RAS 12518

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	:	
	:	**Docket No. IA-05-052**
	:	
	:	**ASLBP No. 06-845-01-EA**
	:	
DAVID GEISEN	:	

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

> At the beginning of this year, having completed a several-year-long investigation, the NRC Staff issued an immediately-effective Enforcement Order to David Geisen, suspending him from any work in the regulated nuclear industry for five years, based on assertedly misleading reports he had filed in late 2001 while an employee of the Davis-Besse Nuclear Power Station in northwestern Ohio. The Staff's Order caused the termination of the work Mr. Geisen was then performing in the industry and the interruption of his chosen career. Memorandum and Order, LBP-06-13, at 1.

So began this Board's May 19, 2006 Order ("Order") denying the NRC Staff's ("Staff") Motion to Hold the Proceeding in Abeyance ("First Motion"). The Order, which held that "the balance of the factors ... [weighed] overwhelmingly against granting the requested delay and in favor of moving forward," Order at 3, followed extensive briefing by the parties and a three-hour hearing before the Board on April 11, 2006. It triggered an appeal by the Staff to the Nuclear Regulatory Commission ("Second Motion") that rehashed the arguments the Board rejected in the first instance and argued the Board committed reversible error by finding that Mr. Geisen's constitutional rights trumped the conjectural prejudice predicted by the Staff. The Commission also rejected the Staff's arguments and denied the motion for interlocutory review and a stay. Memorandum and Order, CLI-06-19, July 26, 2006.

Now, when the exact events that the Staff predicted would occur, Mr. Geisen conceded could occur, and this Board considered might likely occur have *in fact* occurred, the Staff returns with a Motion for Stay of Proceeding or in the Alternative for a Preclusion Order ("Third Motion") seeking the stay of a proceeding that it initiated with virtually identical arguments regarding prejudice. This request, like the others, should be denied.

I. THE STAFF IS NOT ENTITLED TO A STAY.

The Staff's core argument in the this motion is that Mr. Geisen's invocation of his Fifth Amendment rights should cause the Board to revisit and reverse its prior analysis of Commission and judicial precedents that established the framework for the Order -- namely, the factors set forth by the Commission in *Oncology Services Corp.*, CLI-93-17, 38 N.R.C. 44, 50 (1993). But that argument ignores the fact that the Order, and the Commission's review of the Order, assumed the possibility that Mr. Geisen would invoke his Constitutional right against self-incrimination -- an invocation necessitated by the coordination of the NRC and the DoJ in bringing concurrent actions against Mr. Geisen following a multi-year joint investigation. There is simply nothing new that the Staff presents to the Board in this third bite at the apple.[1]

In this Motion, the Staff concedes that the prospect of an invocation by Mr. Geisen was placed squarely before the Board:

> The First Stay Motion requested a stay of the civil enforcement proceeding pending the outcome of the criminal trial on several grounds, a principal one being the potential harm to both the criminal and civil enforcement proceedings

[1] Counsel recognizes that the Board, in a conference call on October 25, 2006, indicated that it did not require argument on whether the Staff was entitled to file a renewed request. This opposition should not be read to suggest that the Staff is procedurally barred from bringing this motion. But the Board conducted an exhaustive review of the legal precedents and faithfully applied that law to the facts of this case in the Order. And it did so with the recognition that Mr. Geisen might, if not in anticipation that he would, invoke his Fifth Amendment rights. In such a circumstance, while a renewed motion is not procedurally barred, it is without merit.

> from an imbalanced civil enforcement discovery process, in which Mr. Geisen would gain discovery from the Staff while asserting his privilege against self-incrimination to avoid complying with his own discovery obligations."

Third Motion at 2.

Review of the oral argument on April 11, 2006 demonstrates that the Board understood the Staff's arguments on this issue and considered the ramifications of Mr. Geisen's potential Fifth Amendment privilege in weighing the *Oncology* factors and considering the prejudice to the parties.

