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UNITED STATES OF AMERICA

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

MISSOULA DIVISION

UNITED STATES OF AMERICA, **Plaintiff,** **vs.** **W.R. GRACE, HENRY A. ESCHENBACH, JACK W. WOLTER, WILLIAM J. McCAIG, ROBERT J. BETTACCHI, O. MARIO FAVORITO, ROBERT C. WALSH,** **Defendants.**	**CR 05-07-M-DWM** **GOVERNMENT'S TRIAL BRIEF**

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Comes now the United States, by and through Kris A. McLean, Assistant United States Attorney for the State and District of Montana; Kevin M. Cassidy, Trial Attorney, Environmental Crimes Section, United States Department of Justice; and Eric E. Nelson, Special Assistant U.S. Attorney for the State and District of Montana; and pursuant to this Court's order, files the Government's trial brief.

I. INTRODUCTION

The evidence at trial will show that the defendants in this case knew the dangers of the asbestos they released into the Libby, Montana air, yet they concealed the dangers, putting local residents at risk while enriching themselves. From 1963 through 1992, W.R. Grace & Company ("Grace") mined vermiculite ore at a site seven miles outside Libby, and processed it at sites within Libby itself as well as a few miles down the Kootenai River. The vermiculite ore contained amphibole asbestos. Amphibole asbestos is a carcinogen and highly dangerous when inhaled, as it can trigger – after a latency period of many years – mesothelioma (cancer) and other asbestos-related diseases.

The Government expects to introduce evidence that the defendants knew that the ore they mined, the product they produced and sold, and the vermiculite they left behind in Libby unavoidably released asbestos when disturbed, and that they knew of the dangers posed by these releases. In fact, the defendants knew these hazards better than any

outsiders, because they had conducted their own, private studies, which Grace's upper-level managers carefully kept to themselves. And over many years, as the defendants concealed the known hazards of asbestos, they allowed vermiculite laced with asbestos to be spread throughout the town of Libby; indeed, they actively distributed it. They provided asbestos-contaminated mine tailings to build running tracks at local junior high and high schools, and to line an elementary school skating rink; they left piles of waste material containing asbestos where children were able to play in it; and they made asbestos-containing vermiculite available to individual local residents, who used it in their yards as soil conditioner. And tragically, in the mid-1990s, Grace sold and leased its former processing facilities – the Screening Plant and the Export Plant, both sites being thoroughly contaminated by asbestos – to local residents without informing them of the danger. The evidence will show that unsuspecting Libby residents, including children, lived, worked and played on those asbestos-contaminated properties for years, disturbing the vermiculite left there by Grace and releasing asbestos, until the EPA clean-up began in 2000.

II. GOVERNMENT'S EXPECTED PROOF AND POTENTIAL EVIDENTIARY ISSUES

A. Count One: Conspiracy (18 U.S.C. § 371)

Count One of the Superseding Indictment charges Defendants Grace, Eschenbach, Wolter, McCaig, Bettacchi, Favorito, and Walsh

with, conspiring to knowingly release the hazardous air pollutant asbestos into the ambient air, knowing that they thereby placed another person in imminent danger of death or serious bodily harm; and conspiring to defraud the United States by misleading Government officials about the hazards of their operation, and otherwise obstructing EPA clean-up efforts. Title 18, United States Code, Section 371 makes it a crime if "two or more persons conspire either to commit any offense against the United States, or to defraud the United States or any agency thereof," and one or more such persons commits an overt act to "effect the object of the conspiracy." Accordingly, to prove this count the Government must prove at trial that:

(1) During the relevant time period, there was an agreement between two or more persons with two objects (described above);

(2) The defendant knowingly and voluntarily joined the conspiracy; and

(3) A member of the conspiracy performed at least one of the overt acts described in the indictment for the purpose of advancing or helping either of the objects of the conspiracy.

See United States v. Alonso, 48 F.3d 1536, 1543 (9th Cir. 1995); *United States v. Caldwell*, 989 F.2d 1056, 1059 (9th Cir. 1993).

