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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

UNITED STATES OF AMERICA Plaintiff, v. W. R. GRACE, ALAN R. STRINGER, HENRY A. ESCHENBACH, JACK W. WOLTER, WILLIAM J. MCCAIG, ROBERT J. BETTACCHI, O. MARIO FAVORITO, ROBERT C. WALSH, Defendants.	Cause No. CR-05-07-M-DWM **DEFENDANTS' JOINT TRIAL BRIEF**

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INTRODUCTION

Although the parties have been litigating this case for four years, the nature of a criminal prosecution provides a defendant with little opportunity to explain "his side of the story" before trial. As a result, the numerous issues litigated to date have been resolved almost exclusively on the basis of the Government's unsubstantiated allegations. The Defendants understand that this trial brief is not the appropriate forum for explaining all of the factual and legal insufficiencies of the Government's case. That, of course, is the purpose of the trial. Nevertheless, the Defendants believe that it will assist this Court to explain some of the legal and evidentiary issues that the trial will present and how those issues should be resolved.

ISSUES RELATED TO THE CHARGES

I. Count I: Conspiracy to Defraud the United States and to Violate the Clean Air Act's Knowing Endangerment Provision, 18 U.S.C. § 371.

Emblematic of a prosecution that exceeds the permissible meaning and reach of the criminal laws on which it relies, the Government's conspiracy charge reaches back three decades to brand Grace's legal business activities a conspiracy to endanger the Libby community and to impede the EPA and other federal agencies. The salient features of Count I are these:

- First, the overt acts of the conspiracy are spread over twenty-six years, with long periods of time—including four-and-one-half years between

1995 and 1999—during which the alleged conspiracy was completely dormant.

- Second, the alleged conspiracy consists of no single or unified scheme, but, rather, multiple schemes to carry out entirely different objectives in disparate fashions.
- Third, the various schemes have distinct identities, as different individuals participated in separate schemes over different periods of time.

The objects of the alleged conspiracy, its manner and means, and its overt acts thus charge at least two legally distinct conspiracies: (1) a conspiracy to defraud federal agencies and to endanger the Libby community while Grace operated the Libby mine and mill and (2) four years later, a conspiracy to cover up those purported legal violations by obstructing the EPA's post-1999 investigation of Grace's then-ceased operations.

As the Court is aware, Count I has been the subject of significant litigation in this case. Nevertheless, because three years have passed since the Court considered many of these issues, the Defendants believe that recapitulating the essence of their concerns would assist this Court in its preparation for trial.

A. Count I Charges More Than One Conspiracy.

The Defendants respectfully maintain that Count I charges more than one conspiracy and therefore should have been dismissed, in whole or at least as to the time-barred endangerment conspiracy. This Court disagreed, holding that the Indictment could be read to charge a single conspiracy. *United States v. W.R.*

Grace, 429 F. Supp. 2d 1207, 1225 (D. Mont. 2006) [the "Motions to Dismiss Order"]. In doing so, the Court recognized that if the Government failed to prove at trial a single conspiracy under the *Grunewald* and *Gordon* tests, the Court could act at that time to protect the Defendants from the risk of a non-unanimous verdict, a fatal variance from Count I as charged in the Indictment, or a conviction based solely upon conduct that occurred before the statute of limitations period. *See id.* at 1225 & n.16 ("In deciding whether the proof at trial demonstrates that the charged conduct constitutes two conspiracies, the Court would apply the overall agreement/relevant factors test set forth in *Gordon*.").

A conviction based on multiple conspiracies charged in a single count would violate the Defendants Fifth and Sixth Amendment rights to a unanimous jury verdict and protection from double jeopardy. *See United States v. Aguilar*, 756 F.2d 1418, 1420 (9th Cir. 1985). And, of particular import to this case, a duplicitous conspiracy charge risks allowing the government to circumvent the statute of limitations. To guard against these risks, courts have made clear that defendants may not be convicted of multiple conspiracies charged in a single count.

The Supreme Court has held that a conspiracy to commit a crime is legally distinct from a subsequent conspiracy to conceal that crime, and the Government may not extend the statute of limitations on the former by claiming that it

continued into the latter. *See Grunewald v. United States*, 353 U.S. 391, 401-02 (1957). As that Court recognized: "[E]very conspiracy will inevitably be followed by actions taken to cover the conspirators' traces. Sanctioning the Government's theory would for all practical purposes wipe out the statute of limitations in conspiracy cases." *Id.* at 402.

In addition to *Grunewald*'s crime-concealment rubric, the Ninth Circuit has applied a multi-factor test for identifying duplicity in a conspiracy charge. Under that test, a conspiracy conviction should be dismissed unless

> there was one overall agreement among the various parties to perform various functions in order to carry out the objectives of the conspiracy. The relevant factors in determining the existence of such an "overall agreement" are [1] the nature of the scheme, [2] the identity of the participants, [3] the quality, frequency and duration of each conspirator's transactions, and [4] the commonality of times and goals.

United States v. Gordon, 844 F.2d 1397, 1401 (9th Cir. 1988) (quotation and citation omitted). The Defendants respectfully submit that the Government's purported evidence of a conspiracy will fail both the *Grunewald* and the *Gordon* test.

The Government's purpose in transforming multiple conspiracies into one is self-evident: It is the only way it may pursue allegedly conspiratorial conduct that is now barred by the statute of limitations. For example, setting aside for now the time-barred alleged conspiracy to defraud, the knowing endangerment object of the

alleged conspiracy is stale under *Yates* because the Government has failed to allege, and will not be able to prove, an overt act in furtherance of that object after November 3, 1999. *See United States v. W.R. Grace*, 434 F. Supp. 2d 879, 887 (D. Mont. 2006) ("[I]t is not clear how causing further endangerment limits the Defendants' liability."). This Court therefore correctly dismissed the Government's attempt to remedy that deficiency. *See United States v. W.R. Grace*, 455 F. Supp. 2d 1113, 1122 (D. Mont. 2006), *rev'd in part*, 504 F.3d 745 (9th Cir. 2007).

Given the Government's unsparing pleading—the Superseding Indictment alleges more than one hundred overt acts—one would have expected the Government to avoid the four-year gap and other insufficiencies if it had a factual basis to do so. Instead, it made only a superficial revision to its allegations. Perhaps that changed the nature of the pleading, but it does not change the nature or legal sufficiency of the Government's evidence.

B. The Government Must Prove That the Defendants Committed All of the Elements of the Alleged Conspiracy to Violate the Clean Air Act's Knowing Endangerment Provision After November 15, 1990, the Date on Which That Provision Became an "Offense Against the United States."

In addition to the deficiencies as to when the alleged endangerment conspiracy ended, the Government's case is also defective with respect to when that alleged conspiracy began. The Government alleges that the Defendants agreed

in 1976 to violate the Clean Air Act's knowing endangerment provision, but the Defendants could not have conspired in 1976 to violate that provision because it did not exist until November 15, 1990. *See* Pub. L. No. 101-549, § 701, 104 Stat. 2399 (1990).

It is axiomatic that the object of a conspiracy under the offense prong of 18 U.S.C. § 371 must be an offense against the United States. *Lubin v. United States*, 313 F.2d 419, 422 (9th Cir. 1963) (reversing conspiracy conviction because the object of the charged conspiracy was not a federal offense), *abrogated on other grounds by United States v. Valles-Valencia*, 823 F.2d 381 (9th Cir. 1987); *United States v. Templeton*, 378 F.3d 845, 847 (8th Cir. 2004) (reversing convictions on charges of conspiracy to violate the Clean Water Act and substantive Clean Water Act violations because the defendants' conduct was not proscribed by that Act). In other words, if there is no substantive federal offense, there can be no conspiracy.

In an ordinary case, the Government must prove "(1) an agreement to accomplish an illegal objective; (2) the commission of an overt act in furtherance of the conspiracy; and (3) the requisite intent necessary to commit the underlying offense." *United States v. Lennick*, 18 F.3d 814, 818 (9th Cir. 1994) (quotation omitted) (reversing conspiracy conviction because the government failed to prove an agreement to commit an offense, despite evidence that could be characterized as overt acts); *United States v. Garcia*, 151 F.3d 1243, 1245 (9th Cir. 1998) (stating

that the government must prove "that parties to a conspiracy worked together understandingly, with a single design for the accomplishment of a common purpose." (quotation omitted)).

But when the government charges that a conspiracy straddled the effective date of the substantive offense, it also must prove that each element of the conspiracy was present after that date. *See United States v. Campanale*, 518 F.2d 352, 357-59 (9th Cir. 1975) (reversing conviction on charge of RICO conspiracy because the government had not proven the existence of a conspiracy after the effective date of the statute). A conviction for conspiracy based on conduct occurring entirely before the enactment of the relevant criminal statute violates the *Ex Post Facto* Clause, U.S. Const. art. 1, § 9, cl. 3. *See United States v. Brown*, 555 F.2d 407, 419-21 (5th Cir. 1977) (reversing conviction on charge of RICO conspiracy despite conviction on post-enactment RICO offense because the substantive offense did not require proving a conspiratorial agreement and the jury was not "cautioned that a verdict of guilty could not be returned unless the Government demonstrated the existence of a conspiracy of which the accused was a member after [the statute's effective date]"). In other words, the government must prove its case as though § 371 became effective on the same date the substantive offense became an offense against the United States, and the jury must be instructed to that effect.

Here, the Government has illogically charged that the Defendants conspired in 1976 to violate a statute that would not exist for another fourteen years. Even more anomalous is that the year in which the knowing endangerment provision became effective was the very same year that Grace ended the activity at the heart of the alleged endangerment conspiracy—operations at the Libby mine. And several of the Defendants had ended their involvement with Libby issues as of that date. In addition to the evidentiary issues presented by the Government's charge (see Evidentiary Issues section), the Government must prove beyond a reasonable doubt that each element of a conspiracy was present after November 15, 1990. A conviction based on the Defendants' conduct before that date would be insufficient under § 371 and would amount to an *ex post facto* conviction. U.S. Const. art. 1, § 9, cl. 3.

The jury thus must find beyond a reasonable doubt (1) that the Defendants agreed after November 15, 1990, to accomplish the goal of violating the knowing endangerment provision, (2) that each Defendant had after November 15, 1990, the intent required by that provision, and (3) that at least one of the Defendants committed at least one overt act in furtherance of the endangerment conspiracy after November 3, 1999.

C. A Conspiracy to Defraud Based on Nondisclosure Requires the Government to Prove That the Defendants Had a Legal Duty of Disclosure.

The first of the two conspiracies charged in Count I also alleges that the Defendants conspired to defraud the EPA and the National Institute for Occupational Safety and Health ("NIOSH"). To prove a conspiracy to defraud, the Government must prove that (1) the Defendants entered into an agreement; (2) with the purpose of obstructing a lawful function of the federal government; (3) by deceit, craft, or trickery, or at least by means that are dishonest; and (4) at least one overt act in furtherance of the conspiracy. *See United States v. Caldwell*, 989 F.2d 1056, 1058-59 (9th Cir. 1993) (reversing a conspiracy to defraud conviction because the district court failed to instruct the jury that it had to find that the defendant conspired to defraud the government through deceitful or dishonest means). In light of the Government's allegations and proffered evidence (see Evidentiary Issues section), three aspects of these legal elements bear discussion here.

First, the "target" of a conspiracy to defraud must be the "United States or any agency thereof." *Tanner v. United States*, 483 U.S. 107, 130 (1987) ("The conspiracies criminalized by § 371 are defined not only by the nature of the injury intended by the conspiracy, and the method used to effectuate the conspiracy, but also—and most importantly—by the target of the conspiracy."). As a result, an

alleged conspiracy to defraud a private party, a state entity, or "intermediar[ies] performing official functions on behalf of the Federal Government," *id.*, is legally insufficient under § 371, even if the "incidental effects" of that conspiracy would have impaired the functions of the federal government, *United States v. Licciardi*, 30 F.3d 1127, 1132 (9th Cir. 1994). *See also United States v. Mendez*, 528 F.3d 811, 815 (11th Cir. 2008) (reversing a conviction for conspiracy to defraud because the evidence established only that the defendant intended to defraud the State of Florida and therefore the conviction was "precisely what the *Tanner* Court meant to prevent.").