For example, Judge Hawkens inquired of counsel for the Staff whether allowing the civil case to go forward would work an unfair advantage for Mr. Geisen in the criminal proceeding and counsel responded "[t]he criminal proceeding is the most important. Essentially, Mr. Geisen would get information to which he is not entitled in the criminal proceeding and because of the Fifth Amendment privilege against self-incrimination, he would gain an advantage over the prosecution." April 11 Tr. at 11.

Judge Farrar later raised the raised the prospect of Mr. Geisen's invocation of his Fifth Amendment rights in addressing counsel for the Staff: "[y]ou were concerned about the exercise of the Fifth Amendment right. In a civil case or isn't it true that in a civil case unlike a criminal case the finder of fact can draw a negative inference from the exercise of the Fifth Amendment right?" *Id.* at 43. Judge Farrar went on to note, correctly, that the Board would be permitted, depending on the circumstances of the invocation, to draw an adverse inference should Mr. Geisen invoke his right to remain silent. *Id.*

When undersigned counsel addressed the Board, Judge Hawkens asked directly whether Mr. Geisen would invoke his Fifth Amendment rights, *id.* at 67, to which counsel responded:

> Well, at this point, we're not going to say that he isn't and that we have to take into account the circumstances not only here but before the criminal court and we

> understand the risks associated with the asserting the Fifth Amendment in a civil -- a non-criminal proceeding.

Id. at 67. A discussion then followed regarding the potential that the Board could draw an inference based upon such an invocation:

> MR. HIBEY: [The risk of invoking the right to silence being] [t]hat the Board will be asked to take an adverse [inference] and that the Board will be urged not to do so under the circumstances of this case because we think there is an ample basis for the court not to do so, but we understand the risk. .

Id. at 67-68

Judge Hawkens returned to the issue later and expressed his view that the staff's concern that "if ... the civil proceeding [went forward], [Geisen would] be entitled to expansive discovery and [the Staff], in turn may be confronted with a stone wall of claiming Fifth Amendment privilege" was not a "trivial one." *Id.* at 77.

The Order reflects the fact that the Board viewed Mr. Geisen's prospective invocation as neither a trivial issue nor a remote one. There are numerous references to the effect of an invocation of a defendant's Fifth Amendment rights generally and also to the effect of such an invocation in the context of this particular civil proceeding. Order at 13 n.45; 14; 34 n.109; 35 n.112. Notwithstanding the concerns attendant to such an invocation, including the specific concern that a "targeted individual[] [might] block the Government's reciprocal discovery by exercising [his] Fifth Amendment right to decline to provide testimony at deposition" *Id.* at 34 n. 109, the Board stated:

> Viewed in the light of the above analyses, the overall balance is driven by the overwhelming weight we attach to the first three factors -- in requesting an indefinite delay, the Government has failed to show concretely how, in actual practice, its interests will be harmed by having the hearing before us proceed in the ordinary course, while Mr. Geisen has pointed to the serious disruptions to his life that will continue until he has a chance to vindicate himself.

Id. at 40.

Finally, the Commission, in denying the Staff's Second Motion, also noted the Staff's arguments that Mr. Geisen could gain a "lopsided discovery advantage" by exercising his Fifth Amendment rights. *Id.* at 5 n.22. But the Commission held:

> "[C]onsistent with our usual deference to board's fact-based decisions," we see no reason in the record before us to disturb the Board's carefully-reasoned decision against holding this proceeding in abeyance.

CLI-06-19, at 3.

Given the fact that the Board amply considered the possibility and impact of Mr. Geisen's Fifth Amendment invocation in fashioning the Order, there is no reason to revisit the *Oncology* factors. The Staff, in this Motion, has recast its earlier arguments about the prejudice that it will suffer should this case go forward. But there are no new circumstances that would warrant the Board reversing its initial decision.

