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

UNITED STATES OF AMERICA, Plaintiff, vs. W.R. GRACE, HENRY A. ESCHENBACH, JACK W. WOLTER, WILLIAM J. McCAIG, ROBERT J. BETTACCHI, O. MARIO FAVORITO, and ROBERT C. WALSH, Defendants.	Cause No. CR-05-07-M-DWM **MOTION OF DEFENDANT ROBERT J. BETTACCHI FOR JUDGMENT OF ACQUITTAL**

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INTRODUCTION

The Superseding Indictment charges defendant Robert J. Bettacchi ("Bettacchi") with committing three violations of the Clean Air Act ("CAA"): two substantive offenses (Counts III and IV) and conspiracy (Count I). Those violations are based on the misguided legal theory that Bettacchi's mere signing of deeds to consummate the land transfers constitutes violations of the CAA because the alleged the presence of contaminants on the land ***conceivably*** could become airborne at some unknown future time ***if disturbed*** by some ***unknown person***.

While this legal theory is fatally flawed, the government's failure of proof on virtually all elements of each offense highlights the overreaching that is emblematic of this prosecution and supportive of the defense theory that the Environmental Protection Agency ("EPA") has tried to make Bettacchi a "scapegoat" due to its own actions in Libby. Consequently, all CAA charges must be dismissed against Bettacchi under Fed. R. Crim. P. 29(b).

The Superseding Indictment also charges Bettacchi with conspiring to defraud the United States by concealing information from the government regarding the alleged adverse health effects and friability of Libby vermiculite. In the government's words, Bettacchi and others concealed information regarding the "secret" of Libby vermiculite. Trial Tr. 39:13-16. The evidence at trial, however, established that there was no "secret," that the government was fully aware of all

aspects of Libby vermiculite well before Bettacchi took his first position with the Construction Products Division ("CPD") involving vermiculite, which was in June of 1980. By that time, the government had conducted several intensive investigations of all aspects of Libby vermiculite. Those investigations resulted in the issuance of a bevy of public reports spelling out the vast extent of the government's knowledge of the so-called "secret."

In addition, the evidence—no matter how charitably viewed in a light most favorable to the government—fails to establish the existence of any agreement to violate the law. Moreover, there was no evidence whatsoever to suggest that Bettacchi knowingly and intentionally joined any alleged conspiracy that supposedly began in 1976. Accordingly, the conspiracy to defraud count also must be dismissed under Rule 29(b) due to the absence of proof.

Notably, the only evidence that the government offered against Bettacchi that even remotely suggests that he engaged in any improper conduct was the perjured testimony of the government's key witness, Robert H. Locke. As the Court repeatedly has acknowledged, Locke lied about the now infamous "*caveat emptor*" conversation that he claimed to have had with Bettacchi pertaining to the sale of the Screening Plant to the Parkers. Hr'g Tr. 241:19. As set forth in the defendants' motion to dismiss the Superseding Indictment based on prosecutorial misconduct, this Court should not consider Locke's perjured testimony in ruling on

this Rule 29 motion. The government cannot benefit from sponsoring perjured testimony and from committing a plethora of constitutional discovery violations regarding this witness.

SUMMARY OF CHARGES AGAINST BETTACCHI

I. CAA CHARGES.

The Superseding Indictment charges Bettacchi with committing three violations of the knowing endangerment provision of the CAA. Count I alleges that Bettacchi conspired with others in violation of 18 U.S.C. § 371. Counts III and IV allege that Bettacchi committed substantive CAA violations under 42 U.S.C. § 7413(c)(5)(A) and 18 U.S.C. § 2.

A. Count III: Knowing Endangerment (Screening Plant).

Count III relates to Grace's sale of the Screening Plant property to the Parkers. It alleges that Alan Stringer ("Stringer") offered to sell the Screening Plant property to the Parkers in October of 1992, and that Stringer and Grace signed an agreement to sell the land to the Parkers. Count III asserts that Grace, Stringer and Bettacchi knew that the property was contaminated with tremolite asbestos, and failed to disclose the health hazard associated with the property to the Parkers. As to Bettacchi's alleged involvement in the land transaction, Count III alleges that he signed a deed transferring title to the Parkers. Superseding Indictment ¶ 165. Count III further alleges that between November 3, 1999 and

June 15, 1999, Bettacchi knowingly released or caused to be released asbestos, and at the time knowingly placed the Parkers in imminent danger of death or serious bodily injury. Superseding Indictment ¶ 188.

B. Count IV: Knowing Endangerment (Export Plant).

Count IV mirrors the allegations of Count III, but concerns Grace's donation of the Export Plant property to the City of Libby. As to this charge, Count IV asserts that Grace leased the property to various individuals from 1977 to 1994, and transferred title to the City of Libby without disclosing the health hazards associated with tremolite asbestos left on the property. Superseding Indictment ¶ 156. Bettacchi is alleged to have signed a deed to effectuate the land transfer. Superseding Indictment ¶ 158, 161. Count IV further alleges that between November 3, 1999 and the summer of 2000, Bettacchi knowingly released or caused to be released asbestos, and at the time knowingly placed the Burnetts in imminent danger of death or serious bodily injury. Superseding Indictment ¶ 190.

C. Count I: Conspiracy To Violate The CAA.

Count I, the conspiracy charge, essentially incorporates the land transfers as the key allegations against Bettacchi. The only other references to Bettacchi in Count I pertain to his role in the negotiation and marketing of the Libby Mine. Specifically, Count I alleges that Bettacchi received memoranda regarding 3M's interest in possibly purchasing the Libby Mine. The count further alleges that 3M

declined to buy the mine due to potential environmental issues. There are no allegations that anyone was endangered by the sale of the Libby Mine. Superseding Indictment ¶ 150-152.

II. COUNT I: CONSPIRACY TO DEFRAUD THE UNITED STATES.

Count I also charges Bettacchi with conspiracy to defraud the United States in violation of 18 U.S.C. § 371. The charge asserts Bettacchi and others conspired to defraud the United States by impairing, impeding and frustrating the governmental functions of EPA and NIOSH. Specifically, Count I maintains that the purpose of the defraud object was to conceal and misrepresent the hazardous nature of tremolite contaminated asbestos. Bettacchi and others allegedly committed a fraud on the United States by concealing the full extent of his knowledge regarding the friability and health effects of asbestos-contaminated vermiculite.

EVIDENCE REGARDING COUNTS I, III AND IV[1]

I. COUNT III: KNOWING ENDANGERMENT (SCREENING PLANT).

A. The Parkers' Attempt To Purchase The Mine.

When the Parkers learned that Grace was selling its Libby land holdings, they became interested in purchasing several parcels, including the Libby Mine, the Screening Property, and a 17.2-acre parcel adjacent to the Screening Plant property on the Kootenai River. Trial Tr. 1321:5-14; 1400:10-13. Mel Parker was intimately familiar with the Libby Mine. Beginning in 1987, he worked on the mine site as a forester with St. Regis/Champion. *Id.* 1392:10-23. Thereafter, Mel Parker worked for Grace performing land farming on contaminated land at the mine site. *Id.* 1393:12-20.

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[1] Under Fed. R. Crim. P. 29(a), the Court must grant Bettacchi's motion for judgment of acquittal if the government's evidence, viewed in the light most favorable to the United States, is insufficient to support a jury finding of guilt beyond a reasonable doubt. *United States v. Rios*, 449 F.3d 1009, 1011 (9th Cir. 2006) (reversing district court's denial of Rule 29 motion and stating that "[i]n reviewing a sufficiency of the evidence claim, the central inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.") (internal quotations and citation omitted). *See also United States v. Garcia*, 497 F.3d 964, 967 (9th Cir. 2007) (reversing district court's denial of Rule 29 motion because of insufficient evidence that defendant joined conspiracy); *United States v. Mann*, 389 F.3d 869, 880 (9th Cir. 2004) (reversing district court's denial of Rule 29 motion because of insufficient evidence that defendant's firearm possession was in furtherance of a drug trafficking conspiracy).

In 1992, Mel Parker assisted Miller Shingle in evaluating a potential purchase of the Libby Mine. *Id.* 1399:10-24. In connection with those services, Parker visited the mine on multiple occasions. *Id.* 1400:7-9. The possible transaction, however, did not go forward. *Id.*

In August of 1993, the Parkers became interested in purchasing the mine. *Id.* 1400:10-13. The Parkers submitted an initial offer on September 27, 1993 in the amount of $2 million. *Id.* 1405:14-18; Def. Ex. 8641. They made additional offers of $2.5 million and $3.05 million. *Id.* 1409:4-19. In connection with the initial offer, Mel Parker submitted a management plan to Grace. *Id.* 1411:16-19; Def. Ex. 5610. The management plan specifically referenced the presence of asbestiform fibers. Gov. Ex. 5610; Trial Tr. 1413:10-11. Mel Parker admitted he was aware of asbestiform fibers at the mine site. Trial Tr. 1413:12-17. The Parkers' efforts to purchase the mine site were unsuccessful, as Grace sold the mine to Kootenai Development Corporation. Gov. Ex. 614; Gov. Ex. 618.

B. The Parkers' Purchase Of The Screening Plant Property.

While Grace and the Parkers were unable to reach an agreement regarding the sale of the mine, the parties did reach an agreement concerning the purchase of the Screening Plant property. In November 1992, the Parkers had discussions with Alan Stringer concerning buying the Screening Plant Property. Trial Tr. 1320:7-16. The negotiations relating to the Screening Plant Property involved Stringer and

the Parkers. *Id.* 1333:1-2. At the time, the Parkers owned the largest private nursery in the State of Montana. *Id.* 1389:6-10. The Parkers toured the Screening Plant property with Stringer. *Id.* 1321:5-9; Gov. Ex. 739. The tour lasted approximately three hours. Trial Tr. 1329:8-10.

During the tour, the Parkers saw vermiculite on the property. *Id.* 1328:12-25; 1329:1-2. Before purchasing the property, the Parkers had used vermiculite at Raintree Nursery for many years. *Id.* 1426:5-8. They used it as a top dressing and mixed it with peat. *Id.* 1426:9-13. In fact, in 1987, they had purchased 300 bags of expanded vermiculite from Robinson Insulation. *Id.* 1427:10-15.

After touring the property, the Parkers expressed their interest in buying the land. *Id.* 1323:6-7. The Parkers discussed the fact that Grace would not demolish the Long Shed, as they had an interest in using it. *Id.* 1323:6-7. During their discussions, Stringer did not inform the Parkers of an allegedly hazardous condition of the property, or that the vermiculite on the property contained asbestos. *Id.* 1336:15-24; 1549:20-25; 1550:1-3. On December 9, 1992, Stringer, on behalf of Grace, and the Parkers signed a "buy-sell agreement" for the sale of the Screening Plant property. *Id.* 1334: 17-21; Gov. Ex. 604.

Bettacchi had no dealings with the Parkers in connection with the sale of the land. Mel Parker testified that he had never met Bettacchi. Trial Tr. 1345:17-20.

Parker added that he never had any discussions with Bettacchi relating to the purchase of the Screening Plant property. *Id.* 1410:18-23; 1411:6-8.

C. Grace's Removal Of Piles Of Vermiculite From The Screening Plant Property.

The closing was set for a future date because Grace was still using the Screening Plant property and had not yet completed the demolition of the buildings on the property. *Id.* 1338:13-15; 1340:19-25; 1341:1-7; Gov. Ex. 607. In May of 1993, Grace prepared and circulated a "punch list" of "Items Remaining for Completion" in connection with the demolition and reclamation of the Screening Plant and Export Plant properties. Gov. Ex. 607. The tasks to be completed as to the Screening Plant included the following:

- Clean up all piles of vermiculite
- Clean up all extraneous material
- Remove piles of vermiculite from lot #4. Gov. Ex. 607.

Thereafter, monthly reports detailing the progress of the demolition and reclamation activities in Libby were circulated to numerous individuals in Cambridge, including Bettacchi. Def. Ex. 15033, Def. Ex. 15034, Def. Ex. 15035. The Fire Protection Products Report for June of 1993 included the following update on the removal of vermiculite piles from the Screening Plant:

> Work has also started on hauling of the vermiculite waste piles from the Screen Plant area back up to the mine area. Considerable material

> needs to be hauled back to the mine and this will be done as time permits. Def. Ex. 15033.5.

The Fire Protection Products Report for July of 1993 included an additional update on the removal of vermiculite piles from the Screening Plant:

> A considerable number of Euclid loads of old expanded vermiculite, which was disposed of on the property many years ago, were hauled back up to the mine for burial. Def. Ex. 15034.5.

