March 13, 2007

Lawrence McDade, Chair
Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

E. Roy Hawkens
Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Peter S. Lam
Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

In the Matter of
ANDREW SIEMASZKO
Docket No. IA-05-021
ASLBP No. 05-839-02-EA

Dear Administrative Judges:

The Staff is wishes to inform the Board of the following developments in Siemaszko's criminal proceeding. On March 9, 2007 the federal district court ordered severance of the trial of Andrew Siemaszko from that of his co-defendants, David Geisen and Rodney Cook (Attachment 1). On March 12, 2007, the court ordered the joint trial of Messrs. Geisen and Cook to commence on June 5 (Attachment 2). As further provided, however, if the trial of Mr. Siemaszko does not commence on May 1 as ordered, the trial of Messrs. Geisen and Cook will commence on May 1.

Sincerely,

/RA by Mary C. Baty/

Mary C. Baty
Counsel for the NRC Staff

Enclosures: As stated

cc w/encls: Billie Pirner Garde
John M. Clifford
Sandy Shepherd

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

United States of America	:	Case No. 3:06 CR 712
v.	:	
David Geisen, et al.,	:	**ORDER**

The Court conducted a hearing in this matter on February 6, 2007, to address the pending motion to dismiss indictment (Docket Nos. 68 and 84) and to sever (Docket Nos. 69 and 93) together with other pretrial matters.

The background and facts relevant to this prosecution were fully set forth in the magistrate's report and recommendation filed on January 3, 2007 (Docket No.102). Consequently, the Court finds it unnecessary to repeat such background. In the report and recommendation, the magistrate granted defendants' motion for a hearing to permit full argument on the issues of whether the indictment is multiplicitous and whether the severance requests should be granted. After review of the well-written, multiple memoranda and the eloquent argument of counsel, the Court finds that the motion to dismiss indictment should be overruled in its entirety and that the severance requests should be granted.

MOTION TO DISMISS INDICTMENT

The fourteen-page indictment charges that defendants knowingly concealed and covered up by tricks, schemes and devices, material facts in a matter within the jurisdiction of the Executive

Branch of the U. S. Government (Count One) and willfully made or caused others to make and use false statements of material facts (Counts Two through Five) in violation of 18 U.S.C. §§ 1001 and 1002.

The indictment charges Defendants Geisen and Siemaszko in all five counts; however, Defendant Cook is charged in all counts except Count Four. The charges arise from defendants' relationship with the Davis-Besse Nuclear Power Station (Davis-Besse), a nuclear power plant located in Oak Harbor, Ohio.

In the motion to dismiss Counts Two through Five of the indictment, Defendants Geisen and Cook argue that such counts violate the rule against multiplicity in "two distinct ways" (Docket No. 68, p.9). Defendants argue that the same crime is charged in Count One and again charged in one of the subsequent counts. Defendants' second multiplicity argument is that Counts Two through Five are multiplicitous with each other. To support their argument, defendants claim that they will be forced to defend against one charge multiple times and further that the jury is likely to return inconsistent and conflicting verdicts. The government contends that defendants' multiplicity argument lacks merit because 18 U.S.C. § 1001 sets forth three separate crimes.

The parties have filed multiple memoranda on the issue of multiplicity and presented compelling arguments at the oral argument on February 6, 2007. After review of the briefs and the oral argument transcript, the Court is persuaded that Section 1001 delineates three separate but related crimes. In reaching this decision, the Court looks at the legislative intent supporting the statute and whether separate proof must be offered to meet the burden of proof. *U. S. v. Damrah*, 412 F.3d 618, 622 (6th 2005).

The legislative history accompanying the 1996 amendment to Section 1001 states in pertinent part: "Paragraphs (1), (2) and (3) of subsection (a) then delineate the *three separate* but

related offenses that Section 1001 criminalizes." H. R. REP. 104-680, 1996 U.S.C.C.A.N. 3935) (emphasis added).

In determining whether separate proofs must be offered to meet the burden of proof, the Court finds persuasive the government's argument that 18 U.S.C. § 1001 (a)(1) requires proof of a fact that Section 1001 (a) (3) does not.

Section 1001 of Title 18 criminalizes a person who knowingly and willfully-

> (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
> (2) makes any materially false, fictitious or fraudulent statement or representation; or
> (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious or fraudulent statement or entry; shall be fined under this title, imprisoned not more than 5 years or . . .