Second, a conspiracy to defraud requires more than conspiring to make the federal government's job more difficult. *Caldwell*, 989 F.2d at 1061 ("[W]e won't lightly infer that in enacting 18 U.S.C. § 371 Congress meant to forbid all things that obstruct the government, or require citizens to do all those things that could make the government's job easier."). People are free to impair or impede the federal government—indeed, they may agree to do so—as long as they do not resort to deceitful or dishonest means. *Id.* at 1060 ("The federal government does lots of things, more and more every year, and many things private parties do can get in the government's way. It can't be that each such action is automatically a felony.").

Third, to the extent that the conspiracy to defraud charged in Count I is based upon the Defendants' failure to disclose information to the EPA, the Government also must prove that the Defendants had a legal obligation to disclose that information. *United States v. Murphy*, 809 F.2d 1427, 1431-32 (9th Cir. 1987) ("Where [the law does] not impose a duty to disclose information, failure to disclose is not a conspiracy to defraud the government."). Indeed, the law must "clearly impose a duty to disclose" because "[d]ue process requires that penal statutes define criminal offenses with sufficient clarity that an ordinary person can understand what conduct is prohibited." *Id.* at 1430-31. Thus, when the government predicates a conspiracy to defraud charge on a defendant's noncompliance with a civil statute, a conviction may stand only if the civil statute withstands the same rigorous standard of fair notice that applies to criminal statutes.

Here, the Government alleges that the Defendants had a legal duty under section 8(e) of the Toxic Substances Control Act ("TSCA") to disclose health-effects studies and product tests. TSCA § 8(e) requires certain individuals to disclose "information which reasonably supports the conclusion that [a] substance or mixture presents a substantial risk of injury to health or the environment." 15 U.S.C. § 2607(e). As this Court recognized, in 1978 the EPA interpreted TSCA § 8(e) to exempt from disclosure (1) information that had been published in the

scientific literature and referenced by certain abstract services or (2) information that was "corroborative of well-established adverse effects already documented in the scientific literature and referenced" in those abstract services. *United States v. W.R. Grace*, 455 F. Supp. 2d 1156, 1160 (D. Mont. 2006) (citing 43 Fed. Reg. 11110, 11111 (Mar. 16, 1978)).

To convict the Defendants of a conspiracy to defraud based on the alleged TSCA nondisclosure, the Government must prove at trial that TSCA § 8(e) "clearly impose[d]" a duty on the Defendants to disclose the health-effects studies and product tests identified in the Superseding Indictment ***and*** that the Defendants' alleged failure to disclose those facts was the deceitful means through which they sought to impede the federal government. *Murphy*, 809 F.2d at 1430. In short, a TSCA § 8(e) violation is not a conspiracy to defraud *per se*; the Government still must prove each element of the § 371 offense. If the Government fails to meet that burden, the Court should instruct the jury that it "may not rely on TSCA 8(e) non-compliance as evidence of a conspiracy to defraud, and that the Defendants' acts relating to TSCA 8(e) compliance may not serve as overt acts in support of a conviction." *W.R. Grace*, 455 F. Supp. 2d at 1161.

II. Counts II Through IV: Alleged Violations of the Clean Air Act's Knowing Endangerment Provision, 42 U.S.C. § 7413(c)(5)(A).

Counts II through IV of the Superseding Indictment charge that Grace and several of the other Defendants (the "Clean Air Act Defendants") violated the Clean Air Act's knowing endangerment provision by engaging in four types of actions:

- providing and distributing asbestos-contaminated vermiculite material to the Libby community (Count II);
- causing Grace employees in Libby and their personal effects to be contaminated with asbestos (Count II);
- selling the Screening Plant to the Parker family (Count III); and
- leasing and selling the Export Plant to the Burnetts and the City of Libby, respectively (Count IV).

See Superseding Indictment ¶ 186, 188, 190; *see also* Gov't's App. Br. 40-41 (Jan. 16, 2007).

Because this Court held that knowing endangerment is not a continuing offense, Motions to Dismiss Order, 429 F. Supp. 2d at 1244, those four types of actions, on their own, cannot be the "knowing release" under Counts II through IV. That conduct—and the first instant that another person was allegedly placed in imminent danger—occurred years before the statute of limitations period. *See id.* As a result, the Government charges that the Clean Air Act Defendants' alleged liability under Counts II through IV is based upon "willfully caused" violations through 18 U.S.C. § 2(b). *See, e.g., United States v. W.R. Grace*, 434 F. Supp. 2d

879, 885 (D. Mont. 2006) ("The Indictment does not allege any specific 'release' of hazardous air pollutants after November 3, 1999. Instead, as the Defendants have stated, the government's theory appears to be that some of the defendants 'caused' releases within the limitations period by placing contaminated vermiculite in locations where innocent third parties would later unknowingly release tremolite fibers into the ambient air." (quotation omitted)).

But the Government has not alleged that the Clean Air Act Defendants willfully caused three significant releases of asbestos, as one might expect. Rather, the Government has charged that each outdoor disturbance of asbestos in Libby was a release under § 7413(c)(5)(A)—its "normal human activities" theory:

> The Superseding Indictment alleges the defendants took four types of actions that released asbestos into the ambient air: (1) providing and distributing asbestos-contaminated vermiculite material to the community; (2) causing employees and their personal effects to be contaminated with asbestos; (3) selling the Screening Plant; and (4) leasing and selling the Export Plant.
>
> To prove these actions caused the release of asbestos into the ambient air, the government will introduce evidence at trial that the grounds of certain properties in and around Libby (such as the Screening and Export plants and the high school and junior high school tracks) were contaminated with asbestos-contaminated vermiculite materials. The government will then introduce the opinions of expert witnesses, who will testify that ***normal human activities*** (such as running, driving, sweeping or shoveling) released asbestos fibers into the ambient air from these sources. Experts will also opine that the releases placed persons in imminent danger of substantial bodily injury.

Gov't's App. Br. 40-41 (Jan. 16, 2007) (emphasis added); *see also* Mot. Dismiss Hr'g Tr. 127:4-7 (Feb. 14, 2006) ("[T]his vermiculite material, as described in the indictment, releases asbestos every time it's disturbed. Every time the wind blows across it, every time a shovel is moved, every time somebody runs around the track . . . .").

By pursuing this unconventional prosecutorial theory, the Government has assumed a difficult legal and evidentiary burden: From this morass of alleged releases, it must prove one release for each Count—one instance of running or one instance of shoveling, to use the Government's examples—and that the release discharged into the ambient air enough "asbestos" fibers to have presented, on its own, an "imminent danger" to another person. *See* Motions to Dismiss Order, 429 F. Supp. 2d at 1246 (holding that Counts II through IV raise duplicity concerns that must be addressed, at a minimum, by requiring the jury to unanimously agree as to "which of the distinct charges the defendant actually committed" (quotation omitted)). More specifically, the Government must establish beyond a reasonable doubt that the Clean Air Act Defendants (1) willfully caused (2) after November 15, 1990, (3) ***a*** knowing release (4) of "asbestos" (5) into the ambient

air[1] (6) knowing at the time (7) that ***the*** release placed "another person" in "imminent danger" of death or serious bodily injury, and (8) that the endangerment began on or after November 3, 1999. *See* 42 U.S.C. § 7413(c)(5)(A); 18 U.S.C. § 2(b); Motions to Dismiss Order, 429 F. Supp. 2d at 1245.

Because few courts have interpreted the government's burden under the knowing endangerment provision—and no court has applied § 7413(c)(5)(A) and § 2(b) in a case like this—the Defendants will address how several of those elements should be construed in this case.

A. The Government's Theory That the Defendants "Willfully Caused" Releases of Asbestos Requires the Government to Prove That the Defendants Engaged in the Charged Conduct with the Purpose of Causing Releases That Placed Another Person in Imminent Danger of Death or Serious Bodily Injury.

To prove that the Defendants "willfully caused" releases of asbestos, the Government must prove that the Clean Air Act Defendants engaged in the alleged "four types of actions"—distribution of vermiculite to the Libby community, contamination of workers' personal effects, the sales of the Screening Plant and the

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[1] This Court previously held that "ambient air" excludes indoor air and means "the air exterior to buildings and accessible by the public," rejecting the Government's argument that releases within structures on the Screening Plant property and elsewhere were ambient-air releases. *United States v. W.R. Grace*, 455 F. Supp. 2d 1172, 1175 (D. Mont. 2006) ("While this discussion may be interesting at a philosophical level (Is a building with only three walls still a building? Or a building with no roof?), it is not the case that a structure must be air-tight to be considered a 'building.'").

Export Plant—with the purpose of causing releases that placed another person in imminent danger of death or serious bodily injury.

A defendant is liable as a principal through § 2(b) only if he "***willfully*** causes" another person to engage in conduct that is a federal crime. 18 U.S.C. § 2(b). Section 2(b) is not itself a substantive crime; rather, it allows the government, as part of proving a substantive offense, to impute to the defendant a third party's conduct if the government can prove two additional legal elements: (1) causation (the *actus reus*) and (2) willfulness (the *mens rea*). To prove that the defendant acted "willfully," the government must prove that the defendant acted with the purpose of bringing about the substantive offense. *See United States v. Berlin*, 472 F.2d 13, 14 (9th Cir. 1973) (holding that a *mens rea* of purposefulness, rather than "reasonable foreseeability," was required under § 2(b) because of the latter standard's proclivity to convert "commonplace," innocent conduct into a federal offense); *United States v. Markee*, 425 F.2d 1043, 1046 (9th Cir. 1970) ("[T]he requirement that defendant willfully cause the forbidden act to be done, means that the act must not only have been the causein-fact [sic] of the defendant's activities, but also that defendant have the specific intent of 'bringing about' the forbidden act."); *United States v. Curran*, 20 F.3d 560, 566 (3d Cir. 1994) ("Section 2(b) makes it an offense to deliberately cause another person to perform an act that would violate federal criminal law.").

The Ninth Circuit's reasons for insisting upon a *mens rea* of purposefulness apply with greater force here. After all, it is hard to imagine conduct more "commonplace," as the Ninth Circuit put it in *Berlin*, than "normal human activities." Yet the Government hopes to bootstrap that everyday conduct into a fifteen-year felony against the Clean Air Act Defendants for two reasons. First, the Government needs its § 2(b) theory of caused releases to overcome the statute of limitations and this Court's Order that knowing endangerment is not a continuing offense. Second, unlike in *Berlin*, where the issue was whether the federal government had jurisdiction over what otherwise would be a state crime (stealing cars); here, there essentially would be no crime ***at all*** without § 2(b): The majority of Grace's alleged vermiculite giveaways and generation of take-home dust occurred before Congress enacted the knowing endangerment provision in 1990, and the post-1990 sales of property were not "releases" under § 7413(c)(5)(A). In other words, the Government relies on § 2(b) to effectively double the statute of limitations period and to impute to the Clean Air Act Defendants ***all*** of the *actus reus* of § 7413(c)(5)(A), not just a jurisdictional element. *See Berlin*, 472 F.2d at 14-15 (requiring the government to prove that the defendants acted with a "desire[]" to cause interstate transportation).

Balancing the Government's "normal human activities" theory of causation with anything less than a *mens rea* of purposefulness would result in precisely

what Congress did not intend—unwitting, perpetual criminal liability—and would effectively undo this Court's Order that knowing endangerment is not a continuing offense and improperly nullify the statutory term "willfully." *Cf. Ratzlaf v. United States*, 510 U.S. 135, 140-41 (1994) ("The trial judge . . . treated [the statute's] 'willfulness' requirement essentially as surplusage—as words of no consequence. Judges should hesitate so to treat statutory terms in any setting, and resistance should be heightened when the words describe an element of a criminal offense."); *Liparota v. United States*, 471 U.S. 419, 426 (1985) (holding that the government had to prove that the defendant knew his conduct was illegal to avoid "criminaliz[ing] a broad range of apparently innocent conduct."). At bottom, Congress's use of the word "willfully" in § 2(b) manifests a *quid pro quo* with the prosecutor: The government may convict a defendant who did not himself commit the *actus reus* of the offense only if it also can prove that the defendant acted with a heightened *mens rea*—purposefulness—to cause the offense.