According to Peronard, a Euclid is an "articulated dump truck". Trial Tr. 1223:9-10. A small Euclid holds 10 cubic yards; there also are larger models. Trial Tr. 1223:16-18. A third, consecutive Fire Protection Products Report for August of 1993 reported: "The only major task yet to be completed is the removal of the suspension cables across the Kootenai River." Def. Ex. 15035.5. In reviewing Gov. Ex. 607 and the three Fire Protection Products Reports, Peronard admitted that Bettacchi had received information that all major tasks identified on Gov. Ex. 607 had, in fact, been completed. Trial Tr. 1226:8-11.

Despite the three reports to Cambridge indicating that the piles of vermiculite had been removed from the Screening Plant property, several piles were not removed and remained on the property. *Id.* 723:22-25; 724:1-14. The Parkers, however, were actively using the vermiculite concentrate in connection with their Reishi mushroom business. *Id.* 427:2-7. At the outset of the trial, the United States represented to the jury in its opening statement that the Parkers had requested Grace to leave the vermiculite on the property:

> The evidence will show that the Screening Plant had vermiculite all over the property and, as Mr. McLean mentioned, the Parkers asked Grace to leave it there, it was good for their business. *Id.* 97:21-24.

When directly asked about the government's representation of this fact on cross-examination, Mel Parker denied that he had asked Grace to leave the vermiculite for use in his business, and asked, "where would you come up with that?" *Id.* 1426:17-21.

D. The Closing.

The Parkers moved onto the Screening Plant property in October or November of 1993. *Id.* 1341:8-10. The closing occurred on December 17, 1993. *Id.* 1338:13-14; 1345:5-9. A deed was prepared to convey the property from Grace to the Parkers. Gov. Ex. 610; Trial Tr. 1345:5-9. The deed states that Grace conveyed to Mel and Lerah Parker Government Lot 1 of Section 32, Township 31 North, Range 30 West, P.M.M., Lincoln County, Montana. Gov. Ex. 610. The deed was dated December 17, 1993, and was signed by Robert J. Bettacchi, Vice President of Grace. Gov. Ex. 610.

E. EPA's Conclusion In 1995 That There Are No CAA Violations At The Screening Plant.

On November 29, 1994, approximately one year after the Parkers moved to the Screening Plant property, Michael Crill, a Libby resident, sent a letter to EPA stating his continuing concerns about the former Grace property, including the Screening Plant property. Trial Tr. 2436:17-25; Gov. Ex. 621. On January 31,

1995, the State of Montana inspected the Screening Plant property in response to Crill's letter. Gov. Ex. 621. EPA later sent a letter to Crill, informing him that there were no violations of the CAA at the property:

> The State inspected the former W. R. Grace property on January 31, 1995. During their inspection they found no apparent violations of the Clean Air Act. Neither the State nor EPA plan any action based on this inspection. Gov. Ex. 621.

At the time of the inspection, the Parkers owned the property. Trial Tr. 2438:25; 2439:1.

F. EPA's Knowledge Of The Presence Of Vermiculite On The Screening Plant Property Since November 23, 1999.

Five years later, on November 23, 1999, Peronard and Chris Weis inspected the Screening Plant property. *Id.* 1193:19-23; 1208:3-4. They observed that the Parkers were operating three businesses on the property: a mushroom farm, a commercial nursery and a vehicle storage business. *Id.* 1210:3-25; 1211:1-25. Peronard saw employees and customers on the property. *Id.* 1212:8-13.

During the inspection of the grounds, EPA saw vermiculite at various locations on the property. *Id.* 1212:14-25; 1213:1. Peronard observed vermiculite in 5-gallon buckets in the tunnels, along a path to the orchard, in a pile in the orchard and along the Kootenai River. *Id.* 1213:1-25.

G. EPA's Sampling At The Screening Plant.

Upon seeing the vermiculite on the property during the first visit, Peronard decided to take samples. *Id.* 1214:6-13, 1216:1-6. In December 1999, EPA returned to the Screening Plant and took additional samples. *Id.* 1438:12-14. And in March 2000, EPA informed the Parkers of the results of the sampling. *Id.* 1438:18-25.

Mel Parker testified that the results indicated that the property was contaminated with asbestos. *Id.* 1439-40. At that time, EPA did not instruct the Parkers to leave the property. Instead, EPA told the Parkers that they did not have to leave the property immediately. *Id.* 1440-41.

H. EPA's Inaction Regarding The Presence Of Vermiculite On The Export Plant Property.

EPA had vast authority and resources to eliminate any perceived risk from the release of airborne asbestos at the Screening Plant from the first day of its investigation in late November of 1999. The On-Scene Coordinator, Peronard, had warrant authority allowing him to enter into contracts on behalf of the United States for up to $200,000 without seeking the approval of supervisors. *Id.* 1198:6-10. Peronard testified that EPA also has the ability to strongly recommend to local authorities that people be relocated or evacuated in emergency situations where there is the risk of serious bodily injury or danger. *Id.* 1199:6-8. In addition, he explained a host of fairly simple safety measures that EPA could have taken if

necessary such as (1) erecting fences, (2) posting warning signs, and (3) placing plastic, sand or Curlex on hazardous materials to prevent airborne exposures. *Id.* 1200:1-6.

The evidence indicates that EPA concluded that the Parkers did not face any immediate health risks due to the presence of vermiculite on the Screening Plant property. During the November 23, 1999 inspection, EPA did not instruct the Parkers that it was necessary for them to vacate the property. *Id.* 1437. EPA did not cover the piles of vermiculite with sand, plastic or Curlex (*Id.* 1438), nor did it post any warning signs. *Id.*

On January 31, 2000, EPA publicly announced that it planned to clean up the Screening Plant. *Id.* 2299:9-25. But the cleanup did not begin until June 15, 2000, and the Parkers remained on the property until that time. *Id.* 1191:5-11. And in March of 2000, when EPA returned to the Screening Plant property, it did not cover the piles of vermiculite or post warning signs. *Id.* 1441-1442. According to Mel Parker, during the March visit, EPA took no steps to remove the Parker family from the property or otherwise protect them. *Id.* 1442.

I. EPA's Public Statement On May 24, 2000 That There Was No Immediate Health Risk At The Screening Plant.

Six months after EPA first visited the Screening Plant and saw vermiculite on the property, it memorialized its conclusion that the Parkers did not face an immediate health risk. On May 24, 2000, EPA prepared a press release to be

issued to the Libby community about the projected cleanups of the Screening and Export Plants, which directly considered and addressed the question whether the Parkers were at risk:

> *Q:* If these two sites are so contaminated with asbestos, why did EPA allow, in one case, the family to continue living there and, in the other case, workers to continue working on site?
> *A:* EPA did not take immediate steps to relocate the family or the workers because there was no *immediate* health risk from asbestos at these two sites. The levels of asbestos are high enough to require cleanup but do not pose an *immediate* (acute) health threat. Steps are currently underway to relocate the residents.

Id. 2425:6-25; 2426:1-22; Def. Ex. 16010. According to Dr. Aubrey Miller, it was important that EPA, in its communications with the public, prove truthful and accurate information to ensure that the public knew the facts. Trial Tr. 2423:19-23.

J. EPA Permitted The Parkers To Remain On The Screening Plant Property Until May 15, 2000.

From November 23, 1999 until June 15, 2000, the Parkers remained on the Screening Plant property. *Id.* 1191:9-11; 1442-43:24-1. According to Dr. Miller, during that time period, EPA did not erect a fence at the Screening Plant. *Id.* 2420:17-20. He never told the Parkers that they had to leave the property because an emergency situation existed. *Id.* 2422:12-15.

K. Asbestos Fiber Releases In The Ambient (Outdoor) Air At The Screening Plant.

1. Evidence Of Asbestos.

The government did not call a chemist, geologist or mineralogist to testify about any fibers allegedly released in the ambient air at the Screening Plant property during the applicable timeframe. Additionally, no evidence of sample results of alleged ambient air releases of fibers at the Screening Plant property were admitted. The government did call Gregory Meeker, a geologist with the U.S. Geologic Survey ("USGS") to testify regarding his analysis of 30 amphibole samples that EPA and the USGS took from Vermiculite Mountain in the spring of 2000. *Id.* 6066. None of those samples were taken from the Screening Plant *Id.* 6053.

2. Releases Of Asbestos In The Ambient Air Between November 3, 1999 And June 15, 2000.

The only testimony about releases related to dust in the Long Shed, a three sided covered structure;[2] most of the testimony related to periods before November 3, 1999. Mel Parker testified that he, family members and employees swept the Long Shed three times per year, and that it was dusty. *Id.* 1364:11-25; 1365:1-2; 1367:13-15. This practice began in 1993-1994, although Parker did not

[2] Mel Parker testified that the sweeping in the Long Shed was "indoors," and that the vehicles stored inside were "all under the roof, so to speak". Trial Tr. at 1422:11-16; 1434:1-7; Def. Ex. 18929.

specifically state that it continued after November 3, 1999. *Id.* 1364:1-1367:15. Similarly, Parker testified that beginning in 1994, dust from Rainy Creek Road entered the Long Shed when logging trucks used the road. *Id.* 1368:1-18. He did not specifically state that this situation continued after November 3, 1999. *Id.* at 1368:16-18.

Lerah Parker also testified that she and her family swept the Long Shed on a daily basis, but did not say whether that practice continued after November 3, 1999. Trial Tr. at 1536:11-16. She also testified that dust blew into the Long Shed from truck traffic on Rainy Creek Road. *Id.* 1536:1-7. Lerah Castleton additionally testified that she swept dust in the Long Shed. Trial Tr. 5078:22-25; 5079:1-3. However, she stopped doing so after learning of articles in the *Seattle Post- Intelligencer*. Trial Tr. 5080:5-25; 5081:8-12.

Dr. Miller also testified about samples taken at the Screening Plant, all of which were taken *after* June 15, 2000. Trial Tr. 1930-1938, 1946-49, 1974-1983. Moreover, no evidence was introduced into the record to confirm that the samples discussed by Dr. Miller contained asbestos.

L. The Parkers' Medical Condition.

Mel and Lerah Parker each testified that they have been diagnosed with an asbestos-related disease. Trial Tr. 1386:2-5; Trial Tr. 1553:5-8. Dr. Alan Whitehouse diagnosed the Parkers. Trial Tr. 1386:8-9; Trial Tr. 1553:5-8.

According to Dr. Whitehouse, Mel and Lerah Parker have the same condition—pleural plaques on their right lungs. Trial Tr. 1386:6-7; 1553:9-10; 1621:2-7; 1625:1-5.

M. Ray Was Never Charged With Endangerment.

Mike Ray was an environmental engineer who worked for Grace at the Libby Mine and Mill. Trial Tr. 1208:12-16. Ray worked with Stringer in connection with the closing of the mine. Trial Tr. 1230:14-16. He was the head of the work force that was assembled to perform the demolition and environmental reclamation. Trial Tr. 1230:17-20. Ray was responsible for the condition in which both the Screening Plant and Export Plant properties were left. Trial Tr. 1231:3-9. The government did not charge Ray with endangering people at the Screening Plant or the Export Plant even though he was responsible for the condition with which the properties were left. Trial Tr. 1231:16-20.

II. COUNT IV: KNOWING ENDANGERMENT (EXPORT PLANT).

A. Grace's Donation Of The Export Plant Property To Libby.

The government offered no testimonial evidence regarding the circumstances or mechanics of Grace's donation of the Export Plant property to the City of Libby.[3] Instead, at the close of the government's evidence, the government

[3] Peronard and Ronald L. Anderson, the former Lincoln County Sanitarian, acknowledged that the City of Libby owned the Export Plant property, but provided no details regarding the land transfer (Tr. 1227:1-13; 487:2-26).

sought to prove the transaction through documents, and moved to admit Gov. Exs. 606, 612 and 620. On April 23, 2009, the Court issued an order admitting these documents.

Gov. Ex. 606 is a letter from Stringer to Fred Brown, the Mayor of the City of Libby, dated March 9, 1993. It states that the letter was written to clarify Grace's position as to the land on which the Libby Little League ballfields were located. Stringer wrote that it was Grace's intent to donate 13 acres of land to the City of Libby, and the company was reviewing the Grant Deed that had been submitted by the City.

Gov. Ex. 612 is a Grant Deed that purports to convey Lot 4 of Section 3, Township 30 North, Range 31 West, P.M.M. from Grace to the City of Libby. No particular value is identified in the Grant Deed. The Grant Deed is dated May 12, 1994, and is signed by Robert J. Bettacchi, President of Grace Construction Products.

Gov. Ex. 620 is a Correction Grant Deed that purports to convey Lot 3 of Section 3, Township 30 North, Range 31 West, P.M.M. from Grace to the City of Libby. No particular value is identified in the Correction Grant Deed. The Correction Grant Deed is dated February 23, 1995, and is signed by Robert J. Bettacchi, President of Grace Construction Products.