1. Government's Anticipated Evidence

Beginning in approximately 1976, the evidence will show that the defendants gained extensive knowledge of the hazardous nature of the asbestos contained in the vermiculite ore they mined. They learned about the hazards of inhaling this asbestos – which they called tremolite asbestos – in a host of ways, including by animal toxicological studies, epidemiological studies, several morbidity studies of their own employees, and review of medical and scientific literature. The defendants further learned that the asbestos contaminating their vermiculite was friable – meaning it released fibers into the air when disturbed. The defendants were concerned about the dangers the releases of asbestos posed, and for years attempted to bind the asbestos within the vermiculite using engineering controls they called "binders." The evidence will show that none of the binders were successful in controlling the release of asbestos that occurred when the vermiculite was disturbed.

Having learned of this asbestos's hazards, defendants concealed what they knew of the danger from a large number of people regularly exposed to it – including Grace employees and their families, Libby residents, and Grace customers. The defendants also concealed the danger from the EPA on multiple occasions, including in its TSCA 8(e) submissions and when the EPA response team arrived in Libby in 1999. By hiding the dangers of the asbestos, the defendants furthered their

business venture – making profits, avoiding liabilities, and avoiding shut-down of their operations – thereby enriching themselves.

In this context, the evidence will show that the defendants distributed asbestos-contaminated vermiculite to the Libby community, resulting in a multitude of ongoing asbestos releases into the ambient air. And, after Grace's Libby Mine shut down, the defendants sold and leased asbestos-contaminated real properties, withholding information about the dangers of the asbestos-laced vermiculite that the defendants knew to be on the properties. Thus the defendants, having painstakingly assessed the hazards of the asbestos in their vermiculite, concealed those dangers from other individuals exposed to the asbestos, and caused further exposure by widely dispersing asbestos-contaminated material without sharing information about the hazards posed by the material.

The Government expects to prove the conspiracy alleged in Count One through the introduction into evidence of many of the defendants' own documents. These documents will show the knowledge gained by the defendants of both the hazards of the asbestos in their vermiculite and its propensity to release when disturbed through normal handling, as well as the defendants' actions to keep this knowledge from the public and regulators. These documents will also demonstrate the consistent participation in the conspiracy of each of the conspirators. The Government will also introduce testimony by former Grace employees

that will corroborate evidence set forth in Grace's internal documents. Finally, current and former EPA and NIOSH employees will testify about how Grace's actions impeded their jobs, specifically their investigations into the nature and scope of the dangers posed by Grace's vermiculite mined in Libby.

2. Potential Evidentiary Issues

As a result of the stipulation conference with Judge Otsby, the defendants have stipulated to the authenticity of the majority of the Government's proposed trial exhibits, which are Grace documents. The Government intends to offer these documents into evidence as non-hearsay admissions and statements of co-conspirators. Admissions of an individual party-opponent made either in his individual or representative capacity and offered against him are admissible evidence. Fed. R. Evid. 801(d)(2)(A); *United States v. Workinger*, 90 F.3d 1409, 1415 (9th Cir. 1996). Such statements are not hearsay by definition. (F.R.Evid 801(d): **Statements which are not hearsay.** A. Statement is not hearsay if - . . . .). Statements successfully admitted under 801(d)(2)(A) do not pose Confrontation Clause problems, since a defendant cannot claim lack of opportunity to confront himself. *United States v. Nazemian*, 948 F.2d 522, 526 (9th Cir. 1991). The statements are admissible for whatever inferences can be reasonably drawn from them. *United States v. Warren*, 25 F.3d 890, 894-95 (9th Cir. 1994).