Moreover, the Staff again ignores a critical fact. The Staff, when it issued the "Order Prohibiting Involvement in NRC-Licensed Activities (Effective Immediately)" (the "Enforcement Order"), chose to make its employment prohibition against Mr. Geisen immediately effective despite the fact that throughout the NRC OI's sixteen-month investigation, **and the twenty-nine months that followed**, Mr. Geisen continued to work in the industry at Kewaunee Nuclear Power Station with the NRC's full knowledge. That work at Kewaunee continued a two decade career in the nuclear industry replete with commendations and advancement marred only by the allegations in the instant order. Yet thirty-nine months after the NRC interviewed Mr. Geisen and forty-six months after the discovery of the cavity in the RPV head at Davis-Besse, the Staff alleged that Mr. Geisen presented such an immediate threat to public safety that the Enforcement Order needed to be immediately effective. As detailed in Mr. Geisen's opposition to the Staff's First Motion and as discussed at length in the April 11 hearing,

Mr. Geisen was terminated from Kewanee almost instantly and has suffered immediate and significant harm. Order 3-4, 36-37; April 11 Tr. 4-11 at 54-55, 81-84.

In this motion, the Staff submits:

> [T]he decision to issue the Enforcement Order was made solely by the Staff and was in no way coordinated with, reviewed or otherwise decided in consultation with DOJ. Further, the Staff's decision was based solely upon a determination that immediate action was necessary to ensure safe operation of nuclear facilities which depends on the NRC's ability to rely on individuals to comply with regulatory requirements and provide complete and accurate information to licensees and the NRC. Fundamentally, the Staff's responsibility is to ensure the public health and safety, and the immediate effectiveness of the Order was not driven by any actions of DOJ or any desire to deprive Mr. Geisen of his livelihood.

Third Motion at 16 n.41. This statement strains credulity and is impeached by the timing of the issuance of the charging documents in the NRC and DoJ proceedings (the Enforcement Order is dated January 4, 2006 and the criminal indictment is dated January 19, 2006) and by the Staff's conduct since the issuance of its Enforcement Order.

The First Motion was filed at the behest of the Department of Justice. Order at 1. Despite the fact that the Department of Justice ignored a specific request from the Board to attend the hearing on that motion, *id.* at 42-44, the Staff filed the Second Motion with the Commission seeking review and reversal of the Board's Order -- again presumably at the request of the Department of Justice.

The Staff makes the remarkable assertion "[a]s the Staff anticipated in its initial stay motion, it is apparent that Mr. Geisen is using the NRC's discovery process to aid in his defense of the criminal proceeding by obtaining information he would not be entitled to under criminal discovery while preventing the Staff from obtaining any information necessary to prepare for hearing." Third Motion at 6-7. This is the latest in a string of Staff assertions, dating back to the

First Motion, that have no factual basis.[2] In fact, while Mr. Geisen has sought to move the Staff-initiated proceeding to an expedient conclusion, the Staff has continued to defer to the Department of Justice and has, in effect, positioned this case as a stalking horse for the on-going criminal prosecution. Recent discussions between the parties serve to illustrate this point.

The settlement of the Miller matter and the apparent progress toward settlement of the Moffitt matter suggested to undersigned counsel that the Staff might be willing to make independent decisions regarding the resolution of these enforcement actions. Concurrently, the Staff was suggesting during discussions between counsel regarding Mr. Geisen's invocation of his Fifth Amendment privilege that there was information not known to the Staff regarding Mr. Geisen that the Staff wished to explore through discovery.[3] Undersigned counsel thereupon made this highly unorthodox proposal: Mr. Geisen would be made available to Staff counsel for a complete, comprehensive, and no-limits interview at the Staff's control and direction. There were two conditions to Mr. Geisen's offer: (1) the interview was to be attended only by counsel for the parties to the NRC action, and (2) the contents of the interview had to be unrecorded,

