



The Staff again concedes “it is not possible to definitively answer the question of whether collateral estoppel under the deliberate ignorance instruction can be applied to this proceeding.” Staff Response at 3. Yet, it continues to push for application of the discretionary doctrine to preclude the Board’s consideration of the evidence it heard from December 8-12, 2008 in favor of its construction of what the criminal jury *might* have concluded. *See* Staff Motion at 14-21. The Staff’s speculation ignores the jury’s post-trial comments about what they actually concluded, *see* Opposition at 4 n.1, and fails to adequately explain the jury’s acquittal of Mr. Geisen on Count 5.<sup>1</sup> It also fails to acknowledge the significance of alternative verdicts where one verdict would be inconsistent with the standard to be applied in this case.

Those two facts simply cannot be ignored. Collateral estoppel is a rule of efficiency properly applied when circumstances establish that identical issues to those relevant to a second proceeding were *actually* resolved in an earlier instance by a *rational-acting* jury. With that background, we will address the Board’s questions.

The first and second questions in the Board’s email address specific language in the instruction Mr. Geisen’s jury was given. It is important to take the instruction as a whole, because it is the impact of the entire instruction that has led Courts of Appeal across the country to caution against use of the instruction except in the “rare instance where there is significant

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<sup>1</sup> Count 5 of the Indictment related to Serial Letter 2745, which presented Davis-Besse’s Probabilistic Risk Assessment (PRA). The Letter was submitted two days after Serial Letter 2744 and was based largely upon the work of Rod Cook. The Staff invented various reasons for the acquittal, including the amazing suggestion that “the listed statement [“during 10RFO, in spring of 1996, the entire head was visible so 100% of the CRDM nozzles were inspected with the exception of four nozzles in the center of the head”] fell under the heading “assumptions” and it is most likely that the jury treated the statement as something other than a factual assertion.” Staff Motion at 20. It ignored the most likely reason, and the one consistent with the juror’s actual comments: the jury believed that by the time Serial Letters 2744 and 2745 were filed, Mr. Geisen *should have doubted* Mr. Siemaszko’s reliability (even if he in fact did not) but had no reason to question Mr. Cook’s.

evidence of deliberate ignorance.” *United States v. Skilling*, 2009 U.S. App. LEXIS 204, \*45 (5th Cir. Tex. January 6, 2009).

i. Whether a conviction under the deliberate ignorance instruction satisfies the NRC Staff’s deliberate misconduct standard, because pursuant to the instruction, a conviction would indicate that the jury found the defendant “knew that the submissions and presentations to the NRC concealed material facts or included false statements.”

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The language “knew that the submissions and presentations to the NRC concealed material facts or included false statements” cited in the Board’s first question appears as part of a larger sentence: “If you are convinced that [Geisen] deliberately ignored a high probability that the submissions and presentations to the NRC concealed material facts or included false statements, *then you may find that* he knew that the submissions and presentations to the NRC concealed material facts or included false statements.” Tr. 10/23/07 at 2338-39 (emphasis added). The instruction, in other words, allowed the jury to find the knowledge element satisfied solely from evidence of an effort to deliberately ignore evidence of a statement’s falsity. It did not instruct the jury that it was required to find *actual* knowledge of the falsity, and it would be improper for the Board to read the second half of a sentence alone as support for an argument that the instruction indicated that the jury found actual knowledge.

Judge Katz recognized this significant potential for misuse when he worried aloud that the instruction could cause jurors to convict merely by finding the defendants “[were] deliberately indifferent to their responsibilities . . . .” *Id.* at p. 2297. While he ignored that concern in giving the instruction, it is exactly the same concern articulated by the Sixth and Eleventh Circuits, *United States v. Springer*, 262 Fed. Appx. 703, 706; 2008 U.S. App. LEXIS 2758 (6<sup>th</sup> Cir. 2008)(unpublished opinion)(instruction improperly invites the jury to “convict on a basis akin to negligence: that the defendant should have known that the conduct was illegal”) quoting *United States v. Rivera*, 926 F.2d 1564, 1571 (11th Cir. 1991), the Eighth Circuit, *United*

*States v. Barnhard*, 979 F.2d 647 (8th Cir. 1992)(instruction can “reliev[e] the government of its constitutional obligation to prove the defendant’s knowledge beyond a reasonable doubt”), and the Fifth Circuit, *United States v. Lara-Velasquez*, 919 F.2d 946, 951 (5<sup>th</sup> Cir. 1990)(“[b]ecause the instruction permits a jury to convict a defendant without a finding that the defendant was actually aware of the existence of illegal conduct, the deliberate ignorance instruction poses the risk that a jury might convict the defendant on a lesser negligence standard - the defendant should have been aware of the illegal conduct.”)