Counts Two through Five charge violations of 18 U.S.C. § 1001 (a) (3). The Sixth Circuit has determined that the elements of making a false statement under 18 U.S.C. § 1001 (a) are: "(1) the making of a statement; (2) the falsity for such statement; (3) knowledge of the falsity of the statement; (4) relevance of such statement to the function of a federal department or agency; (5) that the false statement was material." *United States v. Brown*, 151 F.3d 476, 484 (6th Cir. 1998). The statutory language of Section (a) (3) adds the additional element of using or making a "false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry. . . . "

Count One charges concealment under 18 U.S.C. § 1001 (a)(1) and proof of this count requires the government to prove: (1) the concealment of a fact; (2) through a trick, scheme, or device; (3) knowledge of the concealment; (4) relevance of such statement to the function of a federal department or agency; and (5) that the concealed fact was material.

After review of the required elements for prosecution under 18 U.S.C. § 1001 (a) (1) and (3),

the Court finds that the government must prove different facts under (a) (1): the concealment of a fact and the use of a trick, scheme or device to do so. Such facts are not required to prove the making or using of a "false writing or document" under Section 1001 (a) (3). In view of the finding that proof of different facts is required to establish the crimes charged in Counts One and Counts Two through Five, the first prong of the multiplicity argument lacks merit.

The second multiplicity argument is that Counts Two through Five are multiplicitous of each other. Such counts contend that Serial letters 2735, 2741, 2744 and 2745 were each separate false writings. Defendants argue that charging a single statement later repeated as a separate count is multiplicitous. The Court agrees with the government contention that each Serial letter constitutes a separate false writing. *U.S. v. Guzman*, 781 F2d 428, 432-33 (5th Cir 1986) *cert. denied* 106 S. Ct. 1798 (1986). Accordingly, the Court finds that Counts Two through Five are not multiplicitous of each other. Defendants' motion to dismiss Counts Two through Five is overruled.

MOTIONS TO SEVER

Defendants Geisen and Cook seek, pursuant to FED. R. CRIM. P. 14, to sever their trial from that of co-defendant Siemaszko. Defendant Siemaszko similarly seeks severance claiming that the entire defense of co-defendants Cook and Geisen is based upon the argument that if false or misleading information was provided to the government at all, Siemaszko was the source of such information. Defendants Geisen and Cook claim that Siemaszko has made numerous admissions of having intentionally provided false information to the Nuclear Regulatory Commission (NRC) and that he did so in concert with others at Davis-Besse, including Defendant Geisen.

During oral argument, counsel for Cook and Geisen characterized this case as presenting "a very unusual set of circumstances. . . .a clear *Bruton* issue where there are statements by one co-

defendant that is inculpatory and also names the other co-defendants" and defenses that are severely antagonistic. *Bruton v. United States*, 88 S. Ct. 1620 (1968) (Tr. Pg. 25).

This Court recognizes that the well-established law in this Circuit is that absent a serious risk of compromise to a specific trial right, individuals indicted together should be tried together. *U. S. v. Davis*, 170 F.3d 617 (6th Cir. 1999) *cert. denied*, 120 S. Ct. 151 (1999)*; U. S. v. Cobleigh*, 75 F. 3d 242, 248 (6th Cir. 1996) and *U. S. v. Paulino*, 935 F. 2d 739 (6th Cir. 1999), *cert. denied* 112 S. Ct. 315 (1991).

Defendants Cook and Geisen argue that in a joint trial, they would be deprived of the specific trial right to confront their accuser in the event that a confession of a co-defendant is admitted without the ability to cross-examine. Counsel for Geisen and Cook argue that several different kinds of statements by Defendant Siemaszko are likely to be presented at trial: 1) statements that specifically identify Geisen and Cook and allege that they committed illegal acts in connection with Defendant Siemaszko's admissions of his allegedly illegal acts and 2) allegations by Defendant Siemaszko that he was pressured into taking certain actions by management which will clearly implicate Geisen and Cook. If Defendant Siemaszko elects not to testify, Geisen and Cook argue that they will have no way to confront that evidence. This scenario, they contend, clearly presents a *Bruton* issue. In *Bruton v United States*, the U.S. Supreme Court held that a defendant's rights under the Confrontation Clause of the Sixth Amendment are violated when a non-testifying co-defendant's confession names the defendant as a participant in the crime, even if the jury is instructed to consider the confession only against the confessing co-defendant. At the hearing, counsel for Defendant Siemaszko confirmed that he has not decided whether or not to testify (Tr. Pg. 39). Counsel for Defendant Siemaszko argues that his defense is diametrically opposed to the

defense of Geisen and Cook and that without a separate trial, the cross-examination by each of the three defendants will "result in a free for all, one so messy that we will not be able to clean it up . . . " (Tr. Pg. 39). Additionally, defense counsel argued that government counsel had failed to submit satisfactory proposed redactions; however, on February 13, 2007, the government filed an example of a proposed redaction of one of Defendant Siemaszko's statements. Defendants filed further responses contending that the proposed redaction failed to protect defendants' rights under *Bruton* and created a misleading and unfair version of Defendant Siemaszko's statement (Docket Nos. 126, 127 and 131 at page 1).