Defendants' conspiracy was far-reaching, involving several co-conspirators, both indicted and unindicted. Because of this, co-conspirator statements will play an important role in the Government's case. Statements of such co-conspirators, including statements in documentary evidence, are admissible against co-conspirators under Rule 801(d)(2)(E). Fed. R. Evid. 801(d)(2)(E). For a statement to be admitted, the Government must establish by a preponderance of the evidence (1) that a conspiracy existed at the time the statement was made, (2) that Defendants had knowledge of, and participated in, the conspiracy, and (3) that the statement was made in furtherance of the conspiracy. *United States v. Bowman*, 215 F.3d 951, 960-61 (9th Cir. 2000) (citing *Bourjaily*, 483 U.S. at 175). To be in furtherance of a conspiracy, a statement must "further the common objectives of the conspiracy or set in motion transactions that are an integral part of the conspiracy." *United States v. Yarbrough*, 852 F.2d at 1535-36 (quoting *United States v. Layton*, 720 F.2d 548, 556 (9th Cir. 1983)). Courts may consider out-of-court statements, including the proffered statement itself, in determining whether the Government has established the requisite foundation. *Bourjaily*, 483 U.S. at 178-80. However, proof requires more than the statement alone. Fed. R. Evid. 801(d)(2)(E). If these requirements are met, then admission of the statement does not conflict with the Confrontation Clause. *See United States v. Lujan*, 936 F.2d 406, 410 (9th Cir. 1991); *United States v. Larson*, 460 F.3d 1200,

1213 (9th Cir. 2006) ("The *Crawford* Court itself assumed that statements made in furtherance of a conspiracy 'by their nature [are] not testimonial.'" (quoting *Crawford v. Washington*, 541 U.S. 36, 56 (2004))).

B. Counts Two to Four: Clean Air Act Knowing Endangerment (42 U.S.C. 7413(c)(5))

Counts Two through Four of the Superseding Indictment charge the defendants with knowingly releasing and causing the release of asbestos into the ambient air, thereby placing another person in imminent danger of death or serious bodily injury. Count Two charges Grace with knowing endangerment based on having provided and distributed asbestos-contaminated vermiculite to the community; Count Three charges Grace, Wolter, and Bettacchi with knowing endangerment based on having sold the Screening Plant site to the Parkers; and Count Four charges Grace, Wolter and Bettacchi with knowing endangerment based on leasing the Export Plant to the Burnetts, and selling the Export Plant to the City of Libby.

Accordingly, to prove these counts at trial, the Government must prove that:

(1) the defendants knowingly released or caused a release of asbestos into the ambient air; and

(2) the defendants knew at the time, that the release thereby placed another person in imminent danger of death or serious bodily injury.

See United States v. Hylton, 2009 WL 136867 (10th Cir. Jan. 21, 2009), and *United States v. Little*, 2009 WL 136864 (10th Cir. Jan. 21, 2009).

1. Government's Anticipated Evidence

Much of the Government's evidence for these counts as to the defendants knowledge of the hazards posed by their asbestos contaminated vermiculite will be the same as the conspiracy count. In addition, the Government anticipates calling witnesses and introducing documentary evidence to establish that defendants caused repeated releases of asbestos on the relevant dates charged in Counts One through Four of the Superseding Indictment by placing asbestos-contaminated vermiculite in locations in the Libby community where innocent third parties would later disturb it and release asbestos into the ambient air. It is well-settled that principals can cause crimes to be committed by innocent third parties. *See* 18 U.S.C. § 2(b); *United States v. Causey*, 835 F.2d 1289, 1292 ("The reviser's note to section 2 indicates that subsection (b) was added in 1948 to 'remove[ ] all doubt that one who puts in motion or assists in the illegal enterprise but causes the commission of an indispensable element of the offense by an innocent agent or instrumentality, is guilty as a principal . . . .'"); *United States v. Allen*, 341 F.3d 870, 889 (9th Cir. 2003) ("[A]n individual (with the necessary intent) may be held liable if he is a cause in fact of the criminal violation, even though the result which the law condemns is

achieved through the actions of ... intermediaries." (quoting *United States v. Nelson*, 277 F.3d 164 (2d Cir. 2002)).

The Government expects to show that releases of asbestos occurred in Libby and endangered those exposed through several categories of evidence including (1) the defendants' repeated admissions in documents that the contaminant in their vermiculite was asbestos and exposure to that asbestos resulted in asbestos related disease; (2) testimony by former Grace employees that the contaminant in their vermiculite was asbestos; (3) extensive EPA sampling and analysis; and (4) expert testimony. Further the Government will offer testimony of many witnesses who will describe their contact with and exposure to Grace's vermiculite. For some of these witnesses, the evidence will show that they have been diagnosed with asbestos related diseases.