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[2] In its first motion for a stay, the Staff argued that "the civil discovery process could lead to the tainting of evidence in the criminal case, corrupting it through intimidation of witnesses, opportunity for perjury, or tampering with records. (Aff. ¶ 6, Staff Motion at 6-7)." Order at 27. The Board found that the "Government's presentation on the 'tainting' claim is so lacking in any foundation that we are surprised that it was even put before us." *Id.* at 27-28. Specifically, when the Board asked, at Mr. Geisen's invitation, whether the Staff had "any evidence in the record that would suggest Mr. Geisen ever tried to shape or influence the testimony of others or that he was less than forthcoming in the interviews conducted by the NRC during the investigation," April 11 Tr. at 105, the Staff conceded that it did not. *Id.* at 106. When asked whether there was any evidence that Mr. Geisen had tried to intimidate witnesses, the answer from the Staff was, of course, no. *Id.* at 106. And the Board, after noting that Mr. Geisen has not been employed at Davis-Besse for several years, concluded that the Staff's suggestion that Mr. Geisen might tamper with records "borders on the specious." Order at 31.

[3] This assertion remains surprising to Mr. Geisen given the extensive nature of the OI investigation, the specific allegations (albeit inaccurate) about Mr. Geisen contained in the 231-page OI report, and the fact that the Staff filed the Enforcement Order which is replete with accusatory statements regarding Mr. Geisen and which do not betray any suggestion that critical facts remained unknown to the Staff at that point.

including no contemporaneous notes, and held in strict confidence, especially from the prosecutors. Undersigned counsel made clear that the existence of the criminal prosecution made those conditions mandatory. Counsel for the Staff indicated that the Staff would consider the proposal and that the NRC's Alternative Dispute Resolution (ADR) process contained confidentiality provisions designed to further settlement of administrative matters without compromise to parties' interests.

One week later, the Staff rejected Mr. Geisen's proposal and indicated that it would proceed to file the Third Motion. The reason the Staff cited for its rejection of the proposal was that the Department of Justice wanted access to any information received from Mr. Geisen and discouraged the Staff from entering into any type of confidentiality agreement -- an extraordinary proposition in an NRC matter initiated by the NRC Staff. But the Staff made clear that its resulting position was that it would not enter into discussions with Mr. Geisen along the lines proposed by Mr. Geisen's counsel and would not make any assurances regarding confidentiality in either the criminal matter or even in the NRC proceeding.

This proceeding is not and never has been an independent case. Rather, the Staff continues to act at the request of the Department of Justice. In the First Motion, the Staff predicted a party would use the civil enforcement proceeding to advance the criminal case. That was the pot calling the kettle black. In this motion, the Staff raises conservation of expenses in support of its request. Third Motion at 12. But the Staff's rejection of a meaningful opportunity to interview Mr. Geisen because of DoJ's objections and the renewal of a motion twice rejected put the lie to that notion as well. The Board should ignore the Staff's protestations given their own actions.

There is simply nothing that has occurred in this case since the Board issued the Order that should cause the Board to reconsider its exhaustively-researched and thoroughly-reasoned opinion. Mr. Geisen has, as anticipated, invoked his Constitutional right to silence. He has answered discovery requests up to the point at which those responses would implicate and infringe upon that right. He has not, in any way, abused the discovery process in the civil proceeding. And the balancing of interests remains "overwhelming[]," as it was when the Order was issued. Order at 3.

II. THE STAFF IS NOT FACTUALLY OR LEGALLY ENTITLED TO A PRECLUSION ORDER.

If denied an immediate stay of these proceedings, the Staff alternatively requests that the Board enter an order at this time precluding Mr. Geisen from introducing at some future, unscheduled hearing in this matter "*any* evidentiary or factual information, including contentions, claims, and defenses, which Mr. Geisen has not provided to the Staff as of the close of the written discovery process in this proceeding." *See* Third Motion at 9 n.23 (emphasis added); *see also id.* at 14 ("the Staff will seek to obtain adverse inferences against Mr. Geisen for those matters on which he refuses to answer the questions based on his invocation of his Fifth Amendment rights"); *id.* at 18-23. Such a preclusion order is not factually or legally supported, and would violate well-established constitutional principles that protect civil litigants who properly invoke their Fifth Amendment rights.