Here, the Government's reliance on § 2(b) to prove Counts II through IV means that it must prove not only (1) that the charged defendants knew that third parties would release asbestos and (2) that they knew that those releases would place another person in imminent danger, but also (3) that the charged defendants engaged in the alleged "four types of activities" with the purpose of causing

releases of asbestos that thereby placed another person in imminent danger of death or serious bodily injury. In other words, the Government must prove that:

- Grace's goal in providing and distributing asbestos-contaminated vermiculite material to the Libby community (Count II);
- Grace's goal in causing Grace employees in Libby and their personal effects to be contaminated with asbestos (Count II);
- Grace, Wolter, and Bettacchi's goal in selling the Screening Plant to the Parker family (Count III); and
- Grace, Wolter, and Bettacchi's goal in leasing and selling the Export Plant to the Burnetts and the City of Libby, respectively (Count IV);

was to cause a violation of the knowing endangerment provision and that all other elements of § 7413(c)(5)(A) were satisfied.

B. The *Mens Rea* Elements of the Knowing Endangerment Provision Require the Government to Prove That the Defendants Were Substantially Certain That Their Conduct Would Cause Releases of Asbestos and That the Defendants Were Substantially Certain That Their Conduct Thereby Placed Another Person in Imminent Danger of Death or Serious Bodily Injury.

In addition to proving that the Clean Air Act Defendants purposefully caused a violation of § 7413(c)(5)(A), the Government also must prove that all of the Defendants (because of the endangerment conspiracy)[2] acted with the *mens rea* required for each of the knowing endangerment provision's *actus-reus* elements—

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[2] *See United States v. Lennick*, 18 F.3d 814, 818 (9th Cir. 1994) (holding that to convict a defendant of conspiracy to commit an offense against the United States, the government must prove "the requisite intent necessary to commit the underlying crime").

a knowing release and knowing endangerment. 42 U.S.C. § 7413(c)(5)(A). That means the Government must prove that each Defendant was substantially certain that their conduct would cause releases of asbestos and that each Defendant was substantially certain at the time that their conduct placed another person in "imminent danger" of death or serious bodily injury.

1. Proof of "Knowing" Conduct Requires Proof That the Defendants Were Practically or Substantially Certain of the Alleged Result of Their Conduct.

Neither "knowingly" nor "knows at the time" is defined in § 7413(c)(5)(A). When faced with that situation, the Supreme Court and the Ninth Circuit often have looked for guidance to the Model Penal Code's levels of culpability. *See, e.g., United States v. U.S. Gypsum Co.*, 438 U.S. 422, 444 (1978) ("The ALI Model Penal Code is one source of guidance upon which the Court has relied to illuminate questions of this type."); *United States v. Beardslee*, 197 F.3d 378, 389 (9th Cir. 1999) (applying the Model Penal Code standard of "knowingly").

The Model Penal Code provides that "a person acts knowingly with respect to a material element of an offense when: . . . if the element involves a result of his conduct, he is aware that it is ***practically certain*** that his conduct will cause such a result." Model Penal Code § 2.02(2)(b)(ii) (2001) (emphasis added). That standard for "knowing" conduct under § 7413(c)(5)(A) is consistent with the Ninth

Circuit's application of RCRA's knowing endangerment provision.[3] *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 or [sic] death or serious bodily injury.") (quotation omitted)).

The reasons for this rigorous standard of "knowledge" are familiar:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.

Morissette v. United States, 342 U.S. 246, 250, 253 (1952) ("Congress, by the language of this section, has been at pains to incriminate only 'knowing' conversions.").

An exacting *mens rea* standard is particularly appropriate where "the behavior proscribed by the Act is . . . difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct." *See U.S. Gypsum Co.*, 438 U.S. at 440-41 (holding that the government had to prove that the

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[3] Although *Elias* involved a prosecution under the knowing endangerment provision of the Resource Conservation and Recovery Act ("RCRA"), Congress based § 7413(c)(5)(A) on that RCRA provision. S. Rep. No. 101-228 (1989), *as reprinted in* 1990 U.S.C.C.A.N. 3385, 3746 ("Sixth, the [Clean Air Act Amendments of 1990] add[] a new section 113(c)(5), a knowing endangerment provision that conforms the Act to other recently reauthorized environmental statutes. See, section 309 of the Clean Water Act, 33 U.S.C. 1319(c)(3); section 3008 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(e) and (f).").

defendants knew that their conduct would have anticompetitive effects). As the Supreme Court put the point in the antitrust context:

> The imposition of criminal liability on a corporate official, or for that matter on a corporation directly, for engaging in such conduct which only after the fact is determined to violate the statute because of anticompetitive effects, without inquiring into the intent with which it was undertaken, holds out the distinct possibility of overdeterrence; salutary and procompetitive conduct lying close to the borderline of impermissible conduct might be shunned by businessmen who chose to be excessively cautious in the face of uncertainty regarding possible exposure to criminal punishment for even a good-faith error of judgment.

Id. at 441.

Congress cited similar concerns in explaining why it chose to require "knowing endangerment" rather than "reckless endangerment" in statutes like the Clean Air Act:

> [T]he new [RCRA knowing endangerment] offense is drafted in a way intended to assure to the extent possible that persons are not prosecuted or convicted unjustly for making difficult business judgments where such judgments are made without the necessary scienter.
>
> . . . .
>
> There is also general recognition that serious criminal charges are not an appropriate vehicle for second-guessing the wisdom of judgments that are made on the basis of what was known at the time where the person acted without the necessary element of scienter. In this light, the concept of "reckless endangerment" embodied in the House amendment has been rejected in favor of a knowing endangerment provision . . . .

H.R. Conf. Rep. No. 96-1444, at 38-39 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 5028, 5037-38; *see also* 136 Cong. Rec. S16895-01, at *S16951 (daily ed. Oct. 27, 1990) ("Chafee-Baucus Statement of Senate Managers," S. 1630, Clean Air Act Amendments of 1990) (stating that knowing endangerment requires specific intent). Congress's decision to limit knowing endangerment to only the most egregious cases, where a defendant is substantially certain that his conduct will result in "imminent danger of death or serious bodily injury," is not surprising given that violations of the Act are punishable by up to fifteen years of imprisonment.

Therefore, whether characterized as "practically certain" or "substantially certain," the government's burden of proving that a defendant "knew" the results of his conduct is considerable. As the Ninth Circuit explained in holding that a convicted arsonist had not "knowingly creat[ed] a substantial risk of death or serious bodily injury":

> In light of [the Model Penal Code standard], the district court did not clearly err in finding that Beardslee did not act knowingly or recklessly within the meaning of section 2K1.4. Beardslee was doubtless aware that there was a possibility that her actions—or the actions of Venable, under her direction—would cause a substantial risk of death or serious bodily injury. However, a possibility, even a considerable one, is not the same as a "practical certainty," and here it was not practically certain that the burning of Beardslee's warehouse would create a substantial risk of death or injury.

Beardslee, 197 F.3d at 389.

Here, because the Government has charged that the Clean Air Act Defendants violated the knowing endangerment provision by willfully causing releases, both *actus-reus* elements of § 7413(c)(5)(A) are allegedly the result of the Clean Air Act Defendants' conduct. The Government therefore must prove (1) that the Defendants were substantially certain that their conduct would cause releases of asbestos and (2) that the Defendants were substantially certain at the time that their conduct thereby placed another person in imminent danger of death or serious bodily injury.

2. The Government Must Prove that Defendants Wolter and Bettacchi Had Actual Knowledge of the Alleged Endangerment.

With respect to the individual Defendants Jack W. Wolter and Robert J. Bettacchi, the Clean Air Act also requires proof that the individual actually knew and believed that the release he allegedly caused placed another person in imminent danger:

> In determining whether a defendant who is an individual knew that that the violation placed another person in imminent danger of death or serious bodily injury—
>
> > (i) the defendant is responsible for only actual awareness or actual belief possessed; and
> >
> > (ii) knowledge possessed by a person other than the defendant, but not by the defendant may not be attributed to the defendant . . . .

42 U.S.C. § 7413(c)(5)(B). Therefore, the Government must prove that Defendants Wolter and Bettacchi, whose involvement with the Screening Plant and the Export Plant ended in 1993 and 1994, had actual knowledge of alleged releases that placed another person in imminent danger after November 3, 1999.[4]

C. "Imminent Danger" Means Tangible, Individualized Risk That Is Substantially Certain to Cause Death or Serious Bodily Injury; Not Statistical, Aggregate Risk that Becomes Observable Only When Applied to a Large Population.

No reasonable person would characterize an event that has a 1-in-10,000 chance of occurring as "imminent," yet that notion is the foundation of the Government's Clean Air Act charges. Because the language of the knowing endangerment provision does not permit the Government's premise, nor could Congress have intended that result, the Government must prove that each person whom the Clean Air Act Defendants allegedly endangered was exposed to a tangible risk that was substantially certain to cause death or serious bodily injury,

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[4] Section 7413(c)(6) does not alter this result. Although that subsection allows the government to prosecute a "responsible corporate officer" even if he did not personally engage in the conduct proscribed by § 7413(c)(5)(A), the government still must prove that he had knowledge of the offense and the capacity to stop it. *See United States v. Iverson*, 162 F.3d 1015, 1025-26 (9th Cir. 1998) (discussing a similar provision in the Clean Water Act); *see also United States v. MacDonald & Watson Waste Oil Co.*, 933 F.2d 35, 52 (1st Cir. 1991) ("[W]e know of no precedent for failing to give effect to a knowledge requirement that Congress has expressly included in a criminal statute."); *United States v. White*, 766 F. Supp. 873, 895 (E.D. Wash. 1991) (holding that a corporate officer cannot be held criminally liable under RCRA absent actual knowledge).

not just a statistical, aggregate risk that would become observable only if applied to a large population.

To date, the Government has not explained what quantum of risk it believes is required to establish "imminent danger," limiting its argument only to the purported probative value of its evidence. For example, the Government has contended that asbestos in Libby is qualitatively "hazardous" because it is "friable," that the asbestos therefore presented an aggregate risk to the Libby community, and that those alleged facts are relevant to proving knowing endangerment. *See, e.g.*, Gov't's Resp. Defs.' Joint Mot. Exclude Evid. Derived Indoor Releases 9-10 (June 20, 2006) (Docket #565); Gov't's Ninth Cir. Br. 57. But as the Defendants' explained in their supplemental *Daubert* briefs, "friable" does not equal "hazardous" unless the friability has resulted in sufficient fiber concentrations to cause death or serious bodily injury to "another person." It is a question of legal sufficiency, not admissibility.

1. Because § 7413(c)(5)(A) May Be Violated If a Defendant Places Only One Person in "Imminent Danger," the Government May Not Rely on an Aggregate-Risk Construction of "Imminent Danger."

The Government must establish that the amount of asbestos released into the ambient air from one occurrence of "normal human activity" during the statute of limitations period was quantitatively sufficient to present an "imminent danger" to an individual person; an aggregate risk to the Libby community that is too remote

to present a tangible risk to an individual is insufficient to establish "imminent danger" as a matter of law.

The Government has implied that an "imminent danger" is present in Libby because people in Libby are sick. That assertion is a continuation of the EPA's position in the CERCLA case: The low levels of asbestos in Libby—equivalent in risk on an individual basis to the "hazard" of lightning strikes and bicycle accidents—presented an imminent and substantial danger to the Libby community as a whole. This Court illustrated the Government's notion of aggregate risk during oral argument:

> But as far as risk goes, I mean, if you have some sort of cancer and your chances are one in ten of surviving and in five years nine people that survive, those are pretty good odds. The one person that dies, they're not very good odds at all, because of the risk. It's 100 percent for that one person.

Mot. Hr'g Tr. 104:17-22 (July 19, 2006). In other words, under an aggregate-risk theory, a low risk (several orders of magnitude lower than the risk in the Court's hypothetical) may be characterized as an "imminent danger" if that risk is extended to a proportionately large population (the Libby community). The Defendants respectfully submit that "imminent danger" under § 7413(c)(5)(A) must be evaluated based on risk to an individual, not risk in the aggregate.

