Laurence A. Urgenson (pro hac vice)
Barbara M. Harding (pro hac vice)
Tyler D. Mace (pro hac vice)
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Washington, DC 20005-5793
Telephone: (202) 879-5000
Telefax: (202) 879-5200
Email: lurgenson@kirkland.com
bharding@kirkland.com
tmace@kirkland.com

Stephen R. Brown
Charles E. McNeil
Kathleen L. DeSoto
GARLINGTON, LOHN & ROBINSON PLLP
199 West Pine • P.O. Box 7909
Missoula, MT 59807-7909
Telephone: (406) 523-2500
Telefax: (406) 523-2595
Email: srbrown@garlington.com
cemcneil@garlington.com
kldesoto@garlington.com

David M. Bernick, P.C. (pro hac vice)
KIRKLAND & ELLIS LLP
Citigroup Center
153 East 53rd Street
New York, NY 10022-4611
Telephone: (212) 446-4800
Telefax: (212) 446-4900
Email: dbernick@kirkland.com

Scott A. McMillin (pro hac vice)
KIRKLAND & ELLIS LLP
200 East Randolph Drive
Chicago, IL 60601-6636
Telephone: (312) 861-2000
Telefax: (312) 861-2200
Email: smcmillin@kirkland.com

Attorneys for W.R. Grace

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

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

INTRODUCTION

This Court previously held that the statute of limitations bars the Government from prosecuting Grace for alleged violations of the Clean Air Act's knowing endangerment provision based on Grace's conduct that allegedly placed another person in imminent danger before November 3, 1999. *United States v. W.R. Grace*, 429 F. Supp. 2d 1207, 1245 (D. Mont. 2006) [the "Continuing Offense Order"] ("Grace's motion to dismiss is granted as to all Defendants with regard to the criminal conduct charged in Counts II through IV which was complete as of November 3, 1999."). As the Court explained, "the crime defined in th[e knowing endangerment provision] is complete and may be prosecuted at the first instant that another person is placed in imminent danger, regardless of how long the endangerment lasts." *Id.* at 1244 (emphasis added).

The Government affirmatively showed in its opening statement that any "releases" Grace caused through the conduct charged in Counts II through IV placed another person imminent danger before November 3, 1999. This Court therefore should enter a judgment of acquittal as to those Counts because they are time barred.

ARGUMENT

I. THE COURT MAY DISMISS ALL OR PART OF THE SUPERSEDING INDICTMENT IF THE GOVERNMENT'S OPENING STATEMENT AFFIRMATIVELY SHOWS THAT THE GOVERNMENT'S PROSECUTION OF A CHARGE OR CHARGES CANNOT BE SUCCESSFUL.

The Court may dismiss all or part of the Superseding Indictment if the Government's opening statement affirmatively shows that it cannot successfully prosecute all or part of the Indictment. *See Rose v. United States*, 149 F.2d 755, 758 (9th Cir. 1945); *see also United States v. Ingraldi*, 793 F.2d 408, 413 (1st Cir. 1986) (holding that a motion for a judgment of acquittal "can be brought after the government's opening statement" if the government clearly admitted in its opening statement a fact "which must defeat the prosecution in the end"); 2A Charles Alan Wright, Federal Practice and Procedure § 462 ("judgment of acquittal may be ordered even before the government has closed its case if the basic facts lead inescapably to a conclusion that the prosecution must fail regardless of whatever evidence may be introduced.").

II. THE COURT SHOULD DISMISS COUNTS II THROUGH IV OF THE SUPERSEDING INDICTMENT BECAUSE THE GOVERNMENT'S OPENING STATEMENT AFFIRMATIVELY SHOWED THAT THOSE COUNTS ARE TIME BARRED.