B. Lincoln County's Inspection Of The Export Plant In November 1999.

The government introduced evidence regarding Lincoln County's knowledge and awareness of the presence of small amounts of asbestos on the Export Plant property in November of 1999. Ronald L. Anderson, the former Lincoln County Sanitarian, testified that he inspected the Export Plant on November 16 and 17, 1999. Trial Tr. 446:2-12, 457:3-10, 25; 458:7-9. Anderson was aware that Grace had transferred the Export Plant property to the City of Libby, and that the City leased the property to Millworks West, a retail lumber and milling operation owned by Mel and Judy Burnett. *Id.* 458:16-24.

During the inspection on November 16, Anderson saw a pallet of bags labeled as vermiculite concentrate near a building. *Id.* 461:461:17-25; 462:4-24. The label on the bag included the word "warning," and stated that "vermiculite concentrate contains up to one percent asbestiform tremolite." *Id.* 463:14-21. Anderson said that if the material were below one percent, it was unregulated and was not of concern. *Id.* 463:24-25; 4641-3. Anderson acknowledged that Grace had donated the property to the City several years earlier, and was unaware of the origin of the bag of vermiculite concentrate, given the significant passage of time. *Id.* 487: 2-26.

The following day, November 17, 1999, Anderson had bulk samples taken from five locations on the Export Plant property, including from a bag of

vermiculite concentrate. Trial Tr. 464:16-25; 465:1-15. The laboratory results of the samples indicated that two samples contained less than one percent asbestos, one sample had "trace" quantities of asbestos and two samples were "non-detects". Gov. Ex. 627 pp. 5-6; 466:11-18.. Anderson did not perceive those results to raise concerns "from a health standpoint". Trial Tr. 466:19-21; 48820-25; 489:1-13. He also prepared a report of his observations of the Export Plant property. Gov. Ex. 627; Trial Tr. 466:24-25; 467:1-25.

On November 23, 1999, Anderson attended a meeting of the Lincoln County Health Board, which was open to the public. *Id.* 469:24-25; 470:1-14.. He discussed the results of the samples taken at the Export Plant, and recorded minutes of the meeting. *Id.* 470:22-25; 471:22-25, 472:1; Gov. Ex. 628. Shortly thereafter, Anderson met with the EPA response team, including Peronard, Weis and Dr. Miller. *Id.*472:19-25; 473:1-4; 489:14-25. Anderson provided the results of the samples from the Export Plant to EPA, and discussed the results with EPA. *Id*. 473:5-14.

C. EPA's Knowledge Of The Presence Of Vermiculite On The Export Plant Property Since November 23, 1999.

Peronard testified that he arrived in Libby on November 22, 1999, and commenced EPA's response team investigation on November 23, 1999. *Id.* 1202:16-20. On November 23, 1999, Peronard met with Lincoln County officials, including Anderson. *Id.* 1203:1-23. Peronard acknowledged that Anderson had

provided him with the results of the bulk samples taken at the Export Plant on November 17, 1999. *Id.* 1205:1-13; 1206:2-10.

On November 23, 1999, Peronard inspected the Export Plant property. *Id.* 1226:12-18. He saw that Millworks West was operating an active retail lumber business on the property, and that it was open to the public. *Id.* 1227:20-25; 1228:1-25; 1229:1-8. There were customers and employees on the property. *Id.* 1229:6-8. Peronard found some vermiculite on the property, but "it was not as evident as it was at the screening plant". *Id.* 1229:16-19. EPA took samples at the Export Plant on November 23, 1999. *Id.* 1230:9-11.

D. EPA's Sampling At The Export Plant.

In November of 1999, Peronard also took soil samples at the Export Plant. *Id.* 682:9-16, 740:2-5. He also set up air monitoring stations at the Export Plant to take stationary air samples. *Id.* 740:5-11. In December of 1999, EPA returned to the Export Plant and took additional samples. *Id.* 591:8-11. EPA's sampling at the Export Plant initially focused on the historic locations of Grace's operations. *Id.* 614:1-2. In addition, EPA targeted areas at the Export Plant where they observed vermiculite. *Id.* 614:3-4; Gov. Ex. 682.

In 2000, EPA took a "sweeping" scenario sample at Export Plant. *Id.* 618:10-25; 619:1; 882:19-25. On July 21, 2000, Peronard sent a letter to Burnett attaching the results of EPA's sampling at the Export Plant. *Id.* 6012:2-6; Def. Ex.

19101.1-9. One ambient air sample result showed a fiber level of .0003 f/cc. *Id.* 6012:19-25; 6013:1; Gov. Ex. 19101.6.

E. EPA's Inaction Regarding The Presence Of Vermiculite On The Export Plant Property.

EPA did not erect a fence at the Export Plant property until after the cleanup of the property commenced. *Id.* 2420:21-24. According to Mel Burnett, there was no large red tape, fences or warning signs posted at the Export Plant to keep people from going onto the property. *Id.* 6008:5-10. Dr. Miller also never told the Burnetts that they had to leave the Export Plant property because there was an emergency situation due to the presence of vermiculite on the property. *Id.* 2422:16-21.

F. EPA's Public Statement On May 24, 2000 That There Was No Immediate Health Risk At The Export Plant.

As noted in Section I.I. above, six months after EPA first visited the Export Plant, it pronounced in a press release that the workers at the Export Plant property faced no immediate health risk (Def. Ex. 16010) ("EPA did not take immediate steps to relocate the family or the workers because there was no immediate health risk from asbestos at these two sites. The levels of asbestos are high enough to require cleanup but do not pose an *immediate* (acute) health threat. Steps are currently underway to relocate the residents.").

G. EPA Permitted Millworks West To Remain On The Export Plant Property Until October 2000.

Neither Lincoln County health officials nor EPA perceived any immediate health threat at the Export Plant property due to the presence of vermiculite on the property. Anderson, who had taken samples of the vermiculite in mid-November 1999, did not request that the Burnetts leave the Export Plant property. Trial Tr. 491:2-25; 492:1-5). EPA also took samples of the vermiculite at the Export Plant property on November 23, 1999, the first day of the investigation. *Id.* 1230:9-11. Nonetheless, the Burnetts and Millworks West were permitted to remain on the Export Plant property and operate their business until October of 1999. *Id.* 1191:12-18; 1196:22-25; 1197:1;p 2420:14-16; 6008:11-19.

J. Asbestos Fiber Releases In The Outdoor Air At The Export Plant Between November 3, 1999 And September 21, 2000.

Mel Burnett testified that during Millworks West's occupancy of the Export Plant, Zonolite was lying around outside the buildings and in the driveways. *Id.* 5996:12-24. Burnett said that he cleaned the buildings all the time, and that the cleaning involved sweeping with the building doors open. *Id.* 5991:1-12. He testified that EPA visited the property on Thanksgiving weekend 1999, and sometime later came back with air samples, but he was not specific about the date of the samples. *Id.* 5997:18-5998:17. Burnett also testified that during 2000, a Grace contractor cleaned and tested the facility. *Id.* 6001:2-9. Burnett was

notified by EPA that an indoor air sample taken in the break room of the planer building showed 0.099 f/cc, just under the OSHA permissible exposure level of 0.1 f/cc. *Id.* 6009:12-6011:14; Def. Ex. 19101.

Peronard testified that his team took air and soil samples from the Export Plant, including both stationary air samples and personal air samples of the remediation workers. *Id.* 829:16-830:16. Dr. Miller, who is not a chemist and did analyze these samples, testified about the results of personal samples taken of the remediation workers from August to December of 2000. *Id.* 1949:2-1958:14. But results of these samples were not validated by the testimony of any chemist and no evidence was offered that samples taken at the Export Plant showed asbestos.

K. Mel Burnett's Medical Condition.

Dr. Whitehouse diagnosed Mel Burnett as having asbestos-related pleural disease. *Id.* 6003:1-10; 6125:14-18. Burnett testified that he did not know the technical term for his condition. *Id.* 6003:4-7. He said that he was diagnosed in approximately 2003. *Id.* 6003:13-14.

III. COUNT I: CONSPIRACY TO VIOLATE THE CAA.

As charged in the Superseding Indictment, the CAA conspiracy object against Bettacchi is based on the transfers of the Screening Plant and the Export Plant. Evidence regarding the property transactions are set forth above.

The government also offered some evidence regarding the presence of asbestos on Rainy Creek Road after November 15, 1990. Ron Anderson, the Lincoln County Sanitarian, testified about the condition of Rainy Creek Road in 1992. *Id.* 449: 15-25. He stated that on June 4, 1992, he received a letter from Stringer enclosing results of air sampling performed on Rainy Creek Road by Grace. *Id.* 449:18-25, 450:1-10, Gov. Ex. 596. Those results, which were enclosed with Stringer's letter, showed that all fiber releases along Rainy Creek Road were well below the OSHA Permissible Exposure Limit ("PEL"), which was .2 f/cc at that time. Gov. Ex. 596.

IV. COUNT 1: CONSPIRACY TO DEFRAUD THE UNITED STATES.

A. The So-Called "Secret" Theory.

The two central features of the conspiracy to defraud are concealment of the health risks associated with exposure to asbestos in Libby vermiculite, and concealment of information regarding the friability of Libby vermiculite. In its opening statement, the government told the jury that Grace had a "secret" that is allegedly at the heart of the conspiracy to defraud charge. The "secret" that Grace allegedly held was that Libby vermiculite, "even when it contained a small amount of asbestos, released hazardous levels of asbestos to the air when disturbed. Trial Tr. 39:13-21. The government explained "that is the secret that the defendants knew, that the government did not". *Id.* 39:13-21. The "secret" was so "closely

guarded" that it enabled profiteering corporate executives to enrich themselves at the expense of the health of the Libby community. *Id.* 39:6-9, 40:5. The "secret" also permitted Grace to avoid retroactive liability for its actions by misleading the government. *Id.* 39:10-12.

B. Government's Knowledge Of The Friability And Health Effects Of Libby Vermiculite.

Undisputed evidence at trial, however, demonstrated that there was no "secret," and that the government had extensive knowledge about both the friability and health effects of Libby vermiculite well before Bettacchi even joined CPD. A key government witness on this point was Dr. Miller. Dr. Miller admitted the government had amassed substantial knowledge of the presence of asbestos in Libby vermiculite and its friability since the 1970s. Dr. Miller acknowledged the following facts:

- The 1980 EPA Priority Review Level 1 ("PRL 1") report indicated that EPA had known about the presence of asbestos in Libby vermiculite as far back as 1971. Trial Tr. 2313:11-14; 2314:7-11; Gov. Ex. 220.
- The PRL 1 report indicates that EPA was fully aware that while efforts were made to eliminate and remove the asbestos contaminant from Libby vermiculite, some of the contaminant remained behind. Trial Tr. 2316:5-8.
- EPA and OSHA investigated potential health effects of exposure to Libby vermiculite at the O.M. Scott plant in Marysville, OH as far back as 1978-1979. Trial Tr. 2316:22-25, 2317:23-2318:1.
- EPA conducted a preliminary investigation to determine whether to regulate Libby vermiculite. Trial Tr. 2318:12-15.
- The PRL 1 report stated that identified health effects associated with exposure to vermiculite can be attributed to its asbestos contaminant. Trial Tr. 2355:19-23.

Frank Kover, formerly of EPA's Office of Toxic Substances, provided similar testimony regarding the government's knowledge of the friability and health effects of Libby vermiculite. Kover acknowledged these key facts:

- In 1973, Kover prepared a report of almost 70-pages providing an overview of the literature about asbestos and its health effects. Trial Tr. 5914-5916; Def. Ex. 19123.
- By 1976-1977, EPA had vast knowledge about asbestos, which was one of the most studied substances at the time. Trial Tr. 5916-5918. Indeed, Kover did not know of any individual substance or product that was getting more scientific scrutiny from government agencies in the late 1970s and early 1980s than Libby vermiculite. Trial Tr. 5949.
- EPA, OSHA, MSHA and the CPSC were all regulating asbestos by 1977. Trial Tr. 5917.
- The 1978 O.M. Scott incident taught the government that Libby vermiculite contained asbestos. Trial Tr. 5922.
- Grace made a TSCA submission to EPA about the effects of tremolite exposure on workers in 1983. Trial Tr. 5944-46; Gov. Ex. 333.
- Grace answered all follow-up questions asked by EPA's TSCA program. Trial Tr. 5946; Gov. Ex. 333.