In civil litigation, a party may invoke his Fifth Amendment rights in response to written discovery requests. *United States v. Kordel*, 397 U.S. 1 (1970); *Nat'l Acceptance Co. of Am. v. Bathalter*, 705 F.2d 924 (7th Cir. 1983). Indeed, a failure to do so could result in the waiver of those Fifth Amendment rights. *Rogers v. United States*, 340 U.S. 367, 375, 378 (1951). The Federal Rules of Civil Procedure "provide no basis for inflicting sanctions when there is a valid

invocation of the Fifth Amendment" and "[a] refusal to respond to discovery in such circumstances is proper and does not justify the imposition of penalties." *S.E.C. v. Graystone Nash, Inc.*, 25 F.3d 187, 191 (3d Cir. 1994) (citing *Wehling v. Columbia Broadcasting Sys.*, 608 F.2d 1084, 1087 (5th Cir. 1979)); *accord S.E.C. v. Rehtorik*, 135 F.R.D. 204, 206 (S.D. Fla. 1991); *S.E.C. v. Thomas*, 116 F.R.D. 230, 233-34 (D. Utah 1987).

The Supreme Court has held that reliance on the Fifth Amendment in civil cases may, under certain circumstances, give rise to adverse inferences or other consequences against the party invoking the Fifth Amendment. *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976) (analyzing whether the drawing of an adverse inference from Fifth Amendment silence in a civil proceeding imposed too high a cost on the exercise of the privilege); *Doe v. Glanzer*, 232 F.3d 1258 (9th Cir. 2000) (observing that *Baxter* did not require that an adverse inference be drawn, but merely that it permitted an inference in appropriate circumstances). The Court has emphasized, however, that the Constitution precludes "the imposition of any sanction which makes assertion of the Fifth Amendment privilege 'costly'." *Spevack v. Klein*, 385 U.S. 511, 515 (1967) (*quoting Griffin v. California*, 380 U.S. 609, 614 (1965)) (plurality holds that an attorney's refusal, on Fifth Amendment grounds, to produce financial records and testify in a disciplinary proceeding was not a constitutionally permissible basis alone for his disbarment); *see also Lefkowitz v. Turley*, 414 U.S. 70 (1973) (held that government may not bar individual from participating in public contracts as a result of refusal, on self-incrimination grounds, to testify before grand jury); 8 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2018 at 286 (1994) ("To dismiss a party's action, or to grant an adverse judgment, or to foreclose him or her entirely from litigating an issue properly in the case, merely for claiming the constitutional privilege certainly makes the resort to the privilege too 'costly.' It is

difficult to believe that sanctions of this kind can be defended."). Moreover, an individual cannot be forced to waive his rights against self-incrimination by threats that his employment would otherwise be forfeited. *Garrity v. New Jersey*, 385 U.S. 493 (1967); *Lefkowitz v. Turley*, 414 U.S. 70 (1973); *Gardner v. Broderick*, 392 U.S. 273 (1968) (employment may not be explicitly conditioned on a waiver of the Fifth Amendment privilege).

It is clear that the party seeking discovery does not have an absolute or automatic entitlement to a sanction, particularly one that could result in the imposition of final relief against the party invoking Fifth Amendment protection. *See Wehling*, 608 F.2d at 1087; *Cho v. Holland*, 2006 U.S. Dist. LEXIS 76054, at *15 (N.D. Ill. Oct. 3, 2006) (*citing LaSalle Bank Lake View v. Seguban*, 54 F.3d 387, 390-92 (7th Cir. 1995) (a summary judgment must be supported by sufficient, valid evidence; it "may not be based directly, automatically, or solely on Fifth Amendment silence")); *National Acceptance Co. of Am. v. Bathalter*, 705 F.2d 924 (7th Cir. 1983) (assertion of the Fifth Amendment in answer to complaint does not constitute an admission of the allegations and does not relieve plaintiff of the need to adduce proof). Stated differently, a party cannot be found liable in a civil case solely because of reliance on the Fifth Amendment because it would effectively constitute a penalty tied to the exercise of the privilege. *Baxter*, 425 U.S. at 318; *Lefkowitz v. Cunningham*, 431 U.S. 801, 808 n.5 (1977). Beyond that principle, however, there is no bright-line test for deciding whether a proposed sanction or penalty for invocation of the Fifth Amendment during discovery in a civil case runs afoul of the Constitution. The majority of courts have employed a fact-intensive balancing test under which they have analyzed, among other things, the circumstances of the invocation, the impact on the party invoking Fifth Amendment protection, the nature and extent of any prejudice to the party