The Court should dismiss Counts II through IV of the Superseding Indictment because the Government's opening statement affirmatively showed that those Counts are time barred. In its Order of March 3, 2006, this Court held that

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

Counts II through IV charge Grace (and Defendants Wolter and Bettacchi in Counts III and IV) with knowing endangerment based on four types of alleged action:

- providing and distributing asbestos-contaminated vermiculite material to the Libby community (Count II);
- causing Grace employees in Libby and their personal effects to be contaminated with asbestos (Count II);
- selling the Screening Plant to the Parker family (Count III); and

- leasing and selling the Export Plant to the Burnetts and the City of Libby, respectively (Count IV).

Superseding Indictment ¶ 186, 188, 190 (June 26, 2006). Because those four types of actions are specifically charged in the Superseding Indictment as the basis for Grace's alleged liability, the Government must prove that those actions constituted a "release" under the knowing-endangerment provision or that Grace "willfully caused" a "release" through those actions (in addition to the requisite *mens rea*). The Government also must prove that the first completed endangerment that allegedly flowed from those actions is not time barred.

To the extent that those four types of actions are themselves "releases," the Government's opening statement affirmatively showed that Grace cannot be convicted for those "releases" because they allegedly occurred long before November 3, 1999, and, if they were of sufficient duration and intensity, would have placed another person in imminent danger at that time. For example, the Government conceded in its opening statement that between 1977 and 1992 Grace allegedly allowed workers to bring asbestos dust home on their clothes and that between 1977 and 1993 Grace allegedly gave away vermiculite materials. The Government's stated duration of those activities is unsurprising: They are identical to the allegations of the Superseding Indictment and reflect Grace's shutdown and sale of the mine in the early 1990s. The Government further explained that Grace allegedly transferred the Export Plant to the City of Libby in 1994 and sold the

Screening Plant to the Parkers in 1993. The Government thus affirmatively showed in its opening statement that Counts II through IV would be time barred if they were based solely on these four types of actions.

Because releases based solely on Grace's conduct are time barred, the Government sought to save Counts II through IV by alleging that Grace "willfully caused" "releases" through those same four types of actions. The Defendants have referred to this theory of liability as the Government's "normal human activities" theory because the Government has argued that each instance of such activity allegedly resulted in a release that Grace "willfully caused." But despite the Government's reliance on an alternate theory of liability, the statute-of-limitations analysis dictated by this Court's Continuing Offense Order remains the same: Did the "first instant" of endangerment that Grace allegedly caused occur before or after November 3, 1999?

The Government's opening statement affirmatively showed that the first instant of endangerment that Grace allegedly caused occurred before November 3, 1999, meaning that Counts II through IV are time barred in their entirety. The Government conceded in its opening statement that the Parkers lived on and engaged in normal human activities on the Screening Plant property beginning in 1993, when they purchased the property from Grace. It said the same regarding the Burnetts and the City of Libby with respect to the Export Plant beginning in

1994. And the Government conceded that Libby residents allegedly released vermiculite material through their normal human activities during and immediately after Grace allegedly ceased the giveaways because it closed the mine and sold its properties.

The Government's opening statement states the obvious—"normal human activity" was ongoing in Libby immediately after Grace allegedly engaged in the charged four types of actions. And because that "normal human activity" was ongoing, Grace would have caused a release almost immediately through each of the charged four types of conduct and could have been prosecuted at that time. *See* Continuing Offense Order, 429 F. Supp. 2d at 1243 ("[T]he crime defined in th[e knowing endangerment provision] is complete and may be prosecuted at the first instant that another person is placed in imminent danger, regardless of how long the endangerment lasts.").

In short, once Grace's charged conduct stopped, the applicable limitations period started. That limitations period elapsed long ago, and by the Government's admission in its opening statement, the statute of limitations bars its prosecution of Grace for Counts II through IV of the Superseding Indictment. The Court therefore should enter a judgment of acquittal as to those Counts.

CONCLUSION

For the foregoing reasons, the Court should grant Grace's motion for a judgment of acquittal as to Counts II through IV.