2. Potential Evidentiary Issues

a. Presence of Asbestos

The Government must prove that the defendants released or caused the release of material that qualifies as asbestos. To that end, the Government will present testimony of expert witnesses who will identify as asbestos material found at Grace's two former processing facilities—the Screening Plant and the Export Plant—as well as other locations around Libby, including the schools, based in part on a large number of analyzed samples.

Even without the expert testimony and sampling, however, there is sufficient preexisting documentary evidence – admissions by the defendants – to show that what the defendants released was asbestos. *See United States v. Self*, 2 F.3d 1071, 1086-87 (10th Cir. 1993) (holding, in the context of a charge of knowingly storing hazardous waste in violation of a permit under 42 U.S.C. § 6928(d)(2)(B), that "the Government was not required to prove [the material at issue was hazardous waste due to ignitability] through test data"); *United States v. Dee*, 912 F.2d 741, 746-47 (4th Cir. 1990) (holding that a jury may infer that wastes exhibited the characteristic of ignitability from flash points reported in Material Safety Data Sheets and other records); *United States v. Baytank (Houston), Inc.*, 934 F.2d 599, 614 (5th Cir. 1991) (holding that defendant company's internal documents, and trial testimony about defendant's practices, were sufficient to prove that defendant stored a hazardous substance, even though no drum samples were taken); *United States v. Greer*, 850 F.2d 1447, 1452 (11th Cir. 1988) (holding that the jury properly inferred the presence of hazardous solvents based on company records and drum labels).

In the case at bar, the Government will present a multitude of Grace internal communications, going back three decades, showing that the defendants used the very term "asbestos" to describe the material that they knew to be present at the screening plant and export plant sites; in the tailings used to make the junior and senior high school

running tracks, and the Plummer Elementary School outdoor skating rink; and in many other locations.

The Government calls the Court's attention to a recent set of cases from the Tenth Circuit: *United States v. Hylton*, 2009 WL 136867 (10th Cir. Jan. 21, 2009), and *United States v. Little*, 2009 WL 136864 (10th Cir. Jan. 21, 2009). The defendants in these cases were charged with "knowingly causing asbestos to be released into the ambient air, thus placing others in imminent danger of death or serious bodily injury," under 42 U.S.C. § 7413(c)(5)(A) – the same knowing endangerment provision at issue before this Court. In instructing the jury, the District Court saw no need to provide a definition of asbestos. Filed with the Court January 9, 2009 as Attachment 001 to Document 874, Government's Supplement to Jury Instructions. The Tenth Circuit affirmed the jury's convictions on the lesser included offense of negligent endangerment. *Hylton*, 2009 WL 136867 at *2; *Little*, 2009 WL 136864 at *4.

In the case at bar, the Ninth Circuit has clarified that the term "asbestos" is to be construed "according to [its] ordinary, contemporary, common meaning[ ]." 504 F.3d 745, 755 (9th Cir. 2007) (internal quotation marks omitted; alterations in Ninth Circuit opinion). Elaborating on what that meaning is, the court of appeals continued:

> It is well known that asbestos has a common meaning; it is a fibrous, non-combustible compound that can be composed of several

> substances, typically including magnesium. Or, as defined by the CAS Registry, and incorporated by reference into § 7412(b), it is a "grayish non-combustible material" that "consists primarily of impure magnesium silicates." This definition has been established for decades, as was elucidated in the motions in limine.

Id. at 755 (internal citations omitted).

At the Court's January 22, 2009 hearing, much was made of the Ninth Circuit's inclusion of the word "grayish," which the court of appeals took from the CAS Registry definition. *Id*. In considering the particular import of this word, it is important to note that the Ninth Circuit placed the excerpt of the CAS Registry definition after its own definition: Asbestos "is a fibrous, non-combustible compound that can be composed of several substances, typically including magnesium." *Id*. Both definitions were offered to elucidate the "ordinary, contemporary, common meaning" of asbestos. The Government does not believe that the Ninth Circuit's opinion may fairly be read to mean that the "ordinary, contemporary, common meaning" of asbestos imposes a color requirement.