seeking discovery and whether "other, less burdensome, remedies would be an ineffective means of preventing unfairness to [the party seeking discovery]." *Wehling*, 608 F.2d at 1088.

The facts and circumstances relating to Mr. Geisen's assertion of his Fifth Amendment rights in response to certain of the Staff's written discovery responses do not provide any proper basis for entering an immediate preclusion order.

First, Mr. Geisen's invocation of his Fifth Amendment rights was entirely justified and proper, especially given the criminal case pending against him, notwithstanding the Staff's specious argument to the contrary. Third Motion at 6-7 n.16; *supra* at 6. As an initial matter, it is clear that had Mr. Geisen failed to assert his Fifth Amendment rights in the discovery context, he might have exposed himself to an argument that he had waived those rights both in this proceeding and in the criminal case. But on a deeper level, the coordination of the NRC and the DoJ in prosecuting these parallel proceedings, *see* Geisen Opposition to NRC Staff's Motion to Hold Proceeding in Abeyance, at 2-4, and the Staff's recent rejection of substantive settlement discussions, *supra* at 7, demonstrate that the risk that any statements might be used to provide a "link in the chain" of evidence offered against him, *Hoffman v. United States*, 341 U.S. 479 (1951), was neither remote nor unreasonably anticipated. *See Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177 (2004).

Moreover, this case does not involve the situation of a party asserting Fifth Amendment protection while, at the same time, pressing affirmative claims. Thus, the case is decidedly distinct from the collection of cases that the Staff cites in this motion in which a claimant of forfeitable property invoked his right to silence after lodging a claim for the property in question. *See, 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, the sole question before this Board will be whether the Staff, which has already debarred Mr. Geisen from work in the nuclear industry, had a sufficient factual and legal basis for issuing the January 2006 Order.

Second, the Staff's suggestion that it has been "denied any appreciable information from Mr. Geisen," Third Motion at 6, is misleading and the claim that it is unfairly prejudiced by Mr. Geisen's invocation of the Fifth Amendment is patently wrong. While Mr. Geisen did not answer the Staff's contention interrogatories, he did answer those interrogatories that did not implicate his Fifth Amendment rights. But more importantly, "the information balance [in this matter] is skewed heavily in favor of the Government." Order at 33. As the Board correctly noted:

> [H]ere the Government investigated for at least three years the circumstances surrounding an incident that was meticulously documented, in the files of both the NRC Staff and of the highly regulated nuclear plant operating organization under whose aegis the alleged offenses occurred (and which presumably had to make all its records available to the Government).
>
> As a result, the Government is in possession of some 19,000 documents related to the activities that underlie the civil and criminal charges, and has already interviewed the alleged perpetrators, as well as their co-employee witnesses, several times (and has not advised us that on any of those occasions the targets declined to answer any of the inquiries)...