Moreover, the government's knowledge of the health hazards of Libby vermiculite was independently established by the very fact of agency regulations (EPA, OSHA, CPSC) governing permissible exposure limits to asbestos. The Court took judicial notice of those regulations.[4]

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[4] The Court took judicial notice of portions of an emergency 1983 OSHA regulation, Occupational Exposure to Asbestos, 48 Fed. Reg. 51,086, 51,089, 51, 090 (Nov. 4, 1983) (to be codified at 29 C.F.R. pt. 1910). The regulation states, *inter alia*, that "OSHA is aware of no instances in which exposure to a toxic substance has more clearly demonstrated detrimental health effects on humans than has asbestos exposure. The diseases caused by asbestos exposures are in large part life-threatening or disabling. Among these diseases are lung cancer, cancer of the

The evidence also shows that before Bettacchi joined CPD in June 1980, the government had developed a wealth of information on the issue that it says is "secret" of this case: the friability of asbestos in Libby vermiculite.[5] Dr. Miller

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mesothelial lining of the pleura and peritoneum, and asbestosis. In addition, workers exposed to asbestos are at increased risk of gastrointestinal cancer, as shown by epidemiological studies". Tr. 4837: 15-24; *see also* Tr. 4839:15-18, 22-25; 4840:1. ("Well-conducted epidemiologic studies that show a positive association between an agent and a disease are accepted as the most convincing evidence about human risk . . . No extrapolation from animal data to human data is necessary in order to show carcinogenicity of asbestos. For most substances, OSHA must infer human health effects, such as carcinogenicity, from animal data.") (quoting from the same 1983 OSHA emergency regulation).

Even further back in time, Def. Ex. 8967 attaches a proposed OSHA standard for asbestos dust exposure dated 1972, stating that "[n]o one has disputed that exposure to asbestos of high enough intensity and long enough duration is causally related to asbestosis and cancers. The dispute is as to the determination of a specific level below which exposure is safe. Various studies attempting to establish quantitative relations between specific levels of exposure to asbestos fibers and the appearance of adverse biological manifestations, such as asbestosis, lung cancers, and mesothelioma, have given rise to controversy as to the validity of the measuring techniques used and the reliability of the relations attempted to be established." Standard for Exposure to Asbestos Dust, 37 Fed. Reg. 11,518 (June 7, 1972) (to be codified at 29 C.F.R. pt. 1910).

[5] Both the Government in its opening statement and Dr. Miller sought to qualify the nature of this "secret" by characterizing it in terms of the tendency of Grace vermiculite products, even when they contained only a "small" amount of asbestos, to emit hazardous levels of asbestos. *See, e.g.*, Trial Tr. at 39. This qualification is a distinction without a difference, an attempt to concoct a secret where none exists. By definition Libby vermiculite contained only small or trace quantities of asbestos. *See, e.g.*, Trial Tr. 4879:11-17 (Bruce Williams acknowledging that in 1972 EPA discussed "trace quantities" of asbestos in Libby vermiculite); *id.* at 4781: 24-25; 4782: 1-2 (Williams stating that there were "trace amounts" of asbestos in Monokote 4 and Monokote 5). Although the exact amount may be in

testified that by 1980, EPA, OSHA, and CPSC had already combed through records regarding the friability of Libby vermiculite. Trial Tr. 2352:11-14. (acknowledging that EPA knew as far back as June 1980, at the time of the PRL 1 report, that handling vermiculite releases a significant amount of fibers); *Id.*. 2356:9-13 (acknowledging that EPA PRL 1 report discussed fiber releases from Libby vermiculite when handled and described health effects of same); *Id.* 2374:3-7 (acknowledging that a few months after June 1980 EPA PRL 1 report, EPA's consultant MRI was out in the field in Libby taking bulk samples and air samples of vermiculite).

Kover further testified that EPA learned from the O.M. Scott matter that the asbestos in Libby vermiculite could become airborne and was hazardous. Trial Tr. 5922. Kover acknowledged that a February 14, 1980 letter from Bruce Williams of Grace to EPA and CPSC provided both agencies with extensive information regarding Grace products using Libby vermiculite, including ZAI. *Id.* 5926-5927; Gov. Ex. 215. The Williams letter, Kover stated, informed EPA and the CPSC that there is asbestos in Libby vermiculite, that it can become airborne, and that the asbestos is contained in consumer products. *Id.* 5928; Gov. Ex. 215. And Kover acknowledged that Grace made additional disclosures to the CPSC regarding the

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dispute, the fact that the quantity of asbestos in Libby vermiculite was "small" is not at issue in these proceedings.

asbestos content of Zonolite Attic Insulation ("ZAI") in letter from Chip Wood dated April 1, 1980. The letter provided exposure measurements taken in homes and included information about the friability and airborne levels of asbestos. Trial Tr. 5929-5931; Def. Ex. 15002.

This knowledge was acted on at EPA and CPSC. As Kover testified, in 1979 EPA and CPSC initiated a broad investigation into asbestos and asked companies to submit information about asbestos in their products. Trial Tr. 5922-25; Def. Ex. 7461 (EPA/CPSC Joint Advance Notice of Proposed Rulemaking ("ANPR"). Grace was one of the companies that made a submission to EPA and CPSC in response to the ANPR. Trial Tr. 5926-5927; Gov. Ex. 215. Kover also made clear that in 1981, EPA actually visited the Libby mine and took samples, and discussed this visit and these samples in a report. Trial Tr. 5937; Gov. Ex. 259. And in 1983, Kover testified, EPA made a decision that "*asbestos-contaminated vermiculite is considered a lower priority at this time than problems posed by friable asbestos-containing materials in school buildings and commercial and industrial use of asbestos*" Gov. Ex. 362 (emphasis added); Trial Tr. 5950-52.

Kover stated that as of 1983, when EPA made this decision, it already knew about the contamination of Libby vermiculite, the hazardousness of the tremolite contamination, the friability of the tremolite, and the worker exposure at Libby that

have given rise to health problems. *Id.* 5952. No evidence was offered that contradicted these facts.

C. The NIOSH Study And The TSCA Section 8(e) Letter.

Two lynchpins of the government's conspiracy to defraud theory are (1) the alleged obstruction of the NIOSH study and (2) the submission of the TSCA Section 8(e) letter. As to both topics, the Government presented no evidence of Bettacchi's involvement.

There was no testimony that Bettacchi participated in any discussions with NIOSH. The government admitted one document that Bettacchi received regarding the NIOSH study in 1981. Gov. Ex. 268. The document was a memo from Chip Wood to several people. It noted Grace's willingness to cooperate with and assist NIOSH and MSHA with the NIOSH study. In that memo, Wood stated that a meeting would be convened between Grace, NIOSH, and MSHA in order to "settle differences" so that the study could proceed in a cooperative, scientifically sound, and professional manner. There is nothing in this document to suggest an intent to withhold information from the Government regarding the health hazards and friability of vermiculite.

Similarly, the government admitted no testimony or documentary evidence suggesting the Bettacchi participated in the preparation and submission of the TSCA 8(e) letter in 1983. While the evidence showed that there was nothing

misleading or improper regarding Grace's submission of this letter, it is telling that there was no evidence connecting Bettacchi to the submission.

D. The Documentary And Testimonial Evidence Concerning Bettacchi Do Not Pertain To Any Agreement To Violate The Law.

Such testimonial evidence as there is regarding Bettacchi's role in Grace's vermiculite business bears no relation to any alleged agreement to defraud the government. James Becker testified that he recalled knowing who Bettacchi was but stated that "I don't recall working with him or actually even meeting him". Trial Tr. 2923:4. Becker observed that he overlapped with Bettacchi in the Construction Products Division for a "quite brief" period of time. *Id.* 2923:23. Becker said nothing to indicate that Bettacchi agreed implicitly or explicitly to become part of a conspiracy.

Bruce Williams testified about Grace's consumer labeling and product testing work but made no reference, direct or indirect, to a connection with Bettacchi in these matters. *Id*. 4861-4873. Peronard testified that he observed Bettacchi's name on documents relating to tests of unexpanded vermiculite, but said nothing that could lead a reasonable juror to believe that the mere appearance of Bettacchi's name on these documents signified an agreement to join a conspiracy to defraud the Government. *Id.* 1315.

Stephen Venuti also testified as to a disagreement he had with Bettacchi regarding product labeling. The disagreement involved the extent of disclosures that Grace should have made regarding its Libby vermiculite-containing consumer products. *Id*. 4619:17-24. Venuti testified that "[i]t was my position at the time, which I did express to Mr. Bettacchi and others, that it was not really possible to foresee all the end uses of the product; . . . that it was difficult, if not impossible, to say that you could not exceed the exposure limits when using the product." *Id.*

The same is true of all other documentary exhibits admitted at trial that either reference Bettacchi or that Bettacchi would have received or authored. Appendix A is an exhaustive chart of all such exhibits, catalogued by date and overt act allegation, with brief analyses noting why none of these documents can reasonably be seen as pertaining to an alleged agreement to defraud the government.

ARGUMENT

I. THERE WAS INSUFFICIENT EVIDENCE TO PROVE THAT BETTACCHI COMMITTED ANY CAA VIOLATIONS.

A. There Was Insufficient Evidence To Prove Count III.

1. No Evidence That Bettacchi Had The Mens Rea Required By 42 U.S.C. § 7413(C)(5) And 18 U.S.C. § 2(b).

The knowing endangerment provision of the Clean Air Act charged in Counts Three and Four contains two distinct mens rea requirements for criminal liability. The defendant must "*knowingly* release[]" a hazardous substance and, separately, must "*know*[] at the time" that he thereby places another in imminent danger. 42 U.S.C. § 7413(c)(5) (emphasis added). Because the government proceeds against Bettacchi under an accessory theory, it must also show that he "*willfully cause*[*d*]" the alleged offense. 18 U.S.C. § 2(b) (emphasis added).[6]

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[6] This Court has previously held that § 7413(c)(5) does not require that a defendant know that his conduct is unlawful at the time of the offense; in other words, that § 7413(c)(5) is not a crime of specific intent. *United States v. Grace*, 429 F. Supp. 2d 1207, 1229 (D. Mt. 2006). In that opinion, the Court stated that there is "no reason to refer to the legislative history for guidance as the Defendants suggest" and that "resort to legislative history does nothing to bolster the Defendants' position." *Id*. However, after this Court issued its opinion, the Ninth Circuit concluded that it could, in fact, look to legislative history to determine whether § 7413(c)(1) -- the crime of a knowing violation of a legal requirement included in the same section of the CAA as § 7413(c)(5) -- was a crime of specific or general intent. *United States v. Alghazouli*, 517 F.3d 1179 (9th Cir. 2008). Holding that § 7413(c)(1) was a crime of general intent, the Ninth Circuit relied on a statement from the [bill's sponsors] that distinguishes § 7413(c)(1) from "the crimes of knowing and negligent endangerment" also included in the section, which it described as "crimes of specific intent." *Id*. at 1194 (quoting 136 Cong.

In an apparent effort to avoid the applicable statute of limitations, the government relies on an utterly convoluted theory of criminal liability under the CAA's knowing endangerment provision. Bettacchi's sole involvement with the Screening Plant is his signing a deed transferring title to the Parker family by signing a deed on or about December 17, 1993, *See* Superseding Indictment ¶ 158. This act, however, occurred almost six years before the statute of limitations period expired on November 3, 1999. *W.R. Grace*, 429 F. Supp. 2d at 1240, 1245**.**

According to the government's theory, when Bettacchi signed the deed for the Screening Plant, he knew that the property was contaminated with asbestos, and knew that another person (namely, the Parkers) would disturb the ground at some unspecified point in the future, and in so doing, would release asbestos into the ambient air. Under this theory, Bettacchi must also have known at the time he signed the deed that such releases would place others in imminent danger of death or serious bodily injury.

The government, however, has not shown that Bettacchi knew the properties were contaminated with asbestos, and thus cannot establish a knowing release of

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Rec. S16895-01 (daily ed. Oct. 27, 1990) (Chafee-Baucus statement of Senate Managers, S. 1630, Clean Air Act Amendments of 1990)). In light of this characterization of § 7413(c)(5)(A) as a crime of specific intent, Bettacchi respectfully suggests that this Court revisit its ruling on this point and require that the government show that defendants knew their conduct to be unlawful at the time of the offense.

asbestos. The government has not shown that Bettacchi knew such a release would imminently endanger individuals on the property. And the government has not shown, as it must under § 2(b), that Bettacchi willfully caused others to act in a manner that led to such a release. Because the government has not presented evidence sufficient to prove these essential elements, judgment of acquittal should be entered for Bettacchi on Count III of the Indictment.

a. Absence Of Evidence To Show Mens Rea For Release.

Because the government did not adduce evidence sufficient to show that Bettacchi knew that the Screening Plant property was contaminated with asbestos, a jury could not find that he had the requisite mens rea of a knowing release of asbestos.