DATED this 24th day of February, 2009.

By: /s/ Kathleen L. DeSoto
Stephen R. Brown
Charles E. McNeil
Kathleen L. DeSoto
GARLINGTON, LOHN& ROBINSON, PLLP
Attorneys for W.R. Grace

Laurence A. Urgenson
David M. Bernick
Walter R. Lancaster
Barbara M. Harding
Scott A. McMillin
Tyler D. Mace
KIRKLAND & ELLIS, LLP
Attorneys for W.R. Grace

On behalf of:

Attorneys for Harry A. Eschenbach:

David Krakoff
Gary Winters
James T. Parkinson
Lauren R. Randell
Mayer Brown
1909 K Street, NW
Washington, DC 20006-1101
Phone: (202) 263.3000
Fax: (202) 263.3300

Local Counsel for Harry A. Eschenbach:

Ronald F. Waterman
Gough, Shanahan, Johnson & Waterman
33 South Last Chance Gulch
Helena, MT 59601
Phone: (406) 442.8560
Fax: (406) 442.8783

Attorneys for Jack Wolter:

Carolyn Kubota
Jeremy Maltby
O'Melveny & Myers, LLP
400 South Hope Street
Los Angeles, CA 90071-2899
Phone: (213) 430.6613
Fax: (213) 430.6407

Local Counsel for Jack Wolter:

Christian Nygren
W. Adam Duerk
Milodragovich, Dale, Steinbrenner & Binney
620 High Park Way
Missoula, MT 59806-2237
Phone: (406)728.1455
Fax: (406) 549.7077

Attorney for William McCaig:

Elizabeth Van Doren Gray
Sowell, Gray, Stepp & Laffitte
P.O. Box 11449
Columbia, SC 29211
Phone: (803) 929.1400
Fax: (803) 929.0300

Local Counsel for William McCaig:

Palmer Hoovestal
Hoovestal Law Firm, PLLC
P.O. Box 747
Helena, MT 59624-0747
Phone: (406) 457.0970
Fax: (406) 457.0475

Attorney for William McCaig:

William A. Coates
Roe, Cassidy, Coates & Price, P.A.
1000 East North Street
Greenville, SC 29601
Phone: (864) 349.2600
Fax: (864) 349.0303

Attorneys for Robert Bettacchi:

Tom Frongillo
Patrick J .O'Toole
Vernon Broderick
David B. Hird
Weil, Gotshal & Manges
100 Federal Street, 34th Floor
Boston, MA 02110
Phone: 617.772.8335
Fax: 617.772.8333

Attorneys for O. Mario Favorito:

Stephen A. Jonas
Howard M. Shapiro
Jeannie S. Rhee
Wilmer Cutler Pickering Hale and Dorr
60 State Street
Boston, MA 02109
Phone: 617.526.6144
Fax: 617.526.5000

Attorneys for Robert Walsh:

Stephen R. Spivack
David E. Roth
Daniel P. Golden
Bradley Arant Boult Cummings

Local Counsel for Robert Bettacchi:

Brian Gallik
Goetz, Gallik & Baldwin, P.C.
P.O. Box 6580
Bozeman, MT 59771-6580
Phone: (406)587.0618
Fax: (406)587.5144

Local Counsel for O. Mario Favorito:

C.J. Johnson
Kalkstein Law Firm
P.O. Box 8568
Missoula, MT 59807
Phone: 406.721.9800
Fax: 406.721.9896

Local Counsel for Robert Walsh:

Catherine A. Laughner
Aimee M. Grmoljez
Browning Kaleczyc Berry & Hoven, P.C.
801 W. Main, Suite 2A, Bozeman, MT, 59715
Phone: 406. 585.0888
Fax: 406. 551.1059

1133 Connecticut Ave., NW
Washington, DC 20036
Phone: 202.393.7150
Fax: 202.374.1684