Id. at 33 (internal citation omitted).Most important, with respect to the Staff's present claim of unfairness, is that Mr. Geisen himself has submitted to numerous interviews, including a 185-page, sworn deposition that was conducted by NRC investigators.[4] That comprehensive

[4] It is noteworthy in this regard that both Mr. Siemaszko and Mr. Cook were also interviewed by the same NRC investigators. In fact, Mr. Siemaszko was interviewed twice. Therefore, the Staff's complaints regarding its inability to obtain testimony from Mr. Cook and Mr. Siemaszko, Third Motion at 5, are

(footnote continued on next page)

interview, conducted close-in-time to the events in the case, provides the Staff with statements regarding "(1) Mr. Geisen's role in submitting information to the NRC regarding FENOC's responses to Bulletin 2001-01, (2) Mr. Geisen's participation in any meetings, discussions or communications relating to FENOC's responses to Bulletin 2001-01, and (3) any documents, photographs, and video recordings Mr. Geisen received and/or reviewed relating [to] the RPV head." Third Motion at 11. Because of the skewed information balance already established in this matter, the Staff's claims of prejudice are without merit.

The Third Circuit was confronted with a similar situation in the case of *S.E.C. v. Graystone Nash*, 25 F.3d 187 (3d Cir. 1994). There, an SEC enforcement action was initiated against stock brokers who were the targets of an on-going criminal investigation. *Graystone Nash*, 25 F.3d at 189. The brokers invoked their Fifth Amendment rights and refused to testify at depositions. *Id.* at 188. The district court, on motion of the plaintiff, barred the brokers from offering any evidence to contest the plaintiff's motion for summary judgment. *Id.* The Third Circuit, noting that the S.E.C. had "substantial evidence in addition to" the brokers' sworn testimony before the National Association of Securities Dealers and documents provided by the brokers, found that the District Court erred in granting such a broad preclusion order. *Id.* at 193. The Court stated:

> The preclusion sanction did not "level the playing field," but tilted it strongly in favor of the SEC. Courts must bear in mind that when the government is a party in a civil case and also controls the decision as to whether criminal proceedings will be initiated, special consideration must be given to the plight of the party asserting the Fifth Amendment.

Id. at 193-194.

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overstated. Moreover, those challenges, whatever their magnitude, do not result from any actions of Mr. Geisen and do not provide any basis for imposing a sanction on Mr. Geisen.

Graystone Nash cited with approval the case of *F.T.C. v. Kitco of Nevada Inc.*, 612 F.Supp. 1282 (D. Minn. 1985). In that case, the trial judge admitted the testimony of the defendant even though he had previously invoked the Fifth Amendment during discovery. *Kitco of Nevada*, 612 F. Supp. at 1291. The court held that a complete ban on defense testimony was not justified because the plaintiff Federal Trade Commission was not unfairly surprised or prejudiced by the Fifth Amendment assertion as it had "thoroughly prepared its case and seemed able to anticipate through other witnesses what [defendant's] testimony might be." *Id.* at 192.

Here, the Staff is able to prepare its own case and to anticipate Mr. Geisen's position based not only on the thousands of documents that it and the Department of Justice have compiled through their extensive investigation, but also based on Mr. Geisen's own sworn testimony. As the Board has noted, this is simply not a situation where a "a targeted criminal enterprise has been operating in secret for many years, and ... most of the critical evidence [is] in the possession and control of the criminal enterprise [which has] access to full discovery in a civil proceeding ... while ... block[ing] the Government's reciprocal discovery by exercising their Fifth Amendment right to decline to provide testimony at deposition... Order at 34 n.109. Indeed, as the Board has noted, this case is "nearly [its] polar opposite." *Id.*

The Staff suggests that the Board should ignore *Graystone Nash* and *Kitco of Nevada* because neither case "focused on unfair prejudice as a result of the unavailability of the invoking party's contentions, claims, and defenses." Third Motion at 21. It is clear that both reviewing courts made ample consideration of the potential prejudice caused to the plaintiffs by the defendants' invocations of the Fifth Amendment. *Graystone Nash*, 25 F.3d at 193 ("any allegation that the SEC was surprised by suddenly being confronted with new and unexpected evidence must be received with some caution"; "this appears to be a far cry from a case where

invocation of the privilege prevented the opposing party from obtaining the evidence it needed to prevail in the litigation"); *Kitco of Nevada*, 612 F. Supp. at 1291 ("[t]he court has inherent power to monitor whether the assertion of a privilege causes unfair prejudice to the opposing litigant,"; "...the FTC has not been unfairly surprised or prejudiced by [defendant's] assertion of privilege and subsequent decision to testify at trial.") The Staff's assertion is therefore difficult to understand. As is the Staff's statement that "it is more appropriate to focus on the case, *SEC v. Cymaticolor Corp.*" Third Motion at 21, a district court case that the Third Circuit declined to follow "because the court there did not perform the careful evaluation used in *Kitco.*" *Graystone Nash*, 25 F.3d at 192.