The knowing endangerment provision requires the Government to prove that that the Clean Air Act Defendants' conduct "place[d] ***another person*** in imminent

danger of death or serious bodily injury." 42 U.S.C. § 7413(c)(5)(A) (emphasis added). Because the statute refers to "another person," the Government could charge a violation of § 7413(c)(5)(A) even if there was only one alleged "victim." For example, Count III of the Superseding Indictment charges that Defendants Grace, Wolter, and Bettacchi's sale of the Screening Plant to the Parkers caused a release that placed "another person," presumably one of the Parkers, in imminent danger. But the Government cannot establish "imminent danger" for Count III based on aggregate risk because there is no "aggregate," only the alleged individual risk to one of the Parkers.

Similarly, Count II could have charged Grace with knowingly endangering the Libby community even if only one person lived in Libby as long as Grace's conduct caused a release that created a risk so great that the sole resident of Libby was placed in "imminent danger" (and all other elements of the offense were satisfied). That quantum of risk—tangible danger to an individual of death or serious bodily injury—sets the floor for "imminent danger," and that "lowest common denominator, as it were, must govern" in all circumstances. *See Clark v. Martinez*, 543 U.S. 371, 380 (2005) ("In other words, when deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice."); *see also* Motions to Dismiss Order, 429 F. Supp. 2d at 1243 (stating that the knowing endangerment provision's applicability to a short-

lived endangerment rebutted the Government's assertion that Congress intended § 7413(c)(5)(A) to be a continuing offense). The Government may charge (as it did in Count II) that a defendant placed more than one individual in imminent danger, but that charging decision does not lower the legally required quantum of risk simply because the number of allegedly endangered individuals was adequate to result in risk in the aggregate. *See, e.g.*, *United States v. Santos*, 128 S. Ct. 2020, 2030 (2008) (plurality) ("[T]he meaning of words in a statute cannot change with the statute's application. To hold otherwise would render every statute a chameleon and would establish within our jurisprudence . . . the dangerous principle that judges can give the same statutory text different meanings in different cases." (citation and quotation omitted)). Rather, the individual-risk construction of "imminent danger" still applies, and the Government must prove that Grace knowingly exposed each of those individuals to a quantum of risk sufficient to place one person in "imminent danger."

Had Congress intended an aggregate-risk construction of "imminent danger," it would have copied the imminent danger language contained in the CERCLA removal provision. There, Congress provided for EPA removal actions based on releases that "may present an imminent and substantial danger ***to the public health or welfare***," a phrase that implies an aggregate-risk standard. *See* 42 U.S.C. § 9604(a)(1) (emphasis added); *see also id.* § 7603 (". . . the

Administrator, upon receipt of evidence that a pollution source or combination of sources . . . is presenting an imminent and substantial endangerment to public health or welfare, or the environment . . ."). The Clean Air Act's knowing endangerment provision requires proof of much more—observable, individualized risk to "another person"—as one would expect for one of the most serious offenses in the United States Code. This Court must presume that Congress deliberately chose that higher standard. *See, e.g.*, *SEC v. McCarthy*, 322 F.3d 650, 656 (9th Cir. 2003) ("Congress's explicit decision to use one word over another in drafting a statute is material. It is a decision that is imbued with legal significance and should not be presumed to be random or devoid of meaning." (citation omitted)). Because § 7413(c)(5)(A) may be applied if only one person is placed in "imminent danger," the individual-risk construction of "imminent danger" must apply in all circumstances.

2. Cases That Have Applied Environmental Knowing Endangerment Provisions Demonstrate That the Government Must Prove That the Defendant Created a Tangible, Individualized Risk That Was Substantially Certain to Cause Death or Serious Bodily Injury.

Cases that have applied environmental knowing endangerment provisions demonstrate that both the *mens rea* of knowing conduct and the *actus reus* of imminent endangerment effectively require the Government to prove the same standard—substantial certainty. In other words, the tangible, individualized risk

required by § 7413(c)(5)(A) is one that is substantially certain to cause death or serious bodily injury.

For example, in *United States v. Elias*, the defendant ordered on three occasions several of his employees to enter a large storage tank and to wash out the "one to two tons of cyanide-laced sludge" inside. *United States v. Elias*, 269 F.3d 1003, 1007 (9th Cir. 2001). Elias failed to provide any safety equipment, despite his employees' requests. *Id.* On the first occasion, two of Elias's employees entered the tank and within fifteen minutes experienced sore throats and nasal passages. *Id.* The next morning, the employees reported to Elias the health effects they had suffered. *Id.* Nevertheless, Elias again ordered the employees to enter the tank and refused to supply safety equipment. *Id.* Within forty-five minutes of entering the tank, one of the employees (Dominguez) collapsed, was in severe respiratory distress, and was in danger of dying. *Id.* Elias then lied to investigators about the cyanide. *Id.* at 1008. Weeks later, Elias ordered a new employee to move and bury the cyanide-laced sludge, again without safety equipment. *Id.*

Given that chronology of events, the cause and effect relationship between Elias's conduct and the result of that conduct was plain to Elias: Each and every individual whom he sent into that tank was substantially certain to suffer death or serious bodily injury, and Elias knew it. Elias thus exposed his employees to a

tangible, individualized risk that was substantially certain to cause death or serous bodily injury, and the Ninth Circuit affirmed Elias's conviction on that basis:

> [A]fter Dominguez's injury, Elias ***persisted in endangering employees*** by having them acknowledge training that they never undertook and ***by instructing another man to bury the sludge*** that harmed Dominguez without the benefit of safety equipment. Viewing this evidence in the light most favorable to the prosecution, a rational trier of fact could have found beyond a reasonable doubt that Elias knowingly exposed his employees to hazardous waste that he knew with substantial certainty ***would cause*** death or serious bodily injury.

United States v. Elias, No. 00-30145, 2001 WL 1297705, at *1 (9th Cir. Oct. 23, 2001) (emphasis added); *see also Elias*, 269 F.3d at 1018.

In contrast, in *United States v. Villegas*, the court reversed a conviction under the Clean Water Act's knowing endangerment provision because the risk presented by the defendant's conduct was too remote. Villegas, who owned a blood-testing facility, placed "at least one hundred vials" of blood in a bulkhead, from which they entered the Hudson River. *United States v. Villegas*, 784 F. Supp. 6, 7 (E.D.N.Y. 1991), *rev'd on other grounds*, 3 F.3d 643 (2d Cir. 1993). Numerous vials eventually washed ashore, where they were discovered by children playing on the beach. *Id.* Several of the vials that Villegas placed in the bulkhead tested positive for hepatitis B. *Id.*

After a jury convicted Villegas, he argued that there was insufficient evidence to prove that he knew at the time he placed the vials in the bulkhead that he was thereby placing another person in imminent danger of death or serious

bodily injury. *Id.* at 11. Although the court indicated its belief that the statute required a *mens rea* of "substantial certainty," it declined to resolve that issue because the government had failed to prove even a *mens rea* standard of "high probability." As the court explained:

> Of particular significance is the testimony of Dr. Alfred M. Prince, an expert in virology called by the United States Attorney. Dr. Prince suggested that the principal risk of hepatitis infection as a result of exposure to a vial of contaminated blood would arise "[i]f that vial is broken and if a piece of broken glass were to penetrate the skin . . . ." While Dr. Prince testified that the likelihood of contamination in those circumstances was "very high," he also testified that the risk of this happening was "low" . . . .

Id. at 13-14 (citation omitted). Because the government's expert conceded that the defendant created only a "remote" risk, Villegas could not have known that he thereby placed another person in imminent danger. *Id.* at 14.

The different results of these cases is not surprising. Congress's use of the *mens rea* "knowingly" and the phrase "imminent danger" demonstrates that it chose to carry the concept of "substantial certainty" through each element of the offense. Therefore, to establish that the Defendants "place[d] another person in imminent danger," the Government must prove that the Defendants' conduct exposed another person to a tangible, individualized risk that was substantially certain to cause death or serious bodily injury.

3. Requiring the Government to Prove That the Defendant Created a Tangible, Individualized Risk That Was Substantially Certain to Cause Death or Serious Bodily Injury Is Consistent With the

Historical Event That Motivated Congress to Enact the Clean Air Act's Knowing Endangerment Provision—Bhopal.

Requiring the Government to prove a tangible, individualized risk that is substantially certain to cause death or serious bodily injury is consistent with the type of harm Congress sought to punish through the knowing endangerment provision: An event like the release of methyl isocyanate in Bhopal, India, in 1984, which presented a manifest risk so great that within days of the releases thousands of individuals were killed and tens of thousands were injured. *See Clean Air Act Amendments: Hearing on H.R. 4 and H.R. 2585 Before the Subcomm. on Health and the Environment of the H. Comm. on Energy and Commerce*, 101st Cong. pt. 5 (1989) (EPA-submitted "Bush Administration Report on S. 1630," the Senate bill that became the Clean Air Act Amendments of 1990) (stating that the negligent endangerment provision "is meant to provide a criminal sanction for Bhopal-type situations where the conduct involved warrants more than a civil remedy, but where the knowing behavior required under the new [Clean Air Act] felony provisions is not present." The report further states that the knowing endangerment provision is available for the "most egregious types of violation"); S. Rep. 101-228, at 406 (1989), *as reprinted in* 1990 U.S.C.C.A.N. 3385, 3788 (Sen. Lautenberg's statements regarding Congress's goal of preventing a Bhopal-type event); Michael S. Alushin, *Enforcement of the Clean Air Act Amendments of 1990*, 21 Envtl. L. 2217, 2219 (1991) ("The pre-1990 [Clean Air Act] did not

contain sanctions to address a release such as that which occurred in the Bhopal tragedy. Now any such disaster, if it results from knowing action or negligence, is punishable . . . ."). The Bhopal event thus is the appropriate point of reference for determining the nature of the risk necessary to establish "imminent danger" to a group of people under § 7413(c)(5)(A): A risk so great that each of hundreds of people were placed in imminent danger, not a risk so remote that it could be fairly characterized as "imminent," if at all, only because it was applied to hundreds of people.

At bottom, the text of § 7413(c)(5)(A), its legislative history, and cases that have applied environmental knowing-endangerment provisions demonstrate that Congress designed the knowing endangerment provision so that it could not be applied to remote, statistical risk in the aggregate. That is the purpose of the Clean Air Act's civil regulatory scheme. Rather, to prove criminal knowing endangerment, the Government must meet a lofty standard—substantial certainty—with respect to each element of the offense. Anything less would make criminals of every carmaker, airplane manufacturer, and pharmaceutical company, all of whom presumably "know" that "someone" will die because of their product. The low risk that the EPA purported to find in Libby during the statute of limitations period may have been sufficient for its civil removal action, but it does not constitute "imminent danger" under § 7413(c)(5)(A). Here, the Government

must prove that during the statute of limitations period the Clean Air Act Defendants were substantially certain that another person would be exposed to a tangible, individualized risk that was substantially certain to cause that person to suffer death or serous bodily injury.

D. The Defendants Are Entitled to Offer Proof of Entrapment by Estoppel, Which Is a Defense to the Clean Air Act Charges.[5]

Undeterred by these legal principles, the Government alleges that "[m]odern science has not established a safe level for asbestos exposure for which there is no increased risk of disease," Superseding Indictment ¶ 47, implying that only one fiber of asbestos is dangerous and leaving it to the Defendants' to prove otherwise. But the Superseding Indictment omits the decades of relevant federal health-and-safety regulations and agency actions that permitted exposure to measurable levels of asbestos, levels that certainly could not have presented an "imminent danger." Because the facts at trial will show that the Defendants reasonably relied on those statements and conduct, the Defendants are entitled to offer proof of entrapment by estoppel.

The defense of entrapment by estoppel is based on the constitutional guarantee of "fair warning as to what conduct the [g]overnment intended to make

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[5] The evidence at trial may demonstrate that the Defendants are also entitled to a jury instruction on entrapment by estoppel with respect to the other Counts of the Superseding Indictment.

criminal." *See United States v. Penn. Indus. Chem. Corp.*, 411 U.S. 655, 674 (1973). Building on that principle, the Supreme Court has held that "inexplicably contradictory" government standards cannot support criminal sanctions, particularly if the government's statements or actions have been misleading. *See Raley v. Ohio*, 360 U.S. 423, 438 (1959); *Cox v. Louisiana*, 379 U.S. 559, 570-71 (1965). As a result, a criminal defendant is not guilty of the crime charged if he reasonably relied on an authoritative government statement that his conduct was permissible, even if that statement was incorrect. *See United States v. Batterjee*, 361 F.3d 1210, 1216 (9th Cir. 2004) (holding that the defendant was entitled to the defense of entrapment by estoppel where a government form implied by omission that the defendant's conduct was legal); *see also United States v. Tallmadge*, 829 F.2d 767 (9th Cir. 1987).