Last month, the Fifth Circuit returned to this issue, and wrote that “[t]he concern is that once a jury learns that it can convict a defendant despite evidence of a lack of knowledge, it will be misled into thinking that it can convict on negligent or reckless ignorance rather than intentional ignorance.” *Skilling*, 2009 U.S. App. LEXIS 204 at \* 44-45.

These articulated concerns are grounded in the same ambiguity captured by the Board’s first question – what is the relationship between knowledge and deliberate ignorance? Deliberate ignorance has been described as “a half-step between the highest mens rea standard of “knowledge” and the lower standards of “recklessness” and “negligence.” *Id.* at \*43. It has been described as a concept logically distinct from actual knowledge. *United States v. de Francisco-Lopez*, 939 F.2d 1405, 1410 (10th Cir. 1991) (“[i]f evidence proves the defendant actually knew an operant fact, the same evidence could not also prove he was ignorant of that fact. Logic simply defies that result.”) But whatever it is, it is not actual knowledge. The sentence cited by the Board in question (i), read in its entirety, does not indicate that the jury would have found actual knowledge if it convicted under the deliberate ignorance instruction. Therefore, the answer to the first question is no.

ii. Whether a conviction under the deliberate ignorance instruction precludes the conclusion that the jury found the defendant guilty of careless disregard, because

the instruction stated that “carelessness, or negligence, or foolishness is not enough to convict,” but rather the jury must be “convinced beyond a reasonable doubt that the defendant was aware of a high probability that the submissions and presentations to the NRC concealed material facts or included false statements.” Cf. *United States v. Mari*, 47 F.3d 782, 785-86 (6th Cir. 1995) (holding that the express terms of the Sixth Circuit Pattern Jury Instruction foreclose the possibility that a jury will convict a defendant based on what he should have known rather than on what he did know).

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In its second question, the Board references the cautionary sentence regarding “carelessness, negligence, or foolishness” not being enough to convict. However, courts have recognized the inherent limitations of such cautionary clauses. *Cleveland v. Peter Kiewit Sons' Co.*, 624 F.2d 749, 759 (6th Cir. 1980) (“the bench and bar are both aware that cautionary instructions are effective only up to a certain point.”) This has been specifically noted in connection with the deliberate ignorance instruction. *United States v. Barnhard*, 979 F.2d at 651 (“despite the instruction’s cautionary disclaimer, there is a ‘possibility that the jury will be led to employ a negligence standard and convict a defendant on the impermissible ground that he should have known [an illegal act] was taking place.’”) The Sixth Circuit held the instruction, including that exact same cautionary language used in Mr. Geisen’s case “should be used with caution, because of the possibility that ‘juries will convict on a basis akin to a standard of negligence.’” *United States v. Ramos*, 1994 U.S.App.LEXIS 28711, \*9 (6th Cir. 1994)(unpublished opinion), see also *Springer*, 262 Fed. Appx. at 706 (instruction should be used with caution to avoid the possibility that the jury convict on the lesser standard that the defendant should have known his conduct was illegal). Given those expressions, the Board should not give particular credence to the Sixth Circuit’s suggestion in *Mari* that the pattern instructions “foreclose[] the possibility” a jury could do exactly as the Circuit itself said juries could do in *Ramos* and *Springer*. There can be little question that inclusion of the last sentence

in the instruction does not, as a theoretical matter, preclude the possibility that a jury would convict on a “should have known” standard.