No documents were introduced in evidence and there was no testimony to indicate that Bettacchi had any knowledge that piles of vermiculite were left at the Screening Plant property. Indeed, the evidence presented suggests that Bettacchi had every reason to believe that all vermiculite had been removed from the Screening Plant property. Peronard testified, based upon Gov. Ex. 607 and Def. Ex. 15035, that by September 1993 Bettacchi had been informed that all major tasks regarding the demolition and cleanup of the Screening Plant (with the

exception of the removal of the suspension cables across the Kootenai River) had been completed.[7]

Peronard also testified that he had never seen and could not point to a single document showing that Bettacchi either released or directed someone to release asbestos fibers in Libby. Trial Tr. 1234:21-1235:6). Moreover, when asked about the one Grace representative in Libby who was most directly involved in the demolition and cleanup of the Libby properties – Mike Ray – Peronard testified only that he had a "cordial, cooperative relationship with him" and that Ray had never been charged with knowing endangerment of any persons in connection with the sale of the Screening and Export Plants. *Id.* 1230:25-1231:2, 1231:16-20).

Although there was testimony from witnesses that vermiculite was left on the Screening Plant property[8] and that vermiculite was disturbed by persons entering and working on the property,[9] all of the witnesses who testified on these points either made no reference at all to Bettacchi or testified they had never met

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[7] Trial Tr. at 1226:8-11; GOV. EX. 607 at 2 (May 1993 memo from Wolter to file listing more than fifteen items that remained to be completed in connection with demolition and cleanup of Screening Plant, including, *inter alia*, cleaning of piles of vermiculite and removal of suspension cables across Kootenai River); Def. Ex. 15035 at 5 (9/8/93 Fire Protection Products Report, copied to Bettacchi, stating that "[t]he only major task yet to be completed is the removal of the suspension cables across the Kootenai River.").

[8] Trial Tr. 1323:16-17 (Mel Parker); Trial Tr. 1518:12-17 (Lerah Parker); Trial Tr. 5073:17-20 (Lerah Castleton).

[9] *See, e.g.*, *id.* 1342:14-17 (Mel Parker).

him.[10] And there has been no evidence to contradict Peronard's testimony and the evidence of Def. Ex. 15035 that Bettacchi would reasonably have believed that all vermiculite had been cleaned from the Screening Plant prior to its transfer to the Parkers.

Given the lack of any evidence to suggest that Bettacchi himself was aware that vermiculite remained on the Screening Plant property, Bettacchi could not possibly have knowingly caused a release of asbestos into the ambient air. He could not have anticipated, let alone known, that another person would release asbestos by disturbing the ground, or that such a release would place that person (or others) in imminent danger of death or serious bodily injury.

The only evidence that could arguably support an inference that Betttacchi was aware of continued contamination on the Screening Plant property that could pose a threat to others is Robert Locke's so-called "*caveat emptor*" testimony. While Ninth Circuit case law is somewhat inconsistent on this point, both the Circuit Court and district courts within the Circuit have held that testimony regarding a defendant's out-of-court inculpatory statement, to the extent it purports to prove essential elements of the crime charged, requires corroboration by substantial independent evidence to establish its trustworthiness. *See United States*

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[10] *Id.* 1345:19-20, 1410:19-23, 1411:1-3 (Mel Parker testifying that he had never met Bettacchi). Lerah Parker and Lerah Castleton did not reference Bettacchi at all in their testimony regarding the Screening Plant.

v. Corona-Garcia, 210 F.3d 973, 978 (9th Cir. 2000) ("Although the government may rely on a defendant's confession to meet its burden of proof, it has nevertheless long been established that, in order to serve as the basis for conviction, the government must also adduce some independent corroborating evidence.") (citing *United States v. Opper*, 348 U.S. 84, 89 (1954)); *United States v. Lopez-Alvarez*, 970 F.2d 583 (9th Cir. 1992) (reversing conviction based on insufficient corroboration of defendant's admission); *United States v. Taylor*, 802 F.2d 1108 (9th Cir. 1986) (holding that statements to undercover agent and cooperating citizen required corroboration, but noting possible contrary authority); *United States v. Northrup*, 482 F. Supp. 1032 (D. Nev. 1980).

In any event, for the reasons set forth in the defendants' forthcoming motion to dismiss the Superseding Indictment based on prosecutorial misconduct, Locke's testimony regarding Bettacchi (including the "*caveat emptor*" testimony) should be stricken from the record in light of the prosecution's misconduct and Locke's perjury.

b. Absence Of Evidence To Show Mens Rea For Imminent Endangerment.

The government has also failed to adduce sufficient evidence with respect to the second mens rea prong of § 7413(c)(5)(A), knowing endangerment. For Bettacchi to be found guilty of knowing imminent endangerment of others, the government must demonstrate that Bettacchi knew at the time he participated in

the transfer of the Screening and Export Plant properties that a release would place others in imminent danger of death or serious bodily injury. Given that there is no evidence that Bettacchi even knew that vermiculite remained on the Screening Plant, as explained above, the government cannot and has not satisfied this burden.

The government's standard of proof on this element is especially stringent. The words "knowingly" and "knows at the time" are not defined in § 7413(c)(5)(A), and the Court has proposed that knowing endangerment can be shown if a defendant was aware of the act that caused the release[11] and believed that the release was more likely than not to cause death or serious bodily injury to a person exposed to the release.[12] Although even by this standard the government's evidence fails to support a finding of knowing endangerment on Bettacchi's part, the Court should also draw upon the Ninth Circuit's interpretation of the closely analogous knowing endangerment provision of the Resource Conservation and Recovery Act ("RCRA"). In *United States v. Elias*, 269 F.3d 1003 (9th Cir. 2001), the Ninth Circuit found the RCRA knowing endangerment provision to require a showing that the defendant believed with "substantial[] certainty" that death or serious bodily injury would result – a standard more consistent with the purposes

[11] Jury Instr. 15-W.

[12] Jury Instr. 21-W.

and language of § 7413(c)(5) than a "more likely than not" standard.[13] *See id.* at 1018 (jury "had to find that [defendant] believed his conduct was *substantially certain* to cause . . . death or serious bodily injury"). This Court can also turn to the Model Penal Code. *See United States v. U.S. Gypsum*, 438 U.S. 422, 444 (1978) ("The ALI Model Penal Code is one source of guidance upon which the Court has relied to illuminate" levels of culpability). The Model Penal Code states that a person acts "knowingly" with respect to a result when 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).

Moreover, the statute requires not only knowledge that the defendant's acts place another at risk of death or serious bodily injury, but also that the risk be "imminent." Although the government is not required to prove a risk that death or seriously bodily would occur immediately, the government must have produced evidence sufficient to warrant a finding that a risk of death or seriously bodily injury was an immediate result of Bettacchi's conduct.[14]

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[13] Bettacchi assumes for purposes of this motion that the Court's "more likely than not" standard applies but does not waive his right to seek appellate review of such an instruction if it is given to the jury and Bettacchi is convicted on either Counts III or IV or Count I's CAA object.

[14] Jury Instr. 21-W.

The evidence regarding Bettacchi's involvement in the Screening Plant falls short of a basis upon which to find, beyond a reasonable doubt, that Bettacchi believed it was more likely than not – let alone substantially certain – that his conduct would, as an immediate result, give rise to a risk of death or serious bodily injury. As demonstrated above, the evidence establishes that Bettacchi had formed a good-faith belief that all vermiculite piles had been removed by the time of the property's transfer to the Parkers.

c. The "Responsible Corporate Officer" Doctrine Does Not Reduce The Requisite Mens Rea.

The government's arguments for reducing the mens rea requirement of Count III is without merit. First, the Responsible Corporate Officer ("RCO") provision of the CAA, 42 U.S.C. § 7413(c)(6), cannot excuse the government from its obligation to prove beyond a reasonable doubt these statutory mens rea requirements. As the government acknowledges, the RCO provision "relieve[s] the Government *only* of having to prove that the defendant *personally* discharged or caused the discharge of a pollutant." *United States v. Iverson*, 162 F.3d 1015, 1025-26 (9th Cir. 1998); Government's Response To Defendant Bettacchi's Motion In Limine To Exclude Argument And Evidence That Bettacchi's Position As An Officer Is Sufficient To Establish Knowledge Elements Of The Crimes Charged ("Gov.'s RCO Response") (Dkt. 549) at 2). When the government proceeds under an RCO theory, it must still prove that the defendant had whatever

mens rea is required by the underlying statute. *See United States v. Cattle King Packing Co.*, 793 F.2d 232, 240-41 (10th Cir. 1986) (jury must be given statutory specific intent charge in addition to RCO charge); *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).

Nor can the Government rely on the knowledge of someone other than Bettacchi to satisfy the statutory mens rea requirement. *See* 42 U.S.C. § 7413(c)(5)(B)(ii) ("knowledge possessed by a person other than the defendant, but not by the defendant, may not be attributed to the defendant"). Thus, the case against Bettacchi cannot be allowed to proceed if the only evidence indicating a knowing release of asbestos from the Screening Plant is based on knowledge of someone other than Bettacchi.[15]

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[15] The Court properly declined to include in its working instructions an instruction on *Pinkerton* liability that would permit the jury to convict Bettacchi of Counts III and IV if Grace is convicted and Bettacchi is found to have been a member of the Count I conspiracy with intent to further the purposes of the CAA object. Vicarious liability based on the foreseeability standard of *Pinkerton* would here directly contradict the CAA provisions requiring that a defendant "is responsible only for actual awareness or actual belief possessed" and that "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). *See Nye & Nissen v. U.S.*, 336 U.S. 613, 620 (1949) ("*Pinkerton v. United States* is narrow in its scope."); *U.S. v. Cherry*, 217 F.3d 811, 818 (10th Cir. 2000) (crimes incorporating a specific intent requirement are more stringent than the foreseeability standard of *Pinkerton*); *U.S. v. Johnson*, 886 F.2d 1120, 1123 (9th Cir. 1989) (recognizing "the potential due process limitations on the *Pinkerton* doctrine in cases involving attenuated relationships between the conspirator and the substantive crime").

d. Absence Of Evidence Of Willful Causation, As Required By 18 U.S.C. §2(b)

The evidence also does not satisfy the "willfulness" requirement of 18 U.S.C. § 2(b). Because Bettacchi did not take any action related to this case within the relevant statute of limitations, the government is proceeding against Bettacchi on the theory that his conduct prior to the statute of limitations period allegedly *caused* a release of asbestos to occur within the limitations period. For a jury to convict Bettacchi of violating the CAA under this theory, the government must prove not only the elements of 42 U.S.C. § 7413(c)(5)(A), but also those of 18 U.S.C. § 2(b). Although the government suggests that its burden under its unorthodox theory is no different than it would be in a straight-forward case alleging that a defendant himself released a hazardous air pollutant, § 2(b) on its face requires the government to adduce evidence that Bettacchi's alleged causation of the release was willful. *See* 18 U.S.C. § 2(b) ("Whoever *willfully causes* an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.") (emphasis added).

Although the government wants this Court to read the word "willfully" out of § 2(b), contending that the provision imposes no distinct burden on the prosecution whatsoever, *see* April 19, 2009 Point Brief on 18 U.S.C. § 2(b)'s Implications for Mens Rea (Dkt. 1082), the plain language of the statute precludes this interpretation. Moreover, as the Ninth Circuit has indicated, this requirement

is a stiff one. Because § 2(b) has "overtones of agency . . . the willful causation to which it refers must be purposeful rather than be based simply upon reasonable foreseeability." *United States v. Berlin*, 472 F.2d 13, 14 (9th Cir. 1973); *see also United States v. Markee*, 425 F.2d 1043, 1046 (9th Cir. 1970) ("the requirement [in § 2(b)] that defendant willfully cause the forbidden act to be done, means that the act must not only have been the cause-in-fact of the defendant's activities, but also that defendant have the *specific intent of bringing about the forbidden act*") (emphasis added).