Here, the Government's desired application of the Clean Air Act's knowing endangerment provision violates the "traditional notions of fairness inherent in our system of criminal justice," *Penn. Indus. Chem. Corp.*, 411 U.S. at 674, for at least two reasons. First, the Government's charge that the Clean Air Act Defendants placed the people of Libby in imminent danger "inexplicably contradicts" decades of federal-agency statements and actions that permitted ambient-air asbestos exposures equal to or greater than those the Government claims were present in Libby during the statute of limitations period. *See, e.g.*, Asbestos Exposure Limit,

73 Fed. Reg. 11284, 11286 (Feb. 29, 2008) (discussing historical Mine Safety and Health Administration ("MSHA") asbestos-exposure limits); Asbestos NESHAP Revision, 55 Fed. Reg. 48406, 48432-33 (Nov. 20, 1990) (stating that MSHA's asbestos PEL is applicable under the EPA's Clean Air Act regulations).

For example, at all times relevant to the Government's charges, MSHA's Permissible Exposure Limit ("PEL") for asbestos at surface mines like the Libby mine was at least 2.0 fibers per cubic centimeter. *See* 73 Fed. Reg. at 11286. Although MSHA's standard may have tolerated some risk because it applied to workers or because of concerns about economic or technological feasibility, it cannot be that those factors led MSHA to discharge its obligation "to protect the health and safety of the Nation's . . . miners," 30 U.S.C. § 801, through a nationwide standard that amounted to "imminent danger" writ large. Nor can it be, as the Government's charges imply, that Congress and MSHA continued to place miners in "imminent danger" for another eighteen years after Congress enacted § 7413(c)(5)(A). *See* 73 Fed. Reg. at 11303 (lowering in 2008 the asbestos PEL that had applied to the Libby mine since 1978).

Second, the obvious conclusion that neither Congress, MSHA, nor the EPA would have tolerated a safety standard of "imminent danger" demonstrates why the Defendants would have reasonably relied on the MSHA PEL and other federal statements and conduct to establish levels of asbestos exposure that, at a minimum,

did not constitute a fifteen-year felony. Regardless of whether MSHA was correct, its PEL authoritatively informed all mine operators in the United States—including the Defendants—that federal law permitted in the ambient air two million asbestos fibers within arms length of a person for eight hours a day, forty hours a week, fifty weeks a year, for fifty years. The EPA did the same by acknowledging the MSHA PEL in its Clean Air Act regulations and by otherwise making clear that federal law permitted some ambient-air asbestos exposure. In short, the agency responsible for regulating the Libby mine (MSHA) and the agency responsible for administering the Clean Air Act (EPA) authoritatively informed the Defendants at the time of their conduct that federal law permitted certain ambient-air concentrations of asbestos but now assert, in cooperation with the Government, that those levels were a federal crime.

Of course, as explained above, § 7413(c)(5)(A) prohibits the Government's constitutionally unfair and infirm conception of knowing endangerment by establishing a standard for "imminent danger" that is orders of magnitude higher than any relevant federal safety standard. Despite what the Government would ***like*** § 7413(c)(5)(A) to mean, it may not contend that asbestos levels below the then-applicable MSHA PEL and EPA regulations and risk standards (among other safety standards) constitute criminal "imminent danger." *See United States v. Laub*, 385 U.S. 475, 487 (1967) ("[Crimes] may not be constructed nunc pro

tunc."). If the Defendants can show at trial that they reasonably relied on government statements or actions indicating that their conduct was permissible under federal law, they are entitled to a jury instruction on entrapment by estoppel and to a verdict of not guilty.

E. The Government's "Normal Human Activities" Theory Is Time Barred.

This Court previously held that the Government cannot prove violations of the Clean Air Act's knowing endangerment provision by presenting evidence of conduct by the Defendants that placed another person in imminent danger before November 3, 1999. Motions to Dismiss Order, 429 F. Supp. 2d at 1245 ("Grace's motion to dismiss is granted as to all Defendants with regard to the criminal conduct charged in Counts II through IV which was complete as of November 3, 1999."). As the Court explained, "the crime defined in th[e knowing endangerment provision] is complete and may be prosecuted at the first instant that another person is placed in imminent danger, regardless of how long the endangerment lasts." *Id.* at 1244 (emphasis added). The effect of the Court's order is clear: Conduct that caused endangerment before November 3, 1999, is time barred and thus cannot be the basis for conviction under Counts II through IV.

Nevertheless, the Government continues to advance its "normal human activities" theory, which provides that each occurrence of "normal human activity" in Libby is a "release" under § 7413(c)(5)(A). *See, e.g.*, Gov't's App. Br. 40-41

(Jan. 16, 2007) (emphasis added). That theory is time barred and therefore insufficient as a matter of law.[6]

Under the Motions to Dismiss Order, the Government must prove conduct that first placed another person in imminent danger within the limitations period—that is, after November 3, 1999. *Id.* at 1243 ("Section 7413(c)(5) criminalizes any release of a pollutant when the releasing party knows at the time that he thereby places another person in imminent danger of death or serious bodily injury. Assuming all other elements are satisfied, the crime [of knowing endangerment] is complete and may be prosecuted at the first instant that another person is placed in imminent danger, regardless of how long the endangerment lasts." (emphasis

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[6] In fact, these "four types of actions" and the Government's theory of "caused releases" are specifically alleged in the Superseding Indictment and are the sole basis for Counts II through IV. *See* Indictment ¶ 186, 188, 190; *United States v. W.R. Grace*, 434 F. Supp. 2d 879, 885 (D. Mont. 2006) ("The Indictment does not allege any specific 'release' of hazardous air pollutants after November 3, 1999. Instead, as the Defendants have stated, the government's theory appears to be that some of the defendants 'caused' releases within the limitations period by placing contaminated vermiculite in locations where innocent third parties would later unknowingly release tremolite fibers into the ambient air.") (quotation omitted)). The Defendants respectfully submit that the Court should have dismissed Counts II through IV entirely, not just as to "criminal conduct charged in Counts II through IV which was complete as of November 3, 1999," *see* Motions to Dismiss Order, 429 F. Supp. 2d at 1245, because those Counts do not allege any criminal conduct that was ***not*** complete as of that date. Nevertheless, because the grand jury returned Counts II through IV based on the "normal human activities" theory, the Government is "stuck" with that factual predicate. Any deviation would mandate dismissal of those Counts, or reversal of convictions on those Counts, because of constructive amendment or fatal variance from the Superseding Indictment. *See, e.g.*, *Stirone v. United States*, 361 U.S. 212 (1960) (constructive amendment); *United States v. Tsinhnahijinnie*, 112 F.3d 988 (9th Cir. 1997) (fatal variance).

added)). Any other interpretation of the statute would, as this Court recognized, eviscerate the statute of limitations by allowing the Defendants to be held liable for actions they took or caused decades earlier. *Id.* at 1240 ("[T]he purposes of a statute of limitations . . . include protection against prosecution for acts done in the distant past.").

Despite that clear ruling, the Government still plans to prove violations of the knowing endangerment provision based on the various Defendants' alleged distribution of vermiculite to the Libby community (ended by 1992), alleged contamination of workers' personal effects (ended by 1992), and the sales of the Screening Plant (1993) and the Export Plant (1994), which the Government referred to in its Ninth Circuit brief as the Defendants' "four types of actions." That approach violates this Court's Order that knowing endangerment is not a continuing offense and must be rejected.

To begin with, it is self-evident that the "four types of actions," on their own, cannot sustain a conviction because that conduct—and the first instant that another person was allegedly placed in imminent danger—occurred years before November 3, 1999. The Government recognized that statute of limitations problem, which is why it argued that knowing endangerment was a continuing offense. This Court rejected that argument.

Now, the Government hopes it can extend the legal clock on the Clean Air Act Defendants' alleged conduct by arguing to the jury that the Clean Air Act Defendants' "four types of actions" caused third parties to release asbestos through their "normal human activities," thereby placing themselves or others in imminent danger within the statute of limitations period. But the Government's theory of "caused releases" does not solve its statute of limitations problem: Like the Defendants' "four types of actions," the third parties' "normal human activities" would have placed another person in imminent danger long before November 3, 1999.

The gist of the Government's "normal human activities" theory is that the Defendants' conduct created a mechanism of endangerment that was triggered by the conduct of third parties. The statute-of-limitations problem with that theory is straightforward: Because "normal human activity" has been constant in Libby, the alleged triggering event occurred at the same time the Clean Air Act Defendants created the alleged endangerment mechanism. In other words, the statute of limitations period for the alleged "normal human activities" is coterminous with the limitations period for the Clean Air Act Defendants' allegedly causative conduct.

For example, the Clean Air Act Defendants' conduct charged in Count III (the sale of the Screening Plant to the Parker family) allegedly occurred "on or

about December 17, 1993," some six years before November 3, 1999. Superseding Indictment ¶ 166. Needless to say, the "normal human activities" at the heart of the Government's theory occurred during those six years, as did "the first instance" that someone was allegedly endangered by those activities. Indeed, the Government conceded as much during oral argument before this Court. Mot. Dismiss Hr'g Tr. 127:22-128:1 (Feb. 14, 2006) ("[The Government has] to show that the defendants knew, once they left town, once they sold the mine, once they sold the property to the Parkers or to the Burnetts or left it on the baseball fields, that once they packed up and left town, people ***were still*** being endangered." (emphasis added)). Accordingly, "the crime defined in th[e knowing endangerment provision] [wa]s complete and [could have] been prosecuted" at that time. Motions to Dismiss Order, 429 F. Supp. 2d at 1243.

Further, as this Court recognized, Counts II through IV raise duplicity concerns that must be addressed, at a minimum, by requiring the jury to unanimously agree as to "which of the distinct charges the defendant actually committed." *Id.* at 1246 (quotation omitted). That means for each Count the Government must prove a single chain of conduct that grows out of the charged "type of action"—the Defendants' causative conduct, a single release it caused, and the endangerment that resulted from that release (not to mention the requisite *mens rea*)—where the "first instant" of endangerment occurred after November 3,

1999. The Government cannot meet that burden because each link in that chain occurred essentially at the same time, years before the limitations period in this case. In reality, the Government's theory amounts to an elongated chain of conduct—the Defendants' causative conduct, years of caused releases and purported endangerment that the Government hopes are not cognizable under the statute of limitations, and then caused releases and endangerment after November 3, 1999—that would make a mockery of this Court's continuing offense Order and the principles underlying the statute of limitations.

Therefore, under this Court's Motions to Dismiss Order, the Government's "normal human activities" theory of liability is time-barred because the four types of actions charged—distribution of vermiculite to the Libby community, contamination of workers' personal effects, the sales of the Screening Plant and the Export Plant—each allegedly caused endangerment before November 3, 1999.

III. Counts V Through VIII: Obstruction of Justice, 18 U.S.C. § 1505.

Counts V through VIII of the Superseding Indictment charge that Grace corruptly obstructed a pending proceeding before the EPA by

- allegedly providing to the EPA false and misleading information about the tremolite content of vermiculite concentrate historical asbestos levels at the Libby mine (Count V);
- allegedly including false and misleading information in Grace's response to the EPA's second 104(e) request for information (Count VI);
- denying the EPA access to certain properties in Libby (Count VII); and

- allegedly including false and misleading information in Grace's April 10, 2002 letter to the EPA.

A defendant is guilty under § 1505 only if the government proves (1) that there was a proceeding pending before a department or agency of the United States, (2) that the defendant was aware of that proceeding, and (3) that the defendant "intentionally endeavored corruptly to influence, obstruct or impede the pending proceeding." *United States v. Price*, 951 F.2d 1028, 1031 (9th Cir. 1991). Acting "corruptly" means acting with the improper purpose of obstructing justice. *Id.*

Grace's forthright explanations to the EPA and its legitimate use of the legal process that the EPA invoked cannot constitute obstruction of justice, in part because Grace's exercise of its constitutional and statutory rights cannot be the basis for a criminal conviction.