In this case, the Board does not need to delve into the theoretical. The actual jury spoke to its process, *see* Opposition at 4 n.1, and the Board was afforded a first-hand look at how a jury could reach that conclusion. As the Staff did during the evidentiary hearing before the Board, the Department of Justice introduced extensive evidence about Davis-Besse’s failures, even those unrelated to Mr. Geisen,<sup>2</sup> the unreliability of subordinates Mr. Geisen relied upon,<sup>3</sup> and Mr. Geisen’s role as a manager. Given the abundant evidence of what Mr. Geisen, as a manager, “should have known,” it is not surprising the jury utilized this instruction to convict notwithstanding the cautionary clause at the end of the instruction. The answer to the Board’s second question is no.

iii. Even assuming that a conviction under the Sixth Circuit’s deliberate indifference instruction would provide a basis for collateral estoppel, whether the NRC Staff has waived such an argument based on its representation (mentioned above) in its November 17 Motion. But cf. Brief of David C. Geisen in Response to Board’s Order Dated June 30, 2008 at 4 (July 7, 2008) (“While [Mr. Geisen] does not concede the issue of whether he knowingly made false statements to the NRC, he does recognize that the conviction removes that issue from the Board’s consideration.”)

For the reasons set forth above, as well as those articulated in the Opposition, application of collateral estoppel would be unjustified and unfair in this situation. The Board has raised the issue of “waiver” given the Staff’s acknowledgement that the deliberate ignorance instruction

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<sup>2</sup> For example, the repeated postponement of the modification to cut service structure holes (decisions in which Mr. Geisen did not participate), Mr. Goyal’s drafting and routing of condition report 96-0551 regarding the 1996 inspection (which Mr. Geisen did not see), and the plant’s disposition of condition reports concerning the 1998 inspection (of which Mr. Geisen was unaware).

<sup>3</sup> Recall testimony of Mr. Holmberg about the wide variance between the results of his review and that of Mr. Siemaszko and testimony about how Mr. Siemaszko’s 2000 cleaning was not successful notwithstanding his statements to the contrary.

given to Mr. Geisen's criminal jury "does not meet the NRC's deliberate misconduct standard, and instead would be classified as careless disregard." Staff Motion at 23. The Staff is correct in their conclusion, given the requirement on 10 C.F.R. § 50.5(c) of an intentional act.

Moreover, in its last filing, the Staff concedes "it is not possible to definitively answer the question of whether collateral estoppel under the deliberate ignorance instruction can be applied to this proceeding." Staff Response at 3. Accordingly, the Board does not need to determine whether the Staff has "waived" an argument they are not making.<sup>4</sup>

#### Due Process/Arbitrariness.

The Board heard evidence at the hearing about the Staff's investigation of the facts and its decision to debar Mr. Geisen. The evidence proved the manner in which those processes were carried out to be devoid of due process in terms of the integrity of the fact-finding on a half-baked set of facts and on the "holistic" decision-making here that is nothing less than a joke.

In Mr. Geisen's Opposition to the NRC Staff's Motion to Hold the Proceeding in Abeyance (March 30, 2006), Mr. Geisen set forth a detailed analysis of the due process implications of the Staff's imposition of an immediately-effective Order. Each of the concerns discussed in that Motion were implicated by the Enforcement Panel's failure to grant Mr. Geisen the basic opportunity to be heard before a penalty was imposed. Each was exacerbated by the Staff's repeated requests (and ultimate success on the final request) to stay the proceeding it

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<sup>4</sup> In a "cf" to the third question, the Board noted a statement made by undersigned counsel in a July 2008 response. The statement was made before the issue had been fully researched and briefed, and was proven, by that later research, to be incorrect. Mr. Geisen's position on collateral estoppel is set forth in the Opposition and this Response. The Staff indicated in its Response that "it is not necessary to address the question of waiver by either the Staff or Mr. Geisen," Response at 4, and we agree.

initiated. At the hearing, Mr. Geisen testified at length about the impact that the Order had on his personal life and professional career. Tr. 1778-1784. That testimony underscores the reason the Supreme Court developed the due process jurisprudence through cases such as *Mathews* and *Goldberg*. The testimony at the hearing underscored the ways in the Enforcement Panel ignored those interests.

True, the Board did not set out to review the factual substantiality of the investigation or the rationality of the enforcement panel decision. Indeed, the case was to be decided on evidence presented to the Board before Messrs. O'Brien and Luehman took the stand. But their testimony, sought by the Board to assist its deliberations in the event it found Mr. Geisen guilty of knowing and intentional misconduct, is so inextricably enmeshed with the evidence, it cannot be ignored when deliberating on the seminal question of guilt. Due Process concerns impact the question of guilt even before punishment can be weighed.

