006.² The Staff hereby submits its reply to Mr. Geisen's response.

DISCUSSION

The Staff's motion raises two fundamental questions in this proceeding. The first is whether the proceeding should go forward or be stayed until completion of the pending criminal proceeding given that: (1) Mr. Geisen has invoked his Fifth Amendment rights and declined to provide any substantive information to the Staff in discovery; (2) in addition to Mr. Geisen, key witnesses in this proceeding have also invoked their Fifth Amendment rights and therefore will not be available to provide testimony in this hearing; (3) the Staff has provided extensive

¹ "NRC Staff Motion for Stay of Proceeding or in the Alternative for a Preclusion Order" ("Stay Motion").

² "Opposition of David Geisen to NRC Staff Motion for Stay of Proceeding or in the Alternative for a Preclusion Order" ("Geisen Opposition")

discovery in its mandatory document production and response to Mr. Geisen's written discovery requests; and (4) a trial date of April 16, 2007, has been set for the criminal proceeding against Mr. Geisen.³ The second question is whether the Staff is entitled to the remedy requested - a preclusion order - if this proceeding is allowed to go forward in the absence of any discovery on behalf of Mr. Geisen. In Mr. Geisen's opposition, he has raised new issues and claims to which the Staff responds below.

I. Request for Stay

In responding to the Staff's request for a stay, Mr. Geisen has raised a number of allegations and claims, only one of which relates to the grounds for the Staff's motion. That claim - that there has been no change in the circumstances of this proceeding which justifies the Staff's stay request - is false. As detailed above, the circumstances of the proceeding have changed substantially since the Staff's first stay request. After representing that he would engage in reciprocal discovery,⁴ Mr. Geisen for the first time invoked his Fifth Amendment rights when responding to the Staff's written discovery requests.⁵ Mr. Geisen has provided virtually no information in discovery⁶ and declined to state any position concerning any of the claims in the Enforcement Order while the Staff has provided substantial discovery, disclosing

³ All of these circumstances occurred following the Board's decision denying the Staff's first Stay Request, *Memorandum and Order* (Denying Government's Request to Delay Proceeding), May 19, 2006.

⁴ As the Staff pointed out in its Stay Motion at 3, counsel for Mr. Geisen represented that they were prepared to engage in reciprocal discovery and would turn over documents during prehearing conferences held on April 11, 2006, and on June 8, 2006. See, First Stay Motion Argument Transcript at 113, 114, and Prehearing Conference Transcript at 123.

⁵ "David Geisen's Objections and Answers to NRC Staff's First Set of Interrogatories" and "David Geisen's Objections and Answers to NRC Staff's First Request for Admissions" filed October 3, 2006.

⁶ The only information Mr. Geisen has provided in response to the Staff's interrogatories is his educational background and a listing of the positions he has held in the nuclear industry, including salary and qualifications. He has objected to every Staff request for admission, and has not yet produced any documents or privilege log in response to the Staff's discovery requests.

the bases for all aspects of the enforcement order which is the subject of this proceeding.

Additionally, key witnesses to this proceeding, Mr. Cook and Mr. Siemaszko, have also invoked their Fifth Amendment rights. Finally, and most significantly, a trial date has now been set for the criminal proceeding meaning that the stay is no longer for an indefinite duration.

The Staff's motion is based on these changed circumstances and the recognition that some of these circumstances will impede the development of a complete evidentiary record in this proceeding. Unlike the Staff's previous stay request, this motion is not related to a request on behalf of the Department of Justice (DOJ), but instead is predicated upon the potential harm to the full and complete adjudication of the matter before this Licensing Board - whether the Staff's Enforcement Order should be sustained.

At this juncture, the Staff is compelled to respond to allegations made by Mr. Geisen which do not directly relate to the grounds for the Staff's motion or the issues before the Board in this proceeding, but nevertheless require a response because they are misleading and malign the Staff and the agency's enforcement process. To begin with the most egregious, the suggestion that the Staff is merely positioning this case to aid DOJ in its criminal prosecution is completely erroneous and unfounded.