A. Requiring the EPA to Obtain a Court Order Before Allowing Access to Property Is Lawful, Privileged Conduct That Cannot Constitute Obstruction of Justice.

Grace cannot be convicted of obstruction of justice based on its denying the EPA access to its Libby properties because the denial of access was privileged conduct under the Fourth Amendment. It is well established that the Fourth Amendment's prohibition against unreasonable searches applies to administrative inspections of private commercial property like Grace's property in Libby. *See v. City of Seattle*, 387 U.S. 541, 543 (1967) ("The businessman, like the occupant of a

residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property."). To safeguard those Fourth Amendment rights, the Supreme Court has required judicial review of any administrative demand for access to property. *See Marshall v. Barlow's, Inc.*, 436 U.S. 307, 323 (1978) ("The authority to make warrantless searches devolves almost unbridled discretion upon executive and administrative officers, particularly those in the field, as to when to search and whom to search. A warrant, by contrast, would provide assurances from a neutral officer that the inspection is reasonable under the Constitution, is authorized by statute, and is pursuant to an administrative plan containing specific neutral criteria."). And although that Court has not always required a warrant to search, it has done so in limited circumstances only because the statute at issue "provide[d] a constitutionally adequate substitute for a warrant," including judicial review. *See Donovan v. Dewey*, 452 U.S. 594, 603, 605 (1981) ("The Act . . . requires the Secretary, when refused entry onto a mining facility, to file a civil action in federal court to obtain an injunction against future refusals. This proceeding provides an adequate forum for the mineowner to show that a specific search is outside the federal regulatory authority . . . ."). As a result, Grace had a constitutional right to refuse to permit the EPA's administrative inspection of its commercial property under CERCLA § 104(e) because the EPA did not present a warrant or its

equivalent when it demanded access. *See United States v. Tarkowski*, 248 F.3d 596, 599-602 (7th Cir. 2001) (holding that judicial review of CERCLA § 104(e) orders is necessary to avoid giving the EPA "an unlimited power of warrantless search and seizure, something that the statute does not contemplate and that the Fourth Amendment would almost certainly forbid."); *Barlow's, Inc.*, 436 U.S. at 312 ("[I]t is untenable that the ban on warrantless searches was not intended to shield places of business as well as of residence.").

Whatever the requirements for a particular administrative demand for access, it cannot be a crime to invoke constitutional and statutory safeguards by requiring an administrative agency to establish that it has satisfied the legal criteria for access to property. *See United States v. Prescott*, 581 F.2d 1343, 1350 (9th Cir. 1978) ("It was prejudicial error to permit the government to prove, as evidence of [hindering the apprehension of a felon], that Prescott declined to unlock her door when the officers did not have a warrant."). As the Ninth Circuit explained:

> When . . . [an] officer demands entry but presents no warrant, there is a presumption that the officer has no right to enter, because it is only in certain carefully defined circumstances that lack of a warrant is excused. An occupant can act on that presumption and refuse admission. He need not try to ascertain whether, in a particular case, the absence of a warrant is excused. He is not required to surrender his Fourth Amendment protection on the say so of the officer. The Amendment gives him a constitutional right to refuse to consent to entry and search. His asserting it cannot be a crime. Nor can it be evidence of a crime.

Id. at 1350-51. One's motivation for not consenting to property access is irrelevant, and it "cannot be grounds for inferring criminal intent." *See Gasho v. United States*, 39 F.3d 1420, 1431 (9th Cir. 1994) (holding that refusal to surrender property is not evidence of the specific intent to physically interfere with searches and seizures, 18 U.S.C. § 2232(a)); *Prescott*, 581 F.2d at 1351-52 ("The right to refuse protects both the innocent and the guilty, and to use its exercise against the defendant would be . . . a penalty imposed by courts for exercising a constitutional right."). Nor can it constitute interference with an administrative investigation. *See District of Columbia v. Little*, 339 U.S. 1, 6-7 (1950) ("The word 'interfere' in this regulation cannot fairly be interpreted to encompass respondent's failure to unlock her door and her remonstrances on constitutional grounds.").[7]

Here, the EPA's demand for access under CERCLA § 104(e) presented Grace with a *Hobson's choice*: (1) waive its Fourth Amendment rights and consent to the EPA's demand for access, regardless of its statutory basis to do so, or (2) refuse access to its property, thereby preserving its Fourth Amendment rights and triggering the EPA's constitutional obligation to seek a judicial determination

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[7] That may be why the Ninth Circuit has recommended challenging administrative action through a legal proceeding as an alternative to conduct that constituted obstruction of justice. *See United States v. Hopper*, 177 F.3d 824, 831 (9th Cir. 1999) ("If Appellants sincerely believed the levies were invalid, they should have challenged those levies in a civil action . . . .").

that the EPA's demand was not arbitrary and capricious. In short, by failing to require the EPA to obtain judicial authorization before demanding access to property and by barring a property owner from filing a preemptive action against the EPA, *see* 42 U.S.C. § 9613(h), Congress effectively codified what the Government calls "obstruction of justice" as the only legal vehicle for asserting one's constitutional rights and for ensuring minimal due process in the face of the EPA's otherwise-unchecked power to search or commandeer property at its discretion.

Grace cannot be convicted of obstruction of justice based on its denying the EPA access to its Libby properties without a court order, and the Government may not argue that the denial of access was an overt act in furtherance of the alleged conspiracy to defraud. If the Court admits evidence of the denial of access on another basis, it should instruct the jury that Grace's "refusal was privileged conduct which cannot be considered as evidence of the crime charged." *Prescott*, 581 F.2d at 1353.

EVIDENTIARY ISSUES

I. The Government May Not Offer at Trial Evidence Derived from the EPA's "Asbestos" Sampling Database.

A. The EPA's "Asbestos" Sampling Database Is Tainted by Samples That the EPA Concedes Cannot Be Imputed to the Defendants.

As the Defendants explained in their recent discovery motions, EPA scientists in Libby realized by February 2007 that their sampling measurements included asbestos fibers that did not come from the Libby mine. As EPA scientists explained in documents the Government produced in response to this Court's Order of October 24, 2008, asbestos fibers from the Libby mine contain atoms of sodium and potassium, while asbestos fibers from other sources, like naturally occurring asbestos fibers,[8] did not. As a result of its discovery, EPA purported to change its measurement protocol so that it now measures only asbestos fibers that contain sodium and potassium because those are the only fibers that it believes it can connect to the Libby mine and thus impute to Grace. The Defendants do not know whether the EPA has made a similar correction to the seven years of samples it has collected for use in this case.

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[8] Libby is not alone in that regard. The EPA has found that other locations in the United States are similarly "contaminated" with naturally occurring asbestos. *See, e.g.*, U.S. Envtl. Prot. Agency, El Dorado Hills: Naturally Occurring Asbestos in California, http://www.epa.gov/region09/toxic/noa/eldorado/index.html (last visited Feb. 5, 2009).

Setting aside the discovery issues presented by the Government's untimely disclosure of this information, the EPA's realization that its sampling database recorded asbestos fibers that did not come from the Libby mine undermines the potential probative value of those samples at trial. The atomic markers in the minerals the EPA collected are, in effect, the DNA evidence of this case, and that evidence shows that many of the "releases" that the EPA has measured cannot be imputed to Grace. As the Court recognized with respect to the presence of winchite and richterite in the EPA's samples, the Government may not rely on such evidence at trial. *W.R. Grace*, 455 F. Supp. 2d at 1132 ("There is an intolerable risk of unfair prejudice should the government be allowed to put on expert after expert testifying that the Defendants endangered others through the release of a deadly composite of minerals without stating with any certainty what percentage of the minerals released are covered by the criminal statute under which the Defendants are charged.").

B. The Confrontation Clause Precludes the Government's Experts from "Summarizing" the Testimonial Work of Other Government Experts and Agents.

The Government's experts may not rely on or summarize the information contained in the EPA's "asbestos" sampling database because the sampling reports prepared by EPA scientists are "testimonial" evidence and therefore subject to the Confrontation Clause. The Confrontation Clause of the Sixth Amendment

provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. That Clause bars admission of "testimonial statements" of a witness who does not appear at trial unless the witness is unavailable to testify and the defendant has had a prior opportunity for cross examination. *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004). A "testimonial" statement is typically "a solemn declaration or affirmation made for the purpose of proving some past fact." *Davis v. Washington*, 547 U.S. 813, 826 (2006). "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Crawford*, 541 U.S. at 68-69.

The information contained in the EPA's sampling database satisfies all of the criteria for "testimonial" statements. First, the sampling information contains the affirmed opinion of multiple EPA scientists—those in the field and those in the lab—that each sample (1) was collected from a certain location on a certain date, (2) contained a certain type of fiber, (3) contained a certain number of respirable fibers, and (4) came from a particular source. Second, the Government intends to offer the "statements" in the sampling database to prove the truth of the matter asserted, namely, that the Defendants caused the release of an unlawful number of

proscribed fibers.[9] In short, the opinions of EPA scientists that are contained in the EPA sampling database "are an obvious substitute for live testimony, because they do precisely what a witness does on direct examination; they are inherently testimonial." *Davis*, 547 U.S. at 830. Third, the EPA created its sampling database for use against Grace in litigation. Despite the Government's claims in its December 19, 2008 brief regarding the EPA's deletion of a key official's email, the EPA has contemplated since its earliest days in Libby a criminal action against Grace, *see* Order Granting Mot. Compel 14-15 (Jan. 14, 2009), and it has intended to rely on its sampling database for that purpose.

The EPA sampling database thus is squarely within the type of "testimonial" statements that trigger the Defendants' Confrontation rights. *See Crawford*, 541 U.S. at 56 n.7 ("Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse—a fact borne out time and again throughout a history with which the Framers were keenly familiar."); *see also California v. Trombetta*, 467 U.S. 479, 490 (1984) ("[T]he defendant retains the right to cross-examine the law enforcement officer who administered the Intoxilyzer test, and attempt to raise

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[9] In fact, this Court has held that the EPA's sampling database has probative value with respect to all counts of the Indictment. *United States v. W.R. Grace*, 455 F. Supp. 2d 1172, 1177 ("[S]ome of the [EPA sampling] evidence may be relevant to the conspiracy and certain of the obstruction counts, and is of probative value as to those parts of the indictment.").

doubts in the mind of the fact-finder that the test was properly administered."); *United States v. Wade*, 388 U.S. 218, 227-228 (1967) (When the government performs "scientific analyzing of the accused fingerprints, blood sample, clothing, hair, and the like[,] . . . the accused has the opportunity for a meaningful confrontation of the Government's case at trial."); *Diaz v. United States*, 223 U.S. 442, 450 (1912) (An autopsy report "could not have been admitted . . . without the consent of the accused . . . because the accused was entitled to meet the witnesses [who prepared the report] face to face.").

The Government may claim that the EPA also intended to use its sampling database in its regulatory capacity and in civil litigation against Grace, thereby eliminating any Confrontation issue. That argument is of no moment because it is dispositive under the Confrontation Clause that the EPA created the database with an eye toward a criminal action; a potential "dual use" for the statements is irrelevant. *See United States v. W.R. Grace*, 455 F. Supp. 2d 1199, 1203 (D. Mont. 2006) ("Nor does the fact that the statements were not made to police officers distinguish the elemental proposition that if the state is to prove criminal conduct, the defendant has a right to confront and through the crucible of cross-examination, test the government's evidence."); Order Granting Mot. Compel 15 (Jan. 14, 2009) (explaining that the EPA's criminal investigation began before 2001 and therefore "there [was] good reason to impute the EPA's actions in its civil capacity to its

alter ego in the criminal investigation"). Indeed, holding that these statements are not testimonial because they were also intended for civil litigation against a prospective criminal defendant would eviscerate the protections of Confrontation Clause by creating an incentive for prosecutors to sit on the sidelines while a cooperating civil agency—the EPA or the SEC, for example—builds the prosecutor's case and delivers it on a silver platter. *See Crawford*, 541 U.S. at 66 ("The Framers would be astounded to learn that *ex parte* testimony could be admitted against a criminal defendant because it was elicited by 'neutral' government officers.").

Because the information contained in the EPA's "asbestos" sampling database is a "testimonial statement" under the Confrontation Clause, the Government's experts and fact witnesses therefore may not testify about, or rely on, the information in the sampling database unless each EPA scientist involved in compiling the information testifies at trial and is subject to cross examination by the Defendants.