Indeed, the Ninth Circuit's statements about the definition of asbestos rested on the holding that "[a]sbestos is adequately defined as a term." *Id*. at 756. Because asbestos is adequately defined as a term, the court of appeals held that neither the rule of lenity nor the Due Process Clause of the Fourteenth Amendment justified the imposition of a narrow, court-selected definition of the term. *Id*. In this context, it

would be absurd to read the Ninth Circuit's decision as imposing yet another narrow, court-selected definition of "asbestos."

b. "Imminent Danger" Does Not Require Quantification

The crime of knowing endangerment does not require a showing of actual harm. Nor does it require that the risk of harm created by defendants' actions be quantified, or even quantifiable. This is a criminal case, not a toxic tort suit. While concepts like "doubling of the risk" may drive civil liability, they do not determine guilt on a knowing endangerment charge. The Tenth Circuit set forth the criminal law's approach to "imminent danger" in its recent pair of Clean Air Act knowing endangerment cases, in the context of asbestos exposure:

> Defendant is mistaken in suggesting that the evidence was insufficient to support his conviction on Count One because none of the Government's witnesses could testify, with certainty, that the inmates would experience serious bodily injury or death as a result of their exposure to the asbestos in the depot. As explained above, the jury was only required to find that the inmates' exposure to conditions in the depot *could reasonably be expected* to have such an effect.

Little, 2009 WL 136864 at *3 n.1 (emphasis in original); *Hylton*, 2009 WL 136867 at *2 n.2 (same); *see also United States v. Protex Indus., Inc.*, 874 F.2d 740, 744 (10th Cir. 1989) (rejecting defense argument that the RCRA knowing endangerment statute applied only to conduct with a "substantial certainty" of causing death or serious bodily injury, and

stating that "the gist of the 'knowing endangerment' provision of the RCRA is that a party will be criminally liable if, in violating other provisions of the RCRA, it places others in danger of great harm and it has knowledge of that danger"); *United States v. Hansen*, 262 F.3d 1217, 1242-1245 (11th Cir. 2001) (holding that the Government had presented sufficient evidence of knowing endangerment under RCRA where the Government had presented "[e]xpert testimony and reports [that] linked exposure to mercury and caustic to a variety of serious health problems").

c. Latency Does Not Destroy Imminence

Exposure to asbestos does not produce immediate asbestos-related disease; a substantial time lag separates exposure and the appearance of symptoms of such disease. Rather than producing immediate disease, exposing a person to asbestos immediately increases the danger that person will ultimately develop asbestos-related disease. As Dr. Lemen put it, "[a]s the exposures increase, the risk increases." Transcript of Jan. 22, 2009 Hearing at 230. The Tenth Circuit recently made clear in the context of asbestos exposure that this satisfies the requirements of the knowing endangerment statute:

> [The jury instructions] clarified that the danger to which the [victims] were exposed must be 'an immediate result' of Defendant's 'conduct,' but that this danger might 'involve a harm which may not ultimately ripen into death or serious bodily inmury for a lengthy period of time, if at all.'

Little, 2009 WL 136864 at *3 (discussing the district court's jury instructions, and concluding that expert testimony "provided the jury with a sufficient basis to conclude Defendant's actions placed the [victims] in imminent danger of death or serious bodily injury"); *Hylton*, 2009 WL 136867 at *2 (same). Indeed, it would be an unjust result if one of the key features of asbestos-related disease, its latency period, were to operate to negate the imminency element.

The Government expects to show that the defendants knowingly exposed people to asbestos, which immediately increased the risk that those people would ultimately develop asbestos-related disease. In showing this, the Government will make use of expert testimony. Because of the nature of asbestos-related disease, evidence of early asbestos exposure will be helpful to these experts in forming their opinions. As the Government expects its experts to explain, a given exposure incident must be considered in the context of prior exposures; each exposure adds to the pre-existing risk level. *See* comments of Dr. Lemen, *supra*. Early exposures must be viewed as relevant even under the defendants' view of the case, which apparently emphasizes dose response.