The Staff's enforcement decision in this case was premised upon the Staff's assessment of the degree of risk to public health and safety posed by allowing Mr. Geisen to hold a position in the nuclear industry. Mr. Geisen's suggestion that the Staff was motivated by other reasons, presumably to advance DOJ's criminal case, as evidenced by the timing of the action is not only baseless but nonsensical. The reality is that the Staff simply refers cases to DOJ and DOJ independently reaches a decision concerning criminal prosecution. Indeed, in this case, DOJ

and Staff reached different determinations as to which individuals to take action against.⁷ Additionally, DOJ conducts its criminal investigation independently from the Staff and is limited in its ability to share information which is presented before a grand jury. As a consequence, the Staff has limited access to information from the government investigation in this case because DOJ has determined that any information obtained after DOJ began its investigation with the aid of NRC investigators, in November 2003, must be protected under grand jury secrecy requirements. Thus, much of the information cited by Mr. Geisen as available to "the government," such as the 2005 interview conducted by DOJ and the Staff's OI agents,⁸ is not in fact available to the Staff and cannot be presented to this Board.

At the same time, Mr. Geisen has been provided with this information through open discovery by DOJ. Contrary to the picture painted by Mr. Geisen, he - not the Staff - now holds a significant informational advantage since he has been provided the information underpinning the Staff's Order through discovery as well as the grand jury information which cannot be obtained by the Staff. It is difficult to imagine what tactical advantage DOJ would obtain by limiting the investigatory information available to the Staff while disclosing all investigatory information to Mr. Geisen through open discovery and having the Staff disclose all information underpinning its case to Mr. Geisen. Thus, the idea that there has been a coordinated effort between the Staff and DOJ to manipulate the administrative proceeding to advance the criminal case is belied by the facts.

⁷ Specifically, the Staff issued enforcement orders against individuals who were not indicted by DOJ - Mr. Miller, Mr. Moffit, and Mr. Goyal - while DOJ indicted an individual against whom the Staff did not take any enforcement action - Mr. Cook.

⁸ In "David Geisen's Opposition to the NRC Staff's Motion to Hold the Proceeding in Abeyance" filed March 30, 2006, at pp. 2-3, Mr. Geisen noted that DOJ and NRC agents commenced an investigation shortly after issuance of the August 2003, OI report, during which scores of witnesses were interviewed and thousands of pages of documents were analyzed. He further noted that DOJ placed more than forty witnesses before a grand jury and recorded sworn testimony from those witnesses, and that on February 3, 2005, Mr Geisen was interviewed for nearly five hours by NRC agents and attorneys with DOJ and an Assistant U.S. Attorney. None of the information cited is available to the Staff.

However, it is not difficult to discern the tactics behind Mr. Geisen's offer of a secret interview with Staff counsel which cannot be recorded or documented or disclosed to DOJ or this Board. In effect, the information provided during this interview would be tainted by any non-disclosure agreement, placing the Staff in the untenable position of distinguishing between information disclosed by Mr. Geisen during the secret meeting and information obtained from other sources. This dilemma is precisely the reason that DOJ has determined that the investigators utilized in the DOJ investigation are prohibited from discussing any aspects of their investigation with the Staff while the criminal case is pending.

The Staff welcomes any information from Mr. Geisen that would aid in reaching the truth in this case. However, this should be done openly and on the record so that the information is available to those responsible for deciding the facts in this case - the members of this Board. Providing information secretly to the Staff does not aid the ultimate goal of this hearing which is to allow this Board to reach a just and fair decision upon a complete factual record. Indeed, this goal could be undermined since the Staff would be prohibited from informing the Board of any discrepancies between the case presented before the Board and any representations made privately to the Staff.

It should be noted that the Staff did not interpret this offer as a request to negotiate a settlement.⁹ While the Staff would not necessarily be adverse to entering into settlement negotiations, the question of whether the Staff decides to do so is not germane to the Staff's stay request, is not the subject of any motion before this Board, and is simply out of place in Mr. Geisen's response.

⁹ Any settlement negotiations would require a dialogue between Mr. Geisen and the Staff because only the Staff, not Staff counsel, has the authority to make enforcement decisions and to bind the Staff in any settlement of an enforcement matter.