On February 21, 2007, government counsel submitted proposed redactions to each defendant which it contends will comply with *Bruton*. Defendants disagree with the government's claims and provide specific examples of how the proposed reactions fail to provide *Bruton* protection because the redacted statements contain "numerous direct and implicit incriminating references" (Docket Nos. 135 and 136 at page 2).

In the Geisen-Cook response, counsel argues that Defendant Siemaszko's statements contain three types of facially incriminating references to them: specific references, references by title and group references (Docket No. 136). Defendants' counsel presents no argument regarding the redactions of their names; however, with regard to references by Siemaszko to Defendants Cook and Geisen by title as "managers" or "licensing" defendants present objections. Counsel argues that the jury will learn that Mr. Geisen's title was Manager Design Basis Engineering and Mr. Cook was a consultant hired specifically to assist Davis-Besse's Licensing managers; therefore, such references by Siemaszko will implicitly accuse Mr. Geisen and Mr. Cook. The third type of reference which counsel for Geisen-Cook points out is that of group references which appear throughout Mr.

Siemaszko's statements. In these references, Mr. Siemaszko makes accusations that "they knew a certain fact" or they took a certain action (Docket No. 136, page 4). It is defense counsel's position that introduction of statements containing the title and group references are vague and nonspecific. Defendants will be unable to cross-examine Defendant Siemaszko at a joint trial and the jury is likely to have the impression that Defendant was in fact incriminating his co-defendants.

Similarly, Defendant Siemaszko contends that the government's proposed redactions create misleading and unfair versions of Defendant Geisen and Cook's factual recitations. In the absence of his ability to cross-examine Defendants Geisen and Cook, Defendant Siemaszko contends that his Sixth Amendment right will not be protected and that all three defendants will be deprived of their right to a fair trial.

The Court understands that the government intends to use the redacted "statements" rather than testimony to prove its case against all defendants which will deny defendants an opportunity for cross-examination. In attempting to address the *Bruton* issue, the government must confront the "rule of completeness" provision in FED. R. EVID. 106 which provides in pertinent part:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part of any other writing or recorded statement which ought in fairness to be considered contemporaneously.

The Court agrees with defendants' counsel that it appears that the proposed redactions are unlikely to provide full protection of the defendants' constitutional and trial rights. The Court, while recognizing the cost to the government and inconvenience to witnesses if separate trials are scheduled, finds that separate trials are required in order to guarantee a fair trial for each defendant. Accordingly, the trial of Defendants Geisen and Cook will be severed from that of Defendant Siemaszko. The Siemaszko case will proceed to trial on **Tuesday, May 1, 2007, at 9:00 a.m.** with

the Honorable David A. Katz and is expected to last approximately four weeks. Empanelment by the Magistrate Judge Vernelis K. Armstrong will begin on **Monday, April 30, 2007, at 9:00 a.m.** A telephone status conference will be held at **2:30 on March 26. 2007**, to discuss other trial matters.

So ordered.

/s/ David A. Katz
Sr. United States District Judge

Dated: 3/09/07

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

United States of America	:	Case No. 3:06 CR 712
v.	:	
David Geisen, et al.,	:	**ORDER**

The Court has previously ordered a separate trial for Defendant David Siemaszko (Docket No. 137) to be immediately followed by the joint trial of Defendants Geisen and Cook. Trial of Defendant Siemaszko will commence on May l, 2007, with empanelment on April 30, 2007, before the magistrate judge. The joint trial of Defendants Geisen and Cook will follow on June 5, 2007 with jury empanelment on June 4, 2007 at 9:00 before the magistrate judge. If the trial of Defendant Siemaszko does not go forward as scheduled, the joint trial date of Geisen and Cook will be advanced and will commence on May 1, 2007.

The plea deadline for all defendants is April 9, 2007. In the event a plea of guilty is entered after the deadline, the Court may withhold the granting of acceptance of responsibility.

The Court will address further issues regarding trial during the telephone status conference scheduled for March 26, 2007 at 2:30 p.m.

So Ordered.

/s/ David A. Katz
Sr. United States District Judge

Dated: 03/12/07