While the government suggests that under *United States v. Michaels,* 796 F.2d 112 (9th Cir. 1986), the requisite proof for conviction is completely unaffected by the inclusion of § 2(b) in an indictment, *Michaels* simply does not stand for that proposition. In *Michaels*, a defendant was convicted under 18 U.S.C. § 844(d), which punishes the transportation in interstate commerce of any explosive "with the knowledge or intent that it will be used to kill . . .," and § 2(b). After defendant mailed an explosive device to the California office, an employee forwarded the package to New Jersey, where the intended recipient was temporarily working. *Id*. at 1114-15. The Ninth Circuit rejected the defendant's argument that the inclusion of § 2(b) in the indictment required the government to prove that the defendant had specifically intended that the *office worker* transport the device in interstate commerce. *Id*. at 1118. Rather than holding that § 2(b)

imposes no distinct proof requirement, the court reasoned that § 844(d)'s stringent intent requirement related only to use of an explosive to kill, not to the transportation element, and that the inclusion of § 2(b) did not extend the underlying intent requirement to that aspect of the offense. *Id*. Indeed, given that the underlying statute already required the highest possible degree of mens rea, the Court could not have even been presented with the question of whether § 2(b)'s "willful[]" causation element would heighten the requisite mens rea in a case such as this one, where the underlying offense imposes a mens rea standard less stringent than willfulness.[16]

The government's effort to avoid § 2(b)'s plain language is especially inappropriate here, in light of their extraordinary theory of liability. As the government itself notes, "'[t]he precise meaning of the word "willfully" depends on the context in which it is used.'" Gov't Br. of April 19, 2009, at 3 (quoting *Chow Bing Kew v. United States*, 248 F.2d 466, 469 (9th Cir. 1957). Given the extremely attenuated theory as to how Bettacchi caused a violation of § 7413(c)(5),

[16] The other cases cited by the government in their April 19, 2009 Brief provide no firmer support for their efforts to read the term "willfully" out of § 2(b). *United States v. Armstrong*, 909 F.2d 1238 (9th Cir. 1990), concerned whether the government impermissibly amended an indictment that explicitly charged a defendant under § 2(b), but implied an aiding-and-abetting charge under § 2(a). *United States v. Thomas*, 893 F.2d 1066 (9th Cir. 1990), affirmed the conviction of a defendant for knowingly transporting child pornography under § 2(b), where the defendant caused the material to be mailed.

it is critical that they fully satisfy the statutory mandate that such causation be "willful[]." While '[s]ection 2(b) does not . .. limit by its terms the particular means by which the defendant may 'cause' another to commit the act, nor the degree of permissible 'attenuation' between these two peoples actions[,] [t]he mens rea element of the statute provides an outer limit on the latter, for a weak or implausible causal link would make it more diffcult to prove that the defendant brought the effect about 'willfully.'" *United States v. Hsia*, 176 F.3d 517, 522-23 (D.C. Cir. 1999) (citations omitted); *see also United States v. Jordan*, 927 F.2d 53, 55 (2d Cir. 1991) ("'Causation' is not some attenuated relationship between offender and offense. . . . The 'causer' is punishable as a principal for willful action that brings about an offense.").

Here, the government purports to make that showing based on contingent events that allegedly occurred years after any supposedly related act taken by Bettacchi—events that Bettacchi, unaware of any contamination, could never have predicted in 1993 when he signed the deed. As noted, there is no evidence that Bettacchi had even been informed that vermiculite remained on the Screening Plant, let alone that he knew that signing deed would result in the release of asbestos, or, further, that he knew with substantial certainty at the time that such release would involve levels of asbestos that placed others at imminent risk of death or serious bodily injury. The government has cited no case, nor has

independent research disclosed any, in which a defendant was convicted for "causing" a wholly contingent, unpredictable series of events years after the defendant's allegedly culpable conduct, and it should certainly not be allowed to do so here.

2. Even Assuming Sufficient Evidence of Bettacchi's Mens Rea, There Is Insufficient Evidence of the Actus Reus Required by §7413(c)(5).

a. There Is Insufficient Evidence of a Release Into The "Ambient Air".

Section 7413(c)(5)(A) prohibits only releases into "ambient air." The term "ambient air" means outdoor air external to buildings and accessible to the general public.[17] The government's "ambient air" case turns on the issue of whether the long shed at the Screening Plant constitutes a space of outdoor or indoor air. The evidence is insufficient to support a finding of outdoor air beyond a reasonable doubt. Mel Parker testified that the sweeping in the long shed was "indoors," and the vehicles stored inside it were "all under the roof, so to speak." Trial Tr. at 1434, 1422; *see also* Def. Ex. 18929.

In addition, EPA considered the Long Shed to be indoor air, and labeled asbestos samples as such up to the time of trial. *See* Def. Ex. 5012.1 (labeling

[17] Jury Instr. 19-W. *See also United States v. W.R. Grace*, 455 F. Supp. 2d 1172, 1175 (D. Mont. 2006) (finding that term "ambient air" as used in the Clean Air Act refers to the outside air and not to air inside buildings).

sample "media" inside the long shed as "Indoor Air"); Peronard testimony, Trial Tr. at 1065 ("Q. Those particular samples, the long shed samples, were listed and tabulated as being indoor samples. Correct? A. I think they say indoor or inside the long shed. I would look at the sheet and I could tell you, but they were in the long shed, and we've seen what it is."); Goldade testimony, Trial Tr. at 5325 (long shed samples marked as indoor air). Dr. Miller testimony, Trial Tr. 2209:1-2211:23 (acknowledging that EPA initially classified the long shed as an "indoor" space); Def. Ex. 6704. EPA removed the words "indoor air" from its sampling data at the long shed at the bequest of the prosecutor, Mr. McLean. Goldade testimony, Trial Tr. 5241-42; *see also* Def. Ex. 10168.3. The Court should acquit Bettacchi of the Count III because the government has failed to introduce evidence upon which the jury could find, beyond a reasonable doubt that the releases charged were made to the ambient air.

b. There is No Evidence That The Substances Bettacchi Allegedly Caused To Be Released Are Asbestos.

The government must prove that the hazardous air pollutant allegedly released as a result of Bettacchi's conduct is the substance defined as "asbestos" in the CAS Registry: namely, "'a grayish non-combustible material' that 'consists primarily of impure magnesium silicates.'" *United States v. W.R. Grace*, 504 F.3d 745, 755 (9th Cir. 2007). USGS geologist Gregory Meeker testified that 84% of the amphibole material at the Libby mine was winchite and 11% was richterite.

Trial Tr. 6069-6070; Def. Ex. 160230. Winchite and richterite are not named as forms of asbestos in any federal statute or regulation defining asbestos. Trial Tr. 2489-91 (judicial notice of statutes and regulations); Trial Tr. 6073-6075, 6107.

On cross-examination, Meeker acknowledged that several learned treatises described the colors of winchite and richterite and none of those treatises describe the color of either winchite or richterite as "gray" or "grayish." Trial Tr. 6081-6103. Although Meeker testified that minerals which analyzed appeared "grayish," (Trial Tr. 6066), he acknowledged that tremolite itself is gray. Trial Tr. 6103-6104. Therefore, his testimony does not reflect whether the winchite or richterite which he identified was gray, as opposed to the tremolite.

Also, Dr. Miller acknowledged that one cannot identify fibers or their colors from looking at the rocks in which they are embedded. Trial Tr. 2565. On the basis of this record, it would be impossible for a reasonable juror to determine beyond a reasonable doubt that the winchite and richterite which make up 95% of the amphibole materials on Vermiculite Mountain are gray.

To the extent there has been any evidence introduced in this trial as to the color of the minerals reflected in the government's sampling evidence, that evidence does not suffice to permit a jury finding beyond a reasonable doubt that the minerals at issue meet the CAS Registry definition. Accordingly, this Court

can and should direct a verdict in favor of Bettacchi as to Counts III on this basis alone.

c. There Is Insufficient Evidence Of Imminent Endangerment At The Screening Plant.

A conviction under §7413(c)(5) requires a finding that "the risk of death or serious bodily injury is an immediate result of the [defendant's] conduct."[18] There is no evidence in the record to support such a finding of imminent risk at the Screening Plant after November 3, 1999. Rather, the evidence demonstrates the absence of risk.

Mel Parker purchased the Screening Plant property "in full reliance upon his independent investigation and judgment." Trial Tr. 1424. Parker knew that asbestiform fibers were present on the Libby mine, which he described in a proposal to purchase the mine. Trial Tr. 1412-13.

Peronard and Dr. Miller testified that the EPA response team first visited the Screening Plant on November 23, 1999. Trial Tr. 1991-92; 2274. Dr. Miller testified that the team came back on November 30, 1999. *Id.* 2280-81. And EPA began to take samples. *Id.* 2292-2293, 2419. Peronard testified that, as on-scene coordinator, there are many things that can be done to protect people from exposure to hazardous substances, including relocation, putting up fences, and

[18] Jury Instr. No. 21-W.

covering hazardous materials. *Id.* 1199-1200. But there is no evidence that any of those things were done at the Screening Plant. Lerah Castleton testified:

> Q. The EPA did not remove the piles of vermiculite before your parents left the property, did they?
>
> A. No.
>
> Q. In fact, they didn't cover the piles before your parents left the property, did they?
>
> A. Not that I remember.
>
> Q. The EPA didn't put a fence up around the piles before your parents left the property, did they?
>
> A. Not that I remember.
>
> Q. And the EPA also didn't put up any hazard or warning signs about any dangers associated with the materials on the ground at the Raintree Nursery before your parents left, did they?
>
> A. Not that I remember.

Trial Tr. 5089; *see also* M. Parker testimony, Trial Tr. at 1437-38.

Dr. Miller also testified that he did not tell the Parkers to leave, no fence was built around the property, and he did not know whether any piles of vermiculite were covered. Trial Tr. at 2420-2421. EPA announced on January 31, 2000 that it planned to cleanup the Screening Plant. Trial Tr. 2298-99. But the cleanup did not begin until June 15, 2000 and the Parkers remained on the property until that time. Trial Tr. 1191.

Throughout the process, EPA acted as if the Parkers were in no immediate risk. On March 23, 2000, Peronard told the Libby community:

> Sampling to date does not indicate an ambient air asbestos concentration problem. The non-occupational cases probably result from past exposures to vermiculite through pathways that no longer exist.

Def. Ex. 5029-0002-03; *see also* Def. Ex. 5436.1 ("Ambient air monitors colleted samples near the mine and in four locations around Libby for an entire year. The air samples were analyzed and no asbestos was detected."). And on May 24, 2000, EPA prepared a press release to be issued to the Libby community about the projected cleanups of the Screening and Export Plants which said exactly that the Parkers were not in immediate risk:

> *Question:* If these two sites are so contaminated with asbestos, why did EPA allow, in one case, the family to continue living there and, in the other case, workers to continue working on site?
> *Answer:* EPA did not take *immediate* steps to relocate the family or the workers because there was no *immediate* health risk from asbestos at these two sites. The levels of asbestos are high enough to require clean-up, but do not pose an immediate acute health threat. Steps are currently underway to relocate the residents.

Trial Tr. at 2425-2426 and Def. Ex. 16010.

The only evidence which the government introduced concerning risk at the Screening Plant was the testimony of Dr. Miller concerning the results of samples taken *after* the period of alleged endangerment at the Screening Plant (November

3, 1999 to June 15, 2000). Trial Tr. at 1930-1938, 1946-49, 1974-1983. But the Court only permitted Dr. Miller to testify about these sample results under Fed. R. Evid. 104(b), subject to the Government's later submission of evidence showing the validity of those samples. *Id.* 1811-12. The Court noted that "if he doesn't get the rest of the stuff, it's stricken." *Id.* 1812. The government was unsuccessful in submitting those sample results through summary exhibits 715A and 823A offered during the testimony of Mary Goldade.

Subsequently, the Government filed a motion asking the Court to admit those exhibits. (Dkt. 1080). The Defendants have opposed the motion. (Dkt. 1096). If the Court denies the Government's motion, then the testimony of Dr. Miller about those sample result should be stricken pursuant to Fed. R. Evid. 104(b). Without the testimony of Dr. Miller about the sample results, there is no evidence in the record that supports a finding that releases at the Screening Plant created an imminent endangerment. Even if this evidence remains in the record, Dr. Miller admitted that this sample result indicated "a fraction of a fraction of a fraction of the risk associated with the PEL." Trial Tr. 2216; *see also id.* (Dr. Miller agreeing that "under the EPA's guidelines for quantitative risk assessment, these values between 1 in 100,000 and 1 in a million would be acceptable risks; that is not requiring any remedial action at all quantitatively."). Dr. Miller further

testified that there is no scientific calculation linking exposures during the cleanup of the cleanup at the Screening Plant to those faced by the Parkers. *Id.* 2220.

Accordingly, there is no evidence upon which a reasonable juror could reach a determination of imminent endangerment at the Screening Plant, and Mr. Bettacchi should be acquitted on Count III.

3. Bettacchi Must Be Acquitted of Count III Because the Applicable Statute Of Limitations Has Expired.

A determination concerning whether or not a statute of limitations has run is a question of law to be decided by a court. *See Hilao v. Estate of Marcos*, 103 F.3d 767, 779 (9th Cir. 1996) ("The application of a statute of limitations . . . is a question of law for the court, not for the jury."). The government's theory of the case seeks, in effect, to have this Court apply equitable tolling principles to the knowing endangerment provision of the CAA. There is no support for such an approach.