II. Preclusion Order

In arguing that the Staff is not entitled to a preclusion order, Mr. Geisen claims that granting the Staff's request would amount to a *de facto* extension of the enforcement action without any meaningful opportunity for Mr. Geisen to be heard on the merits, thereby imposing an unconstitutional price for the exercise of his Fifth Amendment rights. Geisen Opposition at 17. In making this claim, Mr. Geisen misrepresents and overstates the remedy requested by the Staff. The Staff does not dispute the right of Mr. Geisen to invoke his Fifth Amendment rights, nor the propriety of his choosing to do so in this case. Further, the Staff recognizes that the exercise of his rights under the Fifth Amendment cannot, and should not, be the sole basis for a ruling on the merits of the propriety of the Staff's enforcement sanction against him.

Most importantly, the Staff fully recognizes that Mr. Geisen is entitled to a hearing on the Staff's enforcement action and that the Staff will be required to present the grounds for its action before this Board regardless of Mr. Geisen's determination of whether to invoke his Fifth Amendment rights. However, as a party to a civil proceeding, the Staff is also entitled to certain rights under discovery. Specifically, the Staff is entitled to know, in advance of hearing, what claims, defenses and evidence Mr. Geisen will present at hearing. If the Staff should not be required to guess what positions Mr. Geisen may take in conducting discovery and preparing for the hearing. Mr. Geisen should not be allowed to avoid his basic discovery obligations by suggesting that the Staff should be able to anticipate his positions based on reviewing "thousands of documents." Geisen Opposition at 15.

Moreover, the case law is clear that the remedy the Staff is seeking is appropriate. Contrary to the assertion by Mr. Geisen, the reasoning used by courts in fashioning remedies to prevent the inherent unfairness of allowing a civil litigant to waive or deny the Fifth Amendment privilege after refusing to respond to discovery is fully applicable here, even when the cases

involve a party who is invoking the privilege and making affirmative claims to reclaim property.¹⁰ Any use of the Fifth Amendment privilege to surprise an opposing party with claims or evidence at hearing after refusing to disclose them during discovery should be prevented or remedied regardless of which party is making affirmative claims.

The question of what remedy is appropriate is one that depends on the facts of the particular case; the proper remedy is one that is designed to do no more than to prevent unnecessary prejudice to one party. *SEC v. Graystone Nash*, 25 F.3d 187, 192 (3d Cir. 1994). Here, the circumstances are distinguishable from those in *Kitco of Nevada, Inc.*, 612 F.Supp 1282, 1291, in which the defendant invoked his Fifth Amendment privilege only as to certain areas of inquiry in response to questions posed during the course of his deposition, the defendant offered to waive the privilege after close of the grand jury investigation, and in which the court was considering a motion filed during the trial to bar testimony. The court in that case acknowledged that “the Federal Rules of Civil Procedure aim to prevent surprise, prejudice and perjury by ensuring full and fair mutual discovery before trial,” and, additionally, that a “court has the inherent power to monitor whether the assertion of a privilege causes unfair prejudice to the opposing litigant.” *Id.* Nonetheless, the court found that since all that was at issue was the testimony of the defendant regarding factual information obtainable by the plaintiff from other sources through the discovery process, and that the plaintiff had not been completely deprived of discovery from the defendant, the SEC would not be unfairly surprised by the introduction of such testimony, and thus, a preclusion order was not necessary. *Id.*

In contrast to the situation in *Kitco*, Mr. Geisen has broadly invoked his Fifth Amendment privilege and declined to provide any information concerning his potential defenses. Thus,

¹⁰ Geisen Opposition at 12, *citing*, *United States v. Certain Real Property and Premises Known as: 4033-4055 5th Ave., Brooklyn, NY*, 55 F.3d 78 (2d Cir. 1995); *United States v. Sixty Thousand Dollars in United States Currency*, 763 F. Supp. 909 (E.D. Mich. 1991); *United States v. Eight Thousand Eight Hundred and Fifty Dollars in United States Currency*, 461 U.S. 555 (1983); *United States v. Parcels of Land*, 903 F.2d 36 (1st Cir. 1990).

rather than waiting until hearing, the Staff is seeking a preemptive order with the intention of placing Mr. Geisen on notice that he must decide, reasonably in advance of the hearing, whether to waive or disavow his Fifth Amendment privilege. This remedy is reasonable under the circumstances and necessary to prevent prejudice to the Staff.