The Staff offers no explanation for what was learned through Mr. O'Brien's testimony:

- a. a woefully inadequate OI investigation that left gaping holes in pursuit of the question of what Mr. Geisen knew and when;
- b. OI's complete failure to follow up on the Martin interview of Mr. Geisen with Mr. Geisen; the same Martin whose own interview was deemed by OI to be of no value;
- c. OI's complete failure to investigate Dale Miller's "wide open" written notes;
- d. The Enforcement Panel's complete lack of communication with those OI agents who did the investigation; and
- e. The Panel's failure to elicit from Mr. Geisen his evidence on these issues.

What good are the due process articulations of the debarment regulations if they have been perverted by a case that was poorly prepared, not properly vetted, and then put off for two

years? The “holism”<sup>5</sup> mouthed by Mr. O’Brien means nothing. Applied here, it is a sham designed to avoid the realities of the case. For where there is something inconsistent with the conclusion to debar immediately, he does not factor it into the parts comprising the greater reality, meaning, “holistically,” the universe of *all* the facts. It is merely disregarded in his testimony by the disengaging mantra, “I’d have to look into it.” *See* for example, Tr. 2053: 15 to 2054: 2; Tr. 2084: 8-14; Tr. 2165: 20 to 2167: 2; 2184: 4-20.

#### Oral Argument

In his final Brief, Mr. Geisen requested post-briefing oral arguments. The Staff has opposed this request, citing “additional and unnecessary steps in the adjudicatory process.” That is an ironic objection, given the Staff’s filing of stay motions that delayed the commencement of the trial for more than eighteen months.

Mr. Geisen sought argument out of concern that the Staff would misstate the factual record in its final brief and the Reply validates that concern. The Reply contains numerous assertions remarkable for their lack of good-faith basis in the record. Some are recycled, such as the disingenuous suggestion that Mr. Geisen “concedes that he told the NRC that 100% of the head had been inspected,” Reply at 15, when the notes of Mr. Miller, Mr. Hiser and Mr. Holmberg all reflect that Mr. Geisen qualified that term with the disclosure that “some” (Miller) or “5-6” (Hiser, Holmberg) of the nozzles were precluded from inspection by flange leakage. Others are entirely new, such as the suggestion that Mr. Geisen was referring to an August 15, 2001 meeting *he did not attend* when he allegedly told Jack Martin he viewed videotapes “while

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<sup>5</sup> Holism: the theory that reality is made up of organic or unified wholes greater than the sum of their parts; Holistic: emphasizes the importance of the whole and the interdependence of its parts; concerned with wholes rather than with analysis or dissection into parts. Webster’s II New College Dictionary, 2001. Holistic: a system of therapeutics, especially one considered outside the mainstream of scientific medicine. Webster’s Encyclopedic Unabridged Dictionary, 2001.

preparing for the NRC *interactions*.”<sup>6</sup> Reply at 8-9. Still others are simply baffling, such as the suggestion that Mr. Geisen has presented a “constantly shifting story” by claiming his representations to the NRC were premised upon inaccurate information provided by Mr. Siemaszko.<sup>7</sup> Reply at 12-13. The Staff’s various arguments distort the factual record. If the Board has any questions about how to analyze the evidence, Mr. Geisen should be afforded a final opportunity to engage the Board to fairly resolve them.

Respectfully Submitted,

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<sup>6</sup> Not only does the evidence show that Mr. Geisen did not attend that meeting, the Board’s questions following the Staff’s introduction of the exhibit related to it (Staff Ex. 40) established that Mr. Geisen was not working on the Bulletin response at the time of the meeting and that Mr. Goyal, who attended the meeting, did not speak to Mr. Geisen about the meeting. It is puzzling, at best, for the Staff to suggest Mr. Geisen might have been referring to this meeting in his conversation with Mr. Martin.

<sup>7</sup> This argument appears to be based on a straw man erected by the Staff – that Mr. Geisen believed 1998 and 2000 together provided a view of all nozzles based upon a conversation with Mr. Siemaszko. Of course, Mr. Geisen never said such a thing. He said his belief was based, in part, on Serial Letter 2731 (written in relevant part by Mr. Siemaszko), which represented that a review of the 1998 and 2000 inspections, “[s]ince May 2001...re-confirm[ed] the indications of boron leakage...were not indicative of RPV nozzle leakage.” See, Post-Trial Brief of David Geisen with Proposed Findings of Fact and Conclusions of Law (January 30, 2009) at 28, ¶ 82-85.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that, on the 9th day of February, 2009, 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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