The rationale for a statute of limitations is important and well-established. As the Supreme Court has observed:

> The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions. Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. Such a time limit may also have the salutary effect of encouraging law

> enforcement officials promptly to investigate suspected criminal activity.

Toussie v. United States, 397 U.S. 112, 114 (1970). Thus, "a statute of limitations reflects a legislative judgment that, after a certain time, no quantum of evidence is sufficient to convict." *Stogner v. California*, 539 U.S. 607, 615 (2003); *see also United States v. Marion*, 404 U.S. 307, 323 n.14 (1971) (stating that "[c]riminal statutes of limitation are to be liberally interpreted in favor of repose").

As explained above, the viability of the government's knowing endangerment CAA case against Bettacchi hinges upon the use of 18 U.S.C. §2(b), because any acts committed by Bettacchi in connection with Counts Three and Four were completed no later than 1995. The government's theory of liability is an artifice designed to circumvent the applicable five-year statute of limitations. A "release" means "the movement of material from a source into the air. Once the released material settles out of the air, the release ends."[19] A release, in other words, is not a process that continues over the course of six or seven years or longer.

More significantly, neither is endangerment. This Court has previously ruled that the knowing endangerment provision does not describe a continuing offense, and that evidence of exposure to asbestos occurring prior to November 3,

[19] Jury Instr. 18-W.

1999 is evidence of a completed offense; As this Court ruled: "[a]ssuming all other elements are satisfied, the crime defined in that section 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." *W.R. Grace*, 429 F.Supp.2d at 1243, 1245 ("[T]he important considerations underlying statutes of limitations dictate that the Court refrain from inferring a continuing offense where Congress has failed to speak clearly on the latter."); *id.* at 1244 n.34 ("[T]he running of the statute of limitations under § 7413(c)(5) is not 'pegged' to the release, but rather to the completion of the final element, which must in every case be the endangerment.").

Based on the facts developed at trial, it is clear that as early as 1993, the Parkers were first exposed to asbestos as a result of Grace's alleged failure to remove all vermiculite from the Screening Plant property. Mel Parker testified that he toured the Screening Plant prior to purchasing the property from Grace in 1993 and observed vermiculite scattered about the site. Trial Tr. 1320-1345; 1347-1349. Parker also stated that he observed the presence of dust in the long shed and stated that nobody informed him to use a respirator when unsettling dust. *Id.* 1366. Similarly, Lerah Parker testified that she observed dust in the long shed at the Screening Plant around the time of the purchase of the property from Grace. *Id.* 1530-1542. In addition, Lerah Castleton testified that she observed vermiculite on

the screening plant property during the 1994-1996 period and would sweep away dust in the long shed. *Id.* 5073-5074.

Any imminent endangerment to the Parkers and Castleton within the meaning the § 7413(c)(5) would also have occurred for the first time prior to November 3, 1999. The evidence establishes that if the Parker family was exposed to hazardous levels of asbestos at the Screening Plant as a result of vermiculite left behind by Grace in 1993, then the family was first endangered prior to November 3, 1999. Therefore, any crime regarding the Screening Plant property was complete with the introduction of asbestos into the ambient air and resulting endangerment at that time.

To the extent the government has introduced evidence of asbestos exposure to persons not identified in Count III, who first came onto the Screening Plant after November 3, 1999, the Court should find as a matter of law that such exposures cannot give rise to knowing endangerment liability on the part of Bettacchi because they are not specifically alleged in the Superseding Indictment.

Should the Court find that the Superseding Indictment need not contain such allegations, the Court should nonetheless find that the government has failed to produce sufficient evidence to show specific instances of exposure to persons who first came onto the Screening Plant after November 3, 1999. The jury must "unanimously agree as to the specific release or releases, occurring after November

3, 1999, that placed another person or other persons in imminent danger of death or serious bodily injury."[20] Not only are any such individuals not specifically identified by the Government's evidence, but there also is no evidence of a connection between acts committed by Bettacchi – the signing of a deed in the 1993 – and the supposed consequences – the introduction of asbestos into the ambient air after November 3, 1999, giving rise to a "risk of death or serious bodily injury [a]s an immediate result of the conduct."[21]

Such attenuation cannot form the basis of criminal liability under the knowing endangerment provision of the CAA. To permit otherwise would effectively make this crime a continuing offense because the statute of limitation would start anew each time a new person enters onto the Screening Plant. Such a theory cannot be the basis for liability since theoretically Bettacchi would be liable for exposures and endangerments until any remaining asbestos was removed from the properties, thereby rendering meaningless the statute of limitations.

The government's theory of liability and the resulting impact on the statute of limitations find no support in the case law; indeed, it is at odds with longstanding notions of a defendant's entitlement to finality and due process in the criminal justice system. *Toussie*, 397 U.S. at 114 ("[C]riminal limitations statutes

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[20] Jury Instr. 22-W.

[21] Jury Instr. 21-W.

are to be liberally interpreted in favor of repose."). This interest is especially weighty here, where there is absolutely no evidence to suggest that Bettacchi could have engaged in any relevant conduct at any time after the 1993 execution of the deed to the Parkers. *See United States v. Gonsalves*, 675 F.2d 1050, 1052 (9th Cir. 1982) ("The purpose of the statute of limitations is to balance the government's need for sufficient time to discover and investigate the crime against the defendant's right to avoid perpetual jeopardy for offenses committed in the distant past."). Accordingly, even if the Court concluded that the government had adduced evidence sufficient to prove the mens rea and actus reus of the CAA knowing endangerment Counts, it should enter a judgment of acquittal because they are barred by the statute of limitations.

B. There Was Insufficient Evidence To Prove Count IV.

Bettacchi should be acquitted of Count IV for each of the same reasons that he should be acquitted of Count III.

1. No Evidence That Bettacchi Had The Mens Rea Required By 42 U.S.C. § 7413(C)(5) And 18 U.S.C. § 2(b).

With respect to Count IV, there is no evidence in the record that a reasonable juror would find sufficient to satisfy the mens rea requirements of § 7413(c)(5), let alone the willfulness requirement of 18 U.S.C. § 2(b). Bettacchi's only connection with the Export Plant is that he signed the deed transferring the property to the City of Libby by signing deeds on or about May 12, 1994 (Gov. Ex.

612). Even Locke's account of the alleged *caveat emptor* conversation has no bearing on Count IV: Locke described the conversation in connection with the sale of the Screening Plant, not the transfer of the Export Plant, and in any event, the evidence shows that the Export Plant was donated to the City, rather than sold. Gov. Ex. 606.

There is no evidence that Bettacchi knew of any releases or of any endangerment. Gov. Ex. 607 at 3 (May 1993 memo from Wolter to file) listed five items that remained to be completed in connection with demolition and cleanup of the Export Plant, and Def. Ex. 15035 at 5 (9/8/93 Fire Protection Products Report, copied to Bettacchi), stated that "[t]he only major task yet to be completed is the removal of the suspension cables across the Kootenai River."

With regard to the leasing of the Export Plant property to the Burnetts, there is no evidence that Betttacchi committed any act related to any of Grace's leases of the Export Plant property to the Burnetts between 1989 until approximately 1994. In the absence of any such act, even under the Government's theory, there could be no eventual actionable consequence for which Bettacchi can be charged.

As for Bettacchi's signing of a deed transferring the Export Plant property on or about May 12, 1994, no evidence has been presented demonstrating that Bettacchi knew vermiculite had been left on the Export Plant Property. As previously noted, Peronard testified that he had never seen a document showing

that Bettacchi either released or directed someone to release asbestos fibers in Libby. (Trial Tr. 1234:21-1235:6). Although there was testimony from witnesses that vermiculite was left on the Export Plant properties[22] and that vermiculite was disturbed by persons entering and working on the properties,[23] all of the witnesses who testified on these points either drew no connection between Bettacchi and the presence of vermiculite on the Export Plant or made no reference at all to Bettacchi.[24]

Moreover, nothing in the record would support a finding of willfulness. Rather, the fact that the Export Plant was donated to the City, Gov. Ex. 606, rather than sold, suggests exactly the opposite mental state – a desire to be generous to citizens of Libby, not a willful indifference to their circumstances.

2. Even Assuming Sufficient Evidence of Bettacchi's Mens Rea, There Is Insufficient Evidence of the Actus Reus Required by §7413(c)(5).

a. No Evidence of Releases to Ambient Air.

Unlike with the Screening Plant, the Government made no pretense that releases inside the Export Plant buildings were actually part of the ambient air.

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[22] *See* Tr. 5995:9-11, 5995:16-17 (Mel Burnett); Tr. 551-558 (Paul Peronard).

[23] *See* Tr. 5996:18-19, 5997:2-5 (Mel Burnett).

[24] Mel Burnett made no reference to Bettacchi in his testimony. While testifying to the presence of vermiculite on the Export Plant property in November 1999, Peronard drew no connection to Bettacchi. (Tr. 551-558 (Paul Peronard)).

The Government made no attempt to offer any evidence of releases to the ambient air prior to the commencement of remediation work during the summer of 2000 about which Dr. Miller testified. (Trial Tr. at 1949-1958, 1974-1983). As discussed below, that evidence should be struck because of the Government's failure to satisfy the condition for its admission under Fed. R. Evid. 104(b). But even if that evidence remains in the record, it does not show releases to the ambient air during the period alleged in Count IV.

b. No Evidence of Asbestos.

As discussed with respect to Count III, there is no evidence in the record which would support the conclusion that the material purported released was asbestos.

c. There is Insufficient Evidence of Imminent Endangerment at the Export Plant.

A conviction under §7413(c)(5) requires a finding that "the risk of death or serious bodily injury is an immediate result of the [defendant's] conduct." Jury Instr. 21-W. As with the Screening Plant, there is no evidence in the record to support such a finding of imminent risk at the Export Plant after November 3, 1999. Rather, the evidence demonstrates the absence of risk.

Peronard testified that the EPA team first visited the Export Plant on November 23, 1999. Trial Tr. 1193. The team was provided with samples taken by Ron Anderson, the County Sanitarian. *Id.* 1205. These samples showed only

trace levels and non-detects for asbestos. *Id.* 1206-07. EPA took its own samples at the Export Plant. *Id.* 2292-2293. EPA announced on January 31, 2000 that it planned to cleanup the Export Plant. *Id.* 2298-99. Dr. Miller testified that he did not tell the Burnetts to leave the Export Plant, no fence was built around the property, and he did not know whether any piles of vermiculite were covered. *Id.* 2420-2421. The Burnetts did not relocate from the property until the fall of 2000, 11 months after the EPA response team first arrived in Libby. *Id.* 1191, 6008-09. Mel Burnett testified:

> Q. In fact, isn't it true that you, as you indicated on direct, you were able to run your business--even after the EPA said we're going to have to clean it up, you were able to run your business in November, December, January, February, March, April, May, June, July, August, September. You didn't' move until October of 2000; isn't that right, sir?
>
> A. Uh huh.
>
> Q. You have to answer audibly for the court reporter.
>
> A. Yes, that's right.
>
> Q. And, in fact, the reason you finally moved is because you were able to turn off the key at the old place and start up operation in the new place, right?
>
> A. Yes.
>
> Q. Now, isn't it also true that the EPA told you, indeed they told the public, that the reason you didn't have to move right away was because there

> was no immediate risk to you or your workers. Isn't that true?
>
> A. At one point, that's probably true.

Id. 6008-09.

In fact, on May 24, 2000, EPA prepared a press release to be issued to the Libby community about the projected cleanups of the Screening and Export Plants in which EPA said that the Agency "did not take immediate steps to relocate the family or the workers because there was no *immediate* health risk from asbestos at these two sites. The levels of asbestos are high enough to require clean-up, but do not pose an immediate acute health threat." *Id*. 2425-2426; Def. Ex. 16010.

As with Screening Plant, the only evidence which the Government introduced concerning risk at the Export Plant was the testimony of Dr. Miller concerning the results of samples taken at the Export Plant at the time when cleanup activities began at that property toward the end of the period of exposure alleged in the Indictment. Trial Tr. 1949-1958, 1974-1983. But, as previously discussed, this evidence should not go to the jury because the Government has not met the condition for admissibility under Fed. R. Evid. 104(b) by introducing evidence of the reliability of the sampling and analysis.

Without the testimony of Dr. Miller about the sample results, there is no evidence in the record that supports a finding that releases at the Export Plant created an imminent endangerment. Accordingly, there is no evidence upon which

a reasonable juror could reach a determination of endangerment at the Export Plant during the relevant time period.

3. The Evidence Shows that Count IV is Barred Under the Statute of Limitations.

Count IV, like Count III, is barred by the statute of limitations. Under the Court's analysis, the statute of limitations runs at the first instant that the crime is completed – the first instant of endangerment. As this Court ruled: "[a]ssuming all other elements are satisfied, the crime defined in that section 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." *W.R. Grace*, 429 F. Supp. 2d at 1243.