C. The EPA's "Asbestos" Sampling Database Is Inadmissible Unless the Government Establishes a Proper Chain of Custody.

In addition to *Crawford*'s requirements for the admissibility of the EPA's "asbestos" sampling database, that evidence may not be admitted unless this Court finds that the Government has authenticated its sampling evidence by establishing a proper chain of custody. *See United States v. Harrington*, 923 F.2d 1371, 1374

(9th Cir. 1991) ("The prosecution must introduce sufficient proof so that a reasonable juror could find that [objects connected with the commission of a crime] are in 'substantially the same condition' as when they were seized."); *United States v. Godoy*, 528 F.2d 281, 283 (9th Cir. 1975) ("[T]he government must make a prima facie showing that, at the time of the chemist's tests and the trial, the pills tested and introduced in evidence were the same pills, and in substantially the same condition, as those seized from [the defendant].").

II. The Government's Proffered Expert Opinions.

The Government has charged the Defendants with knowingly placing, and conspiring to place, another person in "imminent danger" through exposure to asbestos.

The "risk" that may be presented by a particular exposure to asbestos cannot be observed by a percipient fact witness. Respirable asbestos fibers are not visible to the naked eye. Whether they have been inhaled cannot be observed by the naked eye. And whether a particular dose of asbestos is capable of causing disease in an individual cannot be observed by a fact witness because the disease process takes years, often decades, to develop. Accordingly, scientists have developed and refined the scientific discipline of epidemiology to systematically and reliably attempt to determine what level and circumstances of asbestos exposure are capable of causing disease.

As that body of science developed, courts developed a body of law that governed the admission of certain scientific conclusions about the health effects of asbestos exposures. Scientific reliability is the cornerstone of that body of law—sufficient data must have been gathered about the asbestos exposures and the diseases of the affected individuals, and the proper methodological techniques from the science of epidemiology and risk assessment must have been employed. Courts focus on reliability and data sufficiency to ensure that opinion testimony inside the courtroom is commensurate with the scientific rigor that scientists require outside the courtroom.

Here, the Government ignores these scientific and legal principles. Instead of a scientifically reliable quantification of exposures and disease and analysis of whether asbestos in Libby presented any tangible risk during the time relevant to this case, the Government believes that it can substitute the bald, unsupported conclusory opinions of Drs. Lemen, Miller, and Rose that imminent danger existed. Similarly, the Government believes that Mr. Peronard's "judgment" qualifies him to opine about risk in Libby, apparently based on the principle of "I know it when I see it."

Although the Government has tried to mask the lack of foundation for these opinions, the Court witnessed at the January 21-22, 2009 *Daubert* hearing some of the deficiencies that plague the Government's unfounded claims about risk and

recognized the potential for those claims to unfairly prejudice the Defendants. *See Daubert* Hr'g Tr. 230:8-11 (Jan. 22, 2009) ("I think we could pile up enough information that they're bad stuff and so somebody has to pay for it, and that's what my concern is here."). Just as an expert could not rely solely on "judgment" to declare a DNA match without proper testing and analysis, here the Government's experts must supplement generalized claims of "experience" or "training" with an explanation of the bases and methodology that support their conclusions. This Court's role as the "gatekeeper" for that evidence is essential to ensuring that the Defendants receive a fair trial. Before any Government expert may testify to ultimate conclusions that go to the heart of the Government's charges, the Government must establish that the proffered opinion satisfies the evidentiary principles embodied in Rules 702, 703, and 403 and long-established by the Ninth Circuit and the Supreme Court.

A. The Government's Expert Testimony Is Inadmissible Unless It Satisfies Rules 702 and 703.

Rules 702 and 703 govern three aspects of expert testimony: (1) the facts or data on which the expert relied, (2) the methodology the expert applied to those facts or data, and (3) the opinion or conclusion the expert formed by applying that methodology to the facts or data. First, the expert's opinion must be based on sufficient facts or data, although some of those facts or data may be inadmissible if an expert would reasonably rely on them in the field. *Id.* at 761-62 ("Rule 702

authorizes expert testimony . . . when the testimony is based upon sufficient facts or data." (quotation omitted)); *see also Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146-47 (1997); Fed. R. Evid. 703. Second, the opinion must be the product of a scientifically reliable methodology. *W.R. Grace*, 504 F.3d at 762 (explaining that the expert must "appl[y] the principles and methods reliably to the facts" (quotation omitted)); *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 590 (1993). Third, the expert's opinion or conclusion must flow from or be supported by the underlying facts and data and methodology employed. *See Joiner*, 522 U.S. at 146-47. And fourth, the opinion must be relevant to the case. *W.R. Grace*, 504 F.3d at 765 (explaining that Rule 702 tests "the fit of the methods to the facts of the case"); *see also Daubert*, 509 U.S. at 591. Rule 702 thus requires a "holistic focus on an expert's testimony . . . in light of the expert's reasoning and methodology as a whole." *Id.* at 762.

Here, the Government has proffered expert opinions to establish, among other things, that "normal human activity" released asbestos fibers and that those releases placed another person in "imminent danger." Because the risk of developing an asbestos-related disease is dependent upon the number of fibers that an individual has inhaled, *see Daubert* Hr'g Tr. 97:23-98:1, and the duration and intensity of the exposure, the Government's experts must establish that the alleged release of "asbestos" at issue discharged so many respirable fibers in such a

manner that any individual exposed to those fibers was substantially certain to suffer death or serious bodily injury, *see* Issues Related to the Charges Section II.C. Yet at the January 21-22, 2009 *Daubert* hearing, Government experts admitted that those opinions present significant *Daubert* issues, which the Government must address before any of its experts may offer those opinions at trial.

1. The Government's Experts Have Not Proffered a Scientifically Reliable Methodology for Estimating the Ambient-Air "Asbestos"-Fiber Concentrations That Allegedly Resulted from "Normal Human Activities."

The Government's experts have not proffered a scientifically reliable methodology for estimating the ambient-air fiber concentrations that allegedly resulted from outdoor "normal human activities." As this Court has recognized, an expert's attempt to estimate those fiber concentrations must satisfy *Daubert*'s reliability and relevance requirements. *United States v. W.R. Grace*, 455 F. Supp. 2d 1196, 1198 (D. Mont. 2006) (Docket #746); *see also In re Armstrong World Indus., Inc.*, 285 B.R. 864, 870-71 (Bankr. D. Del. 2002). For example, this Court found that "[t]he government has not presented a description of a methodology explaining how the knowledge only of the concentration of asbestos fibers in soil like media can reliably be used to identify the concentration present in a release into the air of those fibers when disturbed." *W.R. Grace*, 455 F. Supp. 2d at 1198.

We now know why: The Government's experts' attempts to quantify that purported correlation (a "K factor") revealed that no such correlation exists, and not just for soil. *Daubert* Hr'g Tr. 109:20-25 (Jan. 21, 2009). Despite their best efforts to find a stable connection, they concluded that there was no scientifically reliable relationship between soil concentrations and air concentrations, indoor-air concentrations and outdoor-air concentrations, and the results of Grace's historical product tests and outdoor-air concentrations. *Daubert* Hr'g Tr. 113:18-21, 122:9-13. Therefore, the Government's experts may not estimate ambient-air fiber concentrations based upon these data, and they may not estimate fiber concentrations based upon other facts until the Government proffers a scientifically reliable methodology for such extrapolations.

2. The Government's Experts Have Not Proffered a Reliable Basis for Opining That Extremely Low "Asbestos"-Fiber Exposures Present an "Imminent Danger" of Death or Serious Bodily Injury.

The Government's experts have not proffered a scientifically reliable methodology for opining that extremely low "asbestos"-fiber exposures present an "imminent danger" of death or serious bodily injury. That omission is not surprising given that its expert acknowledged at the *Daubert* hearing that reliable studies have not established a connection between exposures of less than seven fiber-years and asbestosis, lung cancer, or mesothelioma. *See Daubert* Hr'g Tr. 204:4-11.

In contrast, the alleged exposures at issue in the Government's endangerment charges—one occurrence of "normal human activity" like running or shoveling—are best measured in minutes, not years, yet the Government's experts have failed to provide any reliable basis for opining that those brief, low-dose exposures presented an "imminent danger" of death or serious bodily injury. Until the Government's experts provide that proffer, the Court should not permit them to offer that opinion at trial. The Government's unsupported "pathway" theory is nothing more than an unproven hypothesis that, to date, has been refuted by the available epidemiological evidence. An unproven and faulty hypothesis is not a substitute for the scientific data and analysis required to prove their allegations about imminent danger and should not come before the jury.

B. Expert Testimony Still May Be Excluded Under Rule 403.

Even if the Government satisfies the requirements of Rules 702 and 703, Rule 403 excludes expert testimony if its probative value is substantially outweighed by the danger of unfair prejudice or confusion. *Daubert*, 509 U.S. at 595. Indeed, the Supreme Court has warned that expert testimony demands special scrutiny under Rule 403 because it heightens the risk of jury confusion. *Id.* ("Expert evidence can be both powerful and quite misleading . . . . Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 . . . exercises more control over experts than over lay witnesses."

(quotation omitted)). Rule 403 thus independently limits the admissibility of expert testimony, even if such testimony otherwise is relevant and reliable. *See United States v. Benavidez-Benavidez*, 217 F.3d 720, 725 (9th Cir. 2000) ("Once the probative value of a piece of evidence is found to be substantially outweighed by the danger of unfair prejudice, there is no other evidentiary rule that can operate to make that same evidence admissible.").

III. The Proper Subject Matter of the Government's Opening Statement in Light of the Court's Deferral of Certain Defense Motions *in Limine*.

This Court has deferred ruling on a number of the Defendants' motions *in limine* to exclude the Government's evidence. While the Defendants understand that the Court would like to see how the evidence develops at trial before resolving the deferred motions, the subjects of those motions are unfairly prejudicial, often-inflammatory evidence to which the Government may intend to refer in its opening statement. Those subjects include:

- Referring to the Defendants' conduct before November 15, 1990, as overt acts in furtherance of the endangerment conspiracy even though no endangerment conspiracy could have existed before that date. *See* Text Order (July 14, 2006) (Docket #666).
- Evidence offered to prove that the Defendants conspired to defraud non-federal entities or agencies not identified in the Superseding Indictment. *See* Text Order (July 14, 2006) (Docket #671).
- The Government's reliance on its time-barred "normal human activities" theory. *See* Order Granting Gov't's Mot. Strike (Dec. 18, 2008) (Docket #866).

- Purported statistics of the incidence of disease in Libby—evidence that is akin to the findings of the now-excluded ATSDR study—and Dr. Brad Black's testimony as a fact witness. *See, e.g.*, Superseding Indictment ¶¶ 50, 52, 54, 57; Text Order (Sept. 8, 2006) (Docket #750) ("The determination of the admissibility of Dr. Black's fact testimony can and will await trial.").

- Documents like Government Exhibits 743 and 744, which reflect offers to pay for medical expenses. *See* Text Order (July 14, 2006) (Docket #665).

- Portions of deposition and trial transcripts marked as Government exhibits, other than *Crawford* issues. *See* Text Order (July 14, 2006) (Docket #669).

- Evidence of unrelated civil litigation, such as Government Exhibits 296, 323, and 328. *See* Text Order (July 14, 2006) (Docket #672).

Of course, because the Court has deferred ruling on these issues, the Government's discussion of them in its opening statement bears some risk. But the Defendants are at risk as well—the Court's subsequent exclusion of that evidence will do little to reverse the unfairly prejudicial harm the Defendants will have suffered. Whatever value corrective and limiting instructions may have, they would do little to repair the jury's misbegotten negative impression of the Defendants. The Defendants therefore respectfully submit that the Court should decide these issues before trial, or, at a minimum, order the Government not to mention in its opening statement any subject covered by a deferred motion *in limine*. Two of these deferred motions warrant additional discussion.

A. The Court Should Prohibit the Government from Referring to the Defendants' Conduct Before November 15, 1990, As Overt Acts in

Furtherance of an Alleged Conspiracy to Violate the Clean Air Act's Knowing Endangerment Provision.