d. The Government Need Not Prove it Was the Defendants' Purpose or Objective to Release Asbestos, or to Harm or Endanger

The Government must of course make a showing of intent, but the Government need not show that the defendants intended to release

asbestos, or to endanger anybody. Rather, the Government must show that the defendants intended actions that had a high probability of causing a release of asbestos, and that the defendants knew such a release would place persons in imminent danger of death or serious bodily injury – or that they deliberately avoided learning the truth about the danger. *See United States v. Elias*, 269 F.3d 1003, 1018 (9th Cir. 2001) ("The jury had to find that Elias believed his conduct was 'substantially certain to cause danger of death or serious bodily injury.' The second part [of the instruction, which the court of appeals upheld] told the jury that Elias didn't have to have ordered his workers into the tank for the 'design or purpose' of hurting them."); *United States v. Flores-Garcia*, 198 F.3d 1119, 1121-22 (9th Cir. 2000) ("Provided the defendant recognizes he is doing something culpable, . . . he need not be aware of the particular circumstances that result in greater punishment. . . . Criminal intent serves to separate those who understand the wrongful nature of their act from those who do not, but does not require knowledge of the precise consequences that may flow from that act once aware that the act is wrongful." (internal quotation omitted)); *United States v. Heredia*, 483 F.3d 913 (9th Cir. 2007), cert. denied, 128 S. Ct. 804 (2007) (discussing deliberate ignorance). The Government expects the evidence to show that the defendants knew the dangerousness of their vermiculite material, and knew the public was coming into contact

with that material, both at former processing sites throughout Lincoln County and in the community of Libby.

C. Counts Five to Eight: Obstruction of Justice

Counts Five through Eight of the Superceding Indictment charge Grace with obstructing in various ways EPA's assessment and cleanup efforts in and around Libby. To find the defendant guilty on these counts, the Government must prove the following elements, for each count:

i. That the defendant acted corruptly, meaning that it acted with an improper purpose, personally or by influencing another, including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information;

ii. That the defendant obstructed, impeded or endeavored to influence, obstruct, or impede the due and proper administration of the law; and

iii. That there was a pending proceeding before a department or agency of the United States.

See 18 U.S.C. § 1505; *United States v. Price*, 951 F.2d 1028, 1031 (9th Cir. 1991) ("The obstruction need not be successful; the jury may convict one who 'endeavors' to obstruct such a proceeding . . . . An administrative investigation is a 'proceeding' within the meaning of 18 U.S.C. § 1505.").

The Government expects the evidence to show that time and again, the EPA came to Grace looking for answers and assistance, and instead of answers, Grace gave false and misleading statements, and otherwise impeded EPA operations. The government anticipates EPA's On-Scene Coordinator will testify that he asked Alan Stringer, who was acting for Grace, about the vermiculite concentrate at the Export Plant and Screening Plant sites, and Stringer told him that, because the material contained less than one percent asbestos, it was not a hazard. Grace's documents will show, to the contrary, that Grace had discovered that concentrations of less than 1% asbestos still released dangerous levels of asbestos fibers. And when the EPA sent Grace a CERCLA 104(e) Request for Information, directly asking Grace about the nature and scope of asbestos contamination at Libby, Grace's own responses will demonstrate that Grace told the EPA that it did not provide asbestos-contaminated vermiculite to the general public; Grace's answers will also reflect that Grace did not inform the EPA of the asbestos-contaminated material Grace had provided for the junior high school running track and the Plummer Elementary School skating rink. Testimony of community residents will demonstrate, to the contrary, that Grace provided vermiculite to the public for a variety of uses, both to individuals and these schools. Furthermore, Grace's answers to the EPA's 104(e) request will show that Grace told the EPA that employees did not regularly leave the mine site with asbestos-contaminated dust on

their clothing; testimony of former Grace employees will establish that this statement by Grace was false. Additionally, the EPA On-Scene Coordinator will testify that he worked with Grace and a third party, KDC, to arrange sale of the mine site back to Grace, in order to facilitate the EPA's plans to use the mine site as a repository for asbestos-contaminated waste. Grace gave no indication it would deny the EPA access to the site. However, the day after Grace re-purchased the mine site, Grace sent the On-Scene Coordinator a letter excluding the EPA from the mine site, thereby impeding cleanup and forcing the EPA to find an alternative location to store the contaminated waste.