With regard to the Export Plant property, Mel Burnett testified that he recalled sweeping dust on the export plant property during the early period of his use of the site. Trial Tr. 5991. Burnett testified that he bought the Millwork West business from Jim Regh in 1989. *Id.* 5983. He also stated that he recalled seeing vermiculite "most every place" on the property, including nearly everywhere a person could walk or drive. *Id.* 5994-5995. Burnett testified that he gave Mel Parker large bags of vermiculite that had been used by Grace before it vacated the property. *Id.* 5997. Burnett further stated that he performed significant clean-up work outside the export plant buildings. *Id.* 5991.

This evidence establishes that if Mel and Judy Burnett were exposed to hazardous levels of asbestos at the Export Plant as a result of the presence of vermiculite, they too were first endangered prior to November 3, 1999. Therefore, Count IV is barred under the statute of limitations.

C. There Was Insufficient Evidence To Prove The Clean Air Act Object of Count I.

For the same reasons why Bettacchi should be acquitted on Counts III and IV, he should also be acquitted with respect to the CAA endangerment object of Count I. There is no evidence that Bettacchi joined a conspiracy to endanger the citizens of Libby, other than the insubstantial evidence which the Government has offered with respect to Counts III and IV. Any evidence of conduct by Bettacchi prior to the November 15, 1990 enactment of the CAA knowing endangerment provision cannot, as a matter of law, be relevant to determining whether Bettacchi had the intent to violate the CAA prong of the conspiracy. *See United States v. Campanale*, 518 F.2d 352, 357-59 (9th Cir. 1975); *United States v. Brown*, 555 F.2d 407, 419-421 (5th Cir. 1977). Only if the jury determines that Bettacchi engaged in conduct after November 15, 1990 that indicates his adherence to, recognition, or reaffirmation of a continued agreement to violate the CAA can the jury consider pre-November 15, 1990 evidence as to the existence of the conspiracy. *See* Jury Instr. 7-W.

Because there is no evidence upon which a jury could reasonably find that Bettacchi possessed the intent to violate the substantive offenses of §7413(c)(5), as explained in Part I above, this Court must find that Bettacchi cannot have intended to further the CAA object of the conspiracy. *See United States v. Nelson*, 66 F.3d 1036, 1044 (9th Cir. 1995) (requiring as an essential element of a conspiracy a showing of intent to commit the substantive crime). Each of the arguments set forth above with regard to why Bettacchi did not have the requisite mens rea to support a violation of the knowing endangerment provision of the CAA applies with equal force to the Government's conspiracy charge. An underlying theory of criminal liability that fails as a substantive matter cannot be rescued by repackaging it in the form of a conspiracy object. Indeed, although a defendant can be convicted of conspiring to cause another to commit a federal offense, *see United States v. Huber*, 772 F.2d 585, 591 (9th Cir. 1985), the Government's theory of liability on the CAA counts makes the existence of a conspiracy to further the knowing endangerment object impossible, certainly on the evidence before this Court.

II. THERE WAS INSUFFICIENT EVIDENCE TO PROVE THAT BETTACCHI CONSPIRED TO DEFRAUD THE UNITED STATES.

"The essential elements of a conspiracy are (1) an agreement to engage in criminal activity, (2) one or more overt acts taken to implement the agreement, and (3) the requisite intent to commit the substantive crime." *United States v. Nelson*,

66 F.3d 1036, 1044 (9th Cir. 1995) (internal quotation and citations omitted). Thus, to convict of conspiracy, a threshold requirement is that the Government must show evidence that the conspirators agreed to do something illegal. *See United States v. Melchor-Lopez*, 627 F.2d 886, 892 (9th Cir. 1980) ("The law requires more than a conspiracy to attempt to arrange a purchase; it requires an agreement to carry out an illegal act. No such agreement was proven.").

A district court's denial of a Rule 29 motion will be reversed if there is insufficient evidence to support finding that a defendant agreed to join a conspiracy. *United States v. Garcia*, 497 F.3d 964, 967 (9th Cir. 2007). "When there is an innocent explanation for a defendant's conduct as well as one that suggests that the defendant was engaged in wrongdoing, the government must produce evidence that would allow a rational jury to conclude beyond a reasonable doubt that the latter explanation is the correct one." *United States v. Bautista-Avila*, 6 F.3d 1360, 1363 (9th Cir. 1993) (internal quotation and citations omitted).

The government's case on Count I does not survive a Rule 29 analysis as to Bettacchi for two independently sufficient reasons. First, there is insufficient evidence of the existence of a conspiracy – an agreement to engage in illegal, criminal activity – in which Bettacchi could have joined. Second, there is no evidence that Bettacchi knowingly agreed to join the conspiracy with the intent to further that goal. Because the government has not adduced evidence sufficient to

prove either the existence of the alleged conspiracy or Bettacchi's agreement to join it with intent to further its purpose, a judgment of acquittal should be entered on Count One.[25]

A. There Was No Evidence Of A Conspiracy To Defraud The United States.

A conspiracy entails an agreement to engage in *criminal* activity. *Nelson*, 66 F.3d at 1044; *Melchor-Lopez*, 627 F.2d at 892. The government has certainly proven that the defendants engaged in various forms of business activity and business communications. Trial Tr. 4637:16-23 ("That's people doing their job. It may be that you don't like the way they do their job . . . but to have a conspiracy they have to have an agreement to do something illegal.").

In this trial, the government has tried to paint the defendants with various forms of conduct that, even assuming they accurately characterize the defendants' actions, do not equal a conspiracy. *U.S. v. Garcia*, 151 F.3d 1243, 1247 (9th Cir. 1998) ("Because the government introduced no evidence from which a jury could reasonably have found the existence of an agreement to engage in any unlawful conduct, the evidence of conspiracy was insufficient as a matter of law."). The government has sought to show that the defendants violated § 371 by concealing

[25] Count I also alleges a CAA knowing endangerment object. As set forth above, there is insufficient evidence to find that Bettacchi engaged in a knowing endangerment violation. Thus Count I as a whole must be dismissed as to Bettacchi.

information about the health hazards and friability of vermiculite from private parties, i.e., customers of Grace products. Assuming this to be true, that is not an agreement to do something illegal within the meaning of § 371. *See Tanner v. United States*, 483 U.S. 107, 130 (1987) (the target of a § 371 conspiracy to defraud must be the United States or a federal agency).

The Government has sought to show that Grace and the individual defendants made life more difficult for the Government by allegedly failing to share every last detail of the company's knowledge about its commercial and consumer products made with Libby vermiculite. Assuming this to be the case, that too does not describe a conspiracy. *United States v. Caldwell*, 989 F.2d 1056, 1061 (9th Cir. 1993) ("[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."). *See also* Jury Inst. 5-W. Similarly, where the law does not impose a legal duty to disclose information, a person cannot be found guilty of conspiracy for failing to disclose that information. *United States v. Murphy*, 809 F.2d 1427, 1431-32 (9th Cir. 1987); Jury Inst. 5-W.

The only legal duty to which the government is able to point in connection with the Count I defrauding object is Grace's alleged failure to disclose sufficient information regarding the company's vermiculite products in its 1983 TSCA § 8(e)

letter. Superseding Indictment ¶¶ 128-132. But TSCA § 8(e) exempts from disclosure information that is (1) published by EPA in reports, (2) submitted in writing to EPA, (3) published in the scientific literature and referenced by certain abstract services, or (4) "corroborative of well-established adverse effects documented in the scientific literature and referenced" in the relevant abstract services. *United States v. W.R. Grace*, 455 F.Supp. 2d 1156, 1160 (D. Mont. 2006) (citing 43 Fed. Reg. 11110, 11112 subpart VII(d) (Mar. 16, 1978); Jury Inst. 6-W.

Thus, the issue is whether the information reflected in the materials the Government claims were improperly withheld in 1983 – the Hamster Study, the Enbionics review, and the Monson mortality study, *see* Superseding Indictment ¶129 – fall into any of the 8(e)-exempt categories. What is common to all three of these studies, according to the Government's Count One theory, is that they contain knowledge information regarding the adverse health effects and friability of small quantities of asbestos in Libby vermiculite – "the secret" – that the government did not have.

That proposition does not withstand scrutiny. Dr. Miller's testimony regarding the EPA PRL 1 report shows that EPA was privy to a wealth of knowledge regarding the health risks and friability of tremolite contained in Libby vermiculite. Trial Tr. 2313-2314, 2355; Gov. Ex. 220. Kover testified that in 1973 he prepared a 70-page report outlining the health effects of asbestos, and that the

asbestos contained in Libby vermiculite especially was receiving more scientific scrutiny in the late 1970s and early 1980s than any other substance. Trial Tr. 5916, 5918. Kover further stated that by 1983, EPA was apprised of the tremolite contamination and friability issues associated with Libby vermiculite. *Id.* 5952.

A similar analysis applies to the Enbionics review. *Id.* 5916-5917 (testimony regarding the government's "vast" and "extensive knowledge" of asbestos-related disease). As for the Monson mortality study, notes in the NIOSH vermiculite file demonstrate knowledge of a mortality and morbidity study and environmental measures and make reference to a death certificate analysis. Def. Ex. 8617; Trial Tr. 5519-5522.

B. There Was No Evidence That Bettacchi Knowingly And Willfully Joined An Alleged Conspiracy To Defraud The United States.

As to Bettacchi, assuming that a conspiracy existed, the government's evidence does not establish either that Bettacchi agreed to conceal information about Libby vermiculite from one or more private parties (that is, customers of Grace), or that he agreed to withhold such information from the government.

Just as it must do to show the existence of a conspiracy, the government must be able to point to some identifiable evidence sufficient to permit a jury to find that Bettacchi agreed to impair, impede, and frustrate the governmental functions of the United States, including EPA and NIOSH. To show this agreement, the government cannot simply rely on evidence regarding Bettacchi's

relationship as a Grace executive to private parties. *Tanner*, 483 U.S. at 130. Nor can the government rest its hat on evidence suggesting that Bettacchi allegedly failed to be as cooperative with the government as the government now, in retrospect, wishes he had been. *Caldwell*, 989 F.2d at 1058-59.

There was no testimony or documentary evidence connecting Bettacchi to the Hamster Study, the Monson mortality study, or the Enbionics review. These documents simply fall outside the time frame of Bettacchi's involvement in Grace's vermiculite business. There also was no oral testimony – including from Kathleen Kennedy, the government's lead witness on the NIOSH matter – that Bettacchi had a relationship of any kind to the NIOSH study. The sole exhibit regarding the NIOSH study on which Bettacchi was copied, Gov. Ex. 268, is a 1981 memo from Chip Wood to Jack Wolter in which Wood proposed a meeting with NIOSH and MSHA to "settle differences" regarding protocol and methodology. And there is no evidence to support finding that Bettacchi played a role in any of the other overt acts detailed in the Superseding Indictment.

Finally, the mere fact that Bettacchi was copied on one or more documents that does not permit a jury to infer Bettacchi's agreement to further the conspiracy alleged here. *See United States v. Jones*, 393 F.3d 107, 111-112 (2nd Cir. 2004) ("mere presence at the scene of a criminal act or association with conspirators does not constitute intentional participation in a conspiracy, even if the defendant has

knowledge of the conspiracy . . . Evidence tending to show knowing participation in the conspiracy is also needed, i.e., facts sufficient to draw a logical and convincing connection between circumstantial evidence of an agreement, and the inference that an agreement was in fact made") (internal citations and quotations marks omitted)); *United States v. Duckett*, 550 F.2d 1027, 1030-1031 (5th Cir. 1977) (mere presence and association with conspirators not enough to prove knowing participation in a conspiracy).

While the government alleges that Grace actually obstructed federal investigations, *see* Superseding Indictment ¶¶ 191-198, neither the indictment nor the relevant testimony points to any involvement by Bettacchi. In short, the government has presented no evidence that Bettacchi had the purpose of furthering the defrauding object of the alleged conspiracy. *See also* App. A. Thus, as between an innocent and a more skeptical interpretation of the evidence regarding Bettacchi, absent a basis upon which to permit a jury to find for the latter beyond a reasonable doubt, this Court must choose the more innocent interpretation. *Bautista-Avila*, 6 F.3d at 1363.

CONCLUSION

For these reasons, Bettacchi respectfully requests that this Court allow his motion in its entirety, and enter a judgment of acquittal as to him on Counts I, III, and IV.

RESPECTFULLY SUBMITTED this 24th day of April, 2009.

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I hereby certify that on this 24th day of April 2009, a true and correct copy of the foregoing document was served on the following persons by the following means:

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