The Staff does not contest that factual information denied to the Staff due to Mr. Geisen's invocation of the Fifth Amendment privilege may already be in the Staff's possession, but that fact should not relieve Mr. Geisen from complying with a legitimate and fundamental aim of discovery, the disclosure of his claims, contentions, and defenses. It is important that a party not only disclose the bare facts but also the manner in which those facts are used to develop a claim or defense. It would be manifestly unfair to allow Mr. Geisen to withhold this information until the hearing on the theory that the Staff should be able to anticipate and prepare to respond to every potential defense he could conceivably present.

For these reasons, this case presents a situation most akin to that in *SEC v. Cymaticolor Corp.*, 106 F.R.D. 545, 549-50 (S.D.N.Y. 1985), in which the court held that the defendant, having broadly invoked the Fifth Amendment privilege as to his contentions and defenses, (including the factual and evidentiary underpinnings for those contentions and defenses), should be denied from introducing "any matter relating to the factual bases for his denials and defenses as to which he has asserted his fifth amendment rights." In its analysis, the court noted that "one of the purposes of discovery [] is to ascertain the position of the adverse party on the controverted issues," in a civil proceeding. *Id.* at 549 (citing *Baim & Blank, Inc. v. Philco Distributors, Inc.*, 25 F.R.D. 86, 87 (E.D.N.Y. 1957)). Correspondingly, regarding this purpose of discovery, "it is irrelevant that the party seeking discovery already knows facts as to which he seeks discovery." *Id.* Thus, in response to defendant's argument that the scope of the preclusion order should be limited to that factual evidence not already in possession of the SEC nor available from other discoverable sources, the court stated "while the limited preclusion

order would eliminate surprise regarding the existence of the evidence, surprise may still occur regarding the defendant's theory and use of the evidence." *Id.*

Further, the court noted that if the SEC were privy to the defendant's claims and defenses, "it is likely that the SEC will pursue different avenues of discovery depending on [the defendant's] decision." *Id.* at 550. Recognizing that forcing the SEC to proceed with the discovery process, without any knowledge of the defendant's claims or defenses, would have a definite impact on the careful balance of the discovery process in the case, *id.* at 550, the court held that a preclusion order, as proposed by the SEC, was appropriate and necessary to prevent unfair prejudice to the SEC. *Id.* at 549-50.

As in *Cymaticolor*, the Staff would be deprived of any practicable means of tailoring or guiding the further course of the discovery process without any knowledge of Mr. Geisen's claims, contentions, or defenses. For example, the Staff would not be able to effectively use the deposition process to test and evaluate any of Mr. Geisen's claims and defenses, as Mr. Geisen can of the elements of the NRC Staff's case. Thus, the Staff is asking only that Mr. Geisen determine now, during discovery, to disclose the information he expects to present at hearing, so as to ensure that he cannot withhold information responsive to the Staff's discovery request only to decide on the eve of the hearing that the information will be presented to the Board. This would be fundamentally unfair to the Staff and violate the basic principles of discovery in civil proceedings. The Staff is not asking the Board to restrict Mr. Geisen's Fifth Amendment rights but only to issue an Order necessary to ensure that the Staff is not unfairly surprised at hearing by a decision to disclose information or positions previously withheld from the Staff during the course of discovery.

CONCLUSION

Based on the foregoing reasons, the Board should grant a stay of the proceeding until

the completion of the criminal case. Alternatively, the Board should issue an order precluding Mr. Geisen from presenting any defenses, claims or evidence not disclosed to the Staff during written discovery.

Respectfully submitted,

/RA by Lisa B. Clark/

Lisa B. Clark
Counsel for NRC Staff

Dated in Rockville, MD
this 6th day of November, 2006

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF REPLY TO OPPOSITION OF DAVID GEISEN TO NRC STAFF MOTION FOR STAY OF PROCEEDING OR IN THE ALTERNATIVE FOR A PRECLUSION ORDER" in the above captioned proceeding have been served on the following persons by deposit in the United States Mail; through deposit in the Nuclear Regulatory Commission internal mail system as indicated by an asterisk (*); and by electronic mail as indicated by a double asterisk (**) on this 6th day of November, 2006.

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