D. Other Potential Evidentiary Issues

1. The Government Will Offer Exhibits to Summarize Voluminous EPA Sampling

The Government will seek to introduce at trial through the testimony of On-Scene Coordinator Paul Peronard maps in the form of aerial photographs that summarize the locations and results of EPA sampling during the course of the cleanup. Such summaries are admissible as substantive evidence under Federal Rule of Evidence 1006. *See United States v. Wood*, 943 F.2d 1048, 1053 (9th Cir. 1991).

EPA has taken and analyzed thousands of soil, bulk, dust, and air samples from the Libby Site over the course of several years. It is the "voluminous" nature of this sampling data that makes summarization necessary. *See* FRE 1006. The underlying data have all been provided to the defense, and are themselves admissible.

2. Adverse and Hostile Witnesses Are Subject to Leading Questions on Direct Examination

The Government expects to call as witnesses several former Grace employees and others who may have an ongoing relationship with Grace. Counsel directly examining adverse witnesses may do so using leading questions. Fed. R. Evid. 611(c); *United States v. Castro-Romero*, 964 F.2d 942, 943 (9th Cir. 1992). Because of the disposition of adverse witnesses, the risk that testimony will be subject to the power of persuasion is lessened. *Cf. Castro-Romero*, 964 F.2d at 943. Adverse witnesses include both adverse parties as well as those identified with adverse parties. *See* Fed. R. Evid. 611(c). Once a witness is determined to be either an adverse party or identified with an adverse party, he is presumed hostile and no actual hostility need be demonstrated. *Haney v. Mizell Mem'l Hosp.*, 744 F.2d 1467, 1478 (11th Cir. 1984) (citing *Ellis v. City of Chicago*, 667 F.2d 606, 613 (7th Cir. 1981)).

Courts generally require a witness to have had a personal or professional relationship with an adverse party to be "identified" with that party. *See* Fed. R. Evid. 611(c), advisory committee's notes (noting that the rule intended to liberalize the previous rule which required a formal legal relationship). For example, in *Ellis v. City of Chicago* the Seventh Circuit upheld the trial court's decision to allow leading questioning of witnesses who "worked closely" with an individual defendant and were employees of the defendant city. *Ellis*, 667 F.2d at 613; *see also Alpha Display Paging, Inc., v. Motorola Commc'ns &*

Electronics, 867 F.2d 1168, 1171 (8th Cir. 1989) (upholding the identification of adverse party's employee with the party); *United States v. Hicks*, 748 F.2d 854, 859 (4th Cir. 1984) (upholding the identification of adverse party's girlfriend with the party). Courts have also considered a witness's financial interest in determining whether to identify the witness with the adverse party. *See Riverside Ins. Co. of America v. Smith*, 628 F.2d 1002, 1009 (7th Cir. 1980) (rejecting an argument that the trial court erred in refusing to permit leading questions, noting, "[m]oreover, there was no showing that [either defendant] had any financial interest in the lawsuit").

Witnesses who are neither adverse parties nor identified with adverse parties are also subject to leading questions on a showing that they are actually hostile. Hostility can be shown by hostile demeanor at trial. *See United States v. Stubin*, 446 F.2d 457, 463 (3d Cir. 1971) (applying common-law rule which was codified by 611(c)). Uncooperative and frustrating behavior during non-leading examination also suffices. *See United States v. Brown*, 603 F.2d 1022, 1026 (1st Cir. 1979) (finding hostility after witness had repeated lapses in memory, misunderstood his own previous statements, and seemed generally confused). Even absent a hostile demeanor, evasive behavior has been found to support a determination of actual hostility. *United States v. Brown*, 603 F.2d 1022, 1026 (2d Cir. 1979) ("While [the defendant] was not hostile in the sense

of being contemptuous or surly, he was both evasive and adverse to the Government.").

DATED this 6th day of February, 2009.

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CERTIFICATE OF SERVICE
L.R. 5.2(b)

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