Moreover, the Staff's argument regarding prejudice ignores the fact that the Staff obtained its desired relief upon issuance of the Enforcement Order: the immediate debarment of Mr. Geisen. The purpose of this proceeding is to test the factual and legal basis for that self-help remedy. At this point in the case, Mr. Geisen faces an adversary that holds a significant informational advantage by virtue of a joint investigation and a three-year head start and faces that adversary having already been deprived of his livelihood. The Staff's complaints of prejudice arising from Mr. Geisen's invocation of his Fifth Amendment rights in such circumstances ring hollow.

Third, the Staff's request for a preclusion order would not obviate the Board's duty to make factual and legal determinations on issues as to which Mr. Geisen and his counsel would have a right to be heard at a hearing. *See S.E.C. v. Rehtorik*, 135 F.R.D. 204, 206 (S.D. Fla. 1991) ("[T]o forbid the defendant from submitting any evidence in rebuttal, when the SEC has submitted volumes of exhibits in support of its motion, would prove here too 'costly' a price for Rehtorik's legitimate assertion of privilege. The defendant has a legitimate right, free of court

imposed restrictions, to attack plaintiff's case by means of evidence other than his own privileged testimony."); *see* 8 Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2018 at 288-89 ("it does not necessarily follow that a party will be unable to prove his or her case or rebut the opponent's case without his or her own testimony"). The courts have made clear that no final decision in this case can be based on or result exclusively from Mr. Geisen's invocation of his Fifth Amendment rights. Granting NRC Staff the extraordinary relief they now seek would result in that error.

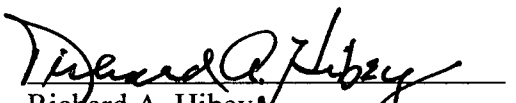
Finally, the prejudice to Mr. Geisen from imposing a preclusion order at this time would be extreme and would vastly outweigh whatever prejudice NRC Staff would suffer. An immediate preclusion order of the type sought by NRC Staff would amount to a *de facto* extension of the Enforcement Order, without any meaningful opportunity for Mr. Geisen to be heard on the merits of whether NRC Staff had a sufficient factual and legal basis for entering the Enforcement Order in the first instance. It would truly impose on Mr. Geisen an unconstitutional price for the exercise of his Fifth Amendment rights. *See Graystone Nash*, 25 F.2d at 191 ("dismissal of an action or entry of judgment as a sanction for a valid invocation of the privilege during discovery is improper...In like vein, a complete bar to presenting any evidence, from any source, that would in all practical effect amount to the entry of an adverse judgment, would be an inappropriate sanction.") (internal citations omitted).

CONCLUSION

For the foregoing reasons, the Staff's third request for a stay of the proceeding that it initiated should be denied. Simply, there has been no change since the Order that would warrant the Board reversing course in its evaluation of Mr. Geisen's due process right to an expedited hearing. Moreover, the Staff's alternate remedy of a preclusion order would unconstitutionally punish Mr. Geisen's invocation of his Fifth Amendment rights, especially given the fact that the Staff has enjoyed, and will continue to enjoy, an information imbalance by virtue of the extended and coordinated investigation that preceded the issuance of the Enforcement Order.

Fundamental fairness and due process mandate that the Staff's latest motion be denied.

Respectfully Submitted,



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Dated: November 2, 2006

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on the 2nd day of November, 2006, true and genuine copies of the foregoing were served on the following persons by electronic mail and, as indicated with an (*), first-class mail, postage prepaid:

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