Allowing the Government to refer to the Defendants' conduct before November 15, 1990, as "overt acts" in furtherance of an alleged endangerment conspiracy improperly invites the jury to convict the Defendants in violation of the *Ex Post Facto* Clause and therefore should be rejected. Notwithstanding the Government's cosmetic amendment of the Indictment, the only alleged conduct that could have been undertaken in furtherance of an endangerment conspiracy—vermiculite giveaways, not providing showers or otherwise endangering workers, providing mill tailings to Libby's schools, and selling Grace's Libby properties—occurred years before the limitations period in this case and predominantly before the knowing endangerment provision became effective. In short, "the amount of assertedly relevant pre-enactment conduct alleged by the Indictment dwarfs the Defendants' alleged post-enactment conduct." *See* Defs.' Joint Mot. Preclude Gov't Improperly Describing Certain Alleged Conduct "Overt Acts" 3 (May 31, 2006) (Docket #460).

These pre-enactment allegations—including the unfounded charges that the Defendants conspired to endanger schoolchildren and youth baseball players—are among the most inflammatory of the Government's allegations. As the Court recognized at the January 21-22, 2006 *Daubert* hearing with respect to the Government's opinion evidence: "I think we could pile up enough information that

they're bad stuff and so somebody has to pay for it, and that's what my concern is here." *Daubert* Hr'g Tr. 230:8-11 (Jan. 22, 2009). The Court's concern applies with equal force to the Government's improper characterization of the Defendants' conduct before November 15, 1990, as "overt acts" in furtherance of a conspiracy to violate a statute that did not exist, and it should not permit the Government to tempt an *ex post facto* conviction.

B. The Court Should Prohibit the Government from Discussing in Its Opening Statement Evidence Offered to Prove That the Defendants Defrauded Non-Federal Entities.

Even though a conspiracy to defraud charge must be limited to defrauding the United States or one of its agencies, there is no doubt that the Government hopes to prove that object of Count I in part through purported evidence that the Defendants misled private parties, state agencies, and other non-federal entities about the alleged friability and hazards of Libby vermiculite. As the Defendants explained in their motion *in limine*, more than sixty of the Government's exhibits relate to a broad range of communications with private parties unrelated to the United States. *See* Defs.' Joint Mot. Exclude Evidence Fraud Non-Federal Entities 3-4 (May 31, 2006) (Docket #478); *see also* Superseding Indictment ¶ 71(b) (alleging that the Defendants conspired to defraud "the United States ***and others***" (emphasis added)). For example, the Government has designated as trial exhibits more than a dozen of Grace's responses to inquiries by its customers throughout

the country. *See* Gov't Tr. Exs. 59, 117, 194, 327, 338, 342, 371, 381, 397, 422, 503, 519, 520.

The Defendants cannot overstate the unfair prejudice they will suffer if the Government discusses in its opening statement the evidence described in the Defendants' motion *in limine.* The Government may not open on an impermissible legal theory. Moreover, the Defendants will be compelled to show that each such communication was appropriate, prolonging an already complicated and lengthy trial with a series of mini-trials on issues that have no real bearing on the case at hand. Regardless of what the evidence may reveal about the Defendants' communications with private parties or state agencies regarding Libby vermiculite, that evidence cannot establish a conspiracy to defraud the United States. *See* Issues Related to the Charges Section I.C. Inclusion of such evidence thus serves no interest whatsoever and should be rejected.

IV. Status of Other Defense Evidentiary Motions *in Limine* That the Court Has Granted.

A. Expert Witnesses

1. Defendants' Joint Motion *in Limine* to Exclude the Expert Testimony of Dr. Daniel Teitelbaum (Docket #456)

This Court held that the Dr. Teitelbaum's proffered testimony was in part unreliable and that it presented Rule 403 issues because "the Government cannot decide the purpose for which it intends to use the Enbionics report." *United States v. W.R. Grace*, 455 F. Supp. 2d 1148, 1155 (D. Mont. 2006) (Docket #733). The

Court held that Dr. Teitelbaum may not testify regarding the reasons behind the difference in the frequency of asbestos disease between the Libby workers and the South Carolina workers. *Id.* at 1154. Dr. Teitelbaum also may not testify about the fact of differing attack rates unless the Government can establish at trial that the findings of radiologists like Dr. Rudikoff and Dr. Goodman constitute information of the type reasonably relied upon by medical toxicologists like Dr. Teitelbaum. *Id.* at 1153.

This Court recognized that these two aspects of Dr. Teitelbaum's proffered testimony—(1) the fact of differing attack rates and (2) the reasons for the differing rates—threaten to unfairly prejudice the Defendants. As a result, the Court held that

> Dr. Teitelbaum may testify as a fact witness. If qualified, he may offer admissible opinion testimony but may not state an opinion as to the reasons for the differing attack rates of asbestos fibers in Libby and South Carolina. The Court will instruct the jury that Dr. Teitelbaum's written opinion on that issue is not the product of scientific study and may be relied upon only to the extent it shows notice to the Defendants.

Id. at 1156. The Court reserved ruling on the admissibility on any other opinion testimony that Dr. Teitelbaum may offer, although it held that Dr. Teitelbaum may not testify about follow-up medical data or related opinions because the Government failed to adequately disclose that information in Dr. Teitelbaum's supplemental expert witness disclosure. *Id.*

2. Defendants' Joint Motion *in Limine* to Exclude the Testimony of Dr. Arthur Frank Regarding the Government's "Victim" Witnesses (Docket #471).

Because the Government agreed that Dr. Arthur Frank will not offer an opinion as to the diagnosis of any alleged victim, this Court denied as moot the Defendants' motion *in limine* to exclude Dr. Frank's testimony regarding the Government's "victim" witnesses. *See* Mot. Hr'g Tr. 130:23-133:12 (July 19, 2006).

B. The Proper Subjects of Expert Testimony

1. Defendants' Joint Motion *in Limine* to Exclude Evidence of or Derived from Indoor Releases (Docket #473).

The Ninth Circuit affirmed this Court's ruling that evidence of indoor air releases—including EPA's Phase II studies and Grace's historical product testing—is inadmissible to prove a Clean Air Act release. *See United States v. W.R. Grace*, 504 F.3d 745, 760 (9th Cir. 2007). This Court must determine whether the Government's experts may rely on indoor air releases to opine about friability.

2. Defendants' Joint Motion *in Limine* to Exclude Expert Opinions Regarding Historical, Non-Ambient Air Product and Commercial Testing (Docket #496).

This Court must determine whether the Government's experts may rely on Grace's historical product testing to opine about friability.

3. Defendants' Joint Motion *in Limine* to Exclude Expert Evidence Relating to the ATSDR Medical Testing Program (Docket #500).

The Ninth Circuit affirmed this Court's exclusion of the ATSDR Report and Peipins Publication for the purpose of proving Counts II through IV and presumably the knowing endangerment object of Count I. *See United States v. W.R. Grace*, 504 F.3d 745, 764 (9th Cir. 2007). This Court must determine whether the Government's experts may rely on the ATSDR Report and Peipins Publication to opine about "associations."

4. Defendants' Joint Motion *in Limine* to Exclude Expert Opinions Regarding "Imminent Danger" Based on EPA "Risk Assessments" (Docket #468).

This Court held that expert opinions regarding "imminent danger" under § 7413(c)(5)(A) are inadmissible to prove fiber concentration levels to the extent that those opinions are based on indoor air releases, Grace's historical product testing, or soil sampling. *United States v. W.R. Grace*, 455 F. Supp. 2d 1203, 1205-06 (D. Mont. 2006) (Docket #752). Further, the Court recognized the Defendants' "understandable" concern that the jury would improperly confuse the CERCLA endangerment standard for cleanup with "imminent danger" under

§ 7413(c)(5)(A) and therefore stated that those concerns would be addressed through a limiting instruction. *Id.* at 1207.

5. Defendants' Joint Motion *in Limine* to Exclude Evidence Regarding Soil Sampling (Docket #571).

This Court granted the Defendants' motion *in limine* to exclude evidence regarding soil sampling, and expert testimony based thereon, for the purpose of proving ambient-air fiber concentrations and "risk associated with the particular releases for which [the Defendants] have been charged." *United States v. W.R. Grace*, 455 F. Supp. 2d 1196, 1198 (D. Mont. 2006) (Docket #746). Although the Court denied the Defendants' motion "with respect to such evidence offered for the purposes of establishing the presence of asbestos fibers in the pertinent soils," it recognized that the Government "bears the burden of demonstrating the contamination's provenance." *Id.* at 1199.

6. Defendants' Joint Motion *in Limine* to Exclude Expert Opinions Regarding Defendants' Alleged Knowledge or Intent (Docket #509).

This Court granted the Defendants' motion *in limine* to exclude expert opinions under Rule 704(b), holding that "[e]xpert witnesses are not allowed to state an opinion or draw an inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged." Text Order (Aug. 10, 2006) (Docket #712).

C. Other Evidence

1. Defendants' Joint Motion *in Limine* to Exclude Woburn 404(b) Evidence (Docket #454).

The Court granted the Defendants' motion *in limine* to exclude Woburn 404(b) evidence. Evidence of Grace's "Alford" guilty plea with respect to Woburn is inadmissible and the Government may not make any "suggestion, mention or implication about this matter in any argument or proof." *See* Text Order (Aug. 10, 2006) (Docket #708).

2. Defendants' Joint Motion *in Limine* to Exclude Rule 404(b) Evidence Regarding Claims Estimation, Bankruptcy, and the Fraudulent Transfer Settlement (Docket #480).

This Court granted the Defendants' motion *in limine* to exclude evidence of Grace's bankruptcy because the Government informed the Court that it will not offer such evidence in its case in chief. *See* Order 25 (Jan. 14, 2009) (Docket #881). Per the Court's Order, the Government must "give at least seven days notice to the Defendants of its intent to introduce evidence related to the bankruptcy for any other purpose." *Id.*

3. Other 404(b) Evidence

This Court held that it will address through limiting instructions evidentiary concerns about the Government's use of other 404(b) evidence. *See* Text Order (Aug. 10, 2006) (Eschenbach) (Docket #710); Text Order (Aug. 10, 2006) (McCaig) (Docket #711).

4. Individual Defendants' Motion *in Limine* to Exclude Deposition and Trial Transcripts Marked As Government Exhibits (Docket #482).

This Court granted the individual defendants' motion *in limine*, holding that the Government may not use at trial the deposition or trial transcript of any person, including a Defendant, unless that person testifies at trial. *See United States v. W.R. Grace*, 455 F. Supp. 2d 1199, 1203 (D. Mont. 2006) (Docket #747) ("Sworn deposition and trial testimony is testimonial in nature regardless of the venue.").

5. Defendants' Joint Motion *in Limine* to Exclude Evidence Based on Sample Results Indicating the Presence of Fibers from Minerals That Do Not Constitute "Asbestos" Under the Clean Air Act (Docket #747).

The Defendants maintain that this Court correctly determined that winchite and richterite are not "asbestos" and properly excluded evidence that failed to distinguish those minerals from tremolite. *See United States v. W.R. Grace*, 455 F. Supp. 2d 1122 (D. Mont. 2006), *rev'd in part*, 504 F.3d 745 (9th Cir. 2007). The Ninth Circuit saw things differently. Nevertheless, as this Court recently recognized, the Ninth Circuit's ruling will have "a significant effect on the proceedings going forward" because the Government must now prove beyond a reasonable doubt that winchite, richterite, and any other mineral that it claims allegedly endangered Libby residents are "asbestos" under the Ninth Circuit's definition. *See* Order Granting Defs.' Mot. Compel 7-8 (Dec. 23, 2008).

6. Defendants' Joint Motion *in Limine* to Exclude Witness Testimony and Evidence Relating to the Government's Alleged Victim Witnesses (Docket #511).

This Court granted in part the Defendants' motion *in limine* to exclude witness testimony or evidence identifying any person as a "victim." *See* Text Order (Aug. 10, 2006) (Docket #714). No witness may be described or identified as a "victim," and no lay witness may testify about the personal effects of any asbestos related disease." *Id.* Lay witnesses with personal knowledge may testify about alleged exposure pathways and their diagnosis of disease, "so long as foundation is shown for some pathway of exposure as it relates to W.R. Grace or any of the other defendants." *Id.* The Defendants may object to the number of such witnesses on the grounds of cumulative evidence. *Id.*

DATED this 6th day of February, 2009.

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