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NAME Diane P. LeBlanc	DATE October 27, 1995
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1995-387-782/03

NA FORM 13040 (10-86)

US DISTRICT COURT
-US DISTRICT COURT
MASSACHUSETTS
MASSACHUSETTS

UNITED STATES OF AMERICA

VS,

W. GRACE & COMPANY

X
X
X
X
X
X
X
X

CRIMINAL ACTION

NO. 87-27-T

CHANGE OF PLEA AND DISPOSITION

APPEARANCES:

Tobin N. Harvey, Esquire, Assistant United States Attorney, John W. McCormack Building, Post Office & Courthouse, Boston, MA 02109, on behalf of the Government.

Robert R. Popeo, Esquire, and Michael S. Gardener, Esquire, Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, One Financial Center, Boston, MA 02111, on behalf of the Defendant.

Courtroom No. 2
Post Office & Courthouse
Boston, Massachusetts 02109
May 31, 1988

Barbara Sakurai - Court Reporter
1221 Post Office & Courthouse
Boston, Massachusetts 02109

Method of Reporting: Stenotype/Notereading



1 UNITED STATES DISTRICT COURT

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6 UNITED STATES OF AMERICA

7 VS,

8 W. R. GRACE & COMPANY

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12 CHANGE OF PLEA AND DISPOSITION

14 APPEARANCES;

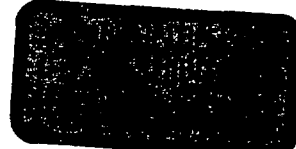
15 Tobin N. Harvey, Esquire, Assistant United
16 States Attorney, John W. McCormack Building,
Post Office & Courthouse, Boston, MA 02109,
on behalf of the Government.

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18 Esquire, Mintz, Levin, Cohn, Ferris, Glovsky &
19 Popeo, One Financial Center, Boston, MA 02111,
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1 THE CLERK: Criminal No. 87-27-T, United
2 States of America vs. W. R. Grace & Company.

3 THE COURT: Do we really need a side bar
4 conference?

5 MR. POPEO: It would be helpful, your Honor.
6 CONFERENCE AT THE BENCH AS FOLLOWS:

7 MR. POPEO: The defendant is going to submit an
8 Alford plea of guilty, with the hope that the Court will
9 accept the Alford plea.

10 THE COURT: The news I got was this was going
11 to be a guilty plea. We started off with a guilty plea,
12 What I am going to ask him is if he pleads guilty. Now,
13 he is going to say what?

14 MR. POPEO: If you ask him if he is going to
15 plead, he would say he is submitting an Alford. The
16 present agreement specifically called for an Alford plea
17 of guilty. The government agrees to stand moot on the
18 issue and not oppose it.

19 THE COURT: So precisely what question am I
20 going to ask him and what is he going to answer? Tell me
21 that. Then we will decide.

22 MR. POPEO: We have a specific specification,
23 which is 6-b to Count 1, which your Clerk has, your Honor,
24 and that is he did make -- the company did make -- a false
25 statement with respect to the reporting of acetone, which

1 is a chemical which was the subject here.

2 THE COURT: I want to ask him whether he
3 intentionally did it and just ask how he pleads. He has
4 to plead guilty. That is all.

5 MR. POPEO: I will actually put in, so there
6 will be no question about it, the factual basis so that
7 there will be a broader statement.

8 THE COURT: So long as there is a factual
9 basis and he says he is guilty.

10 MR. POPEO: There will be a factual basis in
11 the broadest form, including a reference to the Government's
12 pretrial memo. The Government's concern is under McNally,
13 if this got overturned -- the Bank of New England got
14 overturned -- that would be set aside. We are not seeking
15 that at all.

16 THE COURT: I am not going to set anything
17 aside.

18 MR. POPEO: No. No. No. I just want you
19 to know that we will give you a complete factual basis
20 under the rule; however, your Honor, we have made a plea
21 agreement wherein we will submit an Alford plea, which is
22 at the discretion of the Court, and the Government would
23 stand moot.

24 MR. HARVEY: I will take it from the top,
25 your Honor. Count 1 includes an allegation that the company

1 knowingly and willfully made and used a false document
2 known to contain a false statement. The defendant has
3 selected a specific component false statement. So they
4 will plead to Count 1 and specify that component.

5 THE COURT: I understand that. All right.

6 MR. HARVEY: My brother is going to suggest
7 that the Court take an Alford guilty plea to that. The
8 Government will take no position on that, except to advise
9 the Court the Government's perception of the requirement
10 for a basis in fact.

11 THE COURT: I read the thing (indicating). It
12 constitutes a crime. So I am satisfied with it. There is
13 a factual basis,

14 MR. HARVEY: To finish out the string here,
15 your Honor, if the Court exercises its discretion the
16 Government will dismiss Count 2, in that event, and the
17 defendant has agreed that the imposition by you of the
18 maximum penalty on Count 1 is the appropriate disposition.
19 My brother has waived the Presentence Report and filed
20 that with the Court, as well as filing a new attorney-in-
21 fact document.

22 THE COURT: All right.

23 MR. POPEO: One other thing is that the judg-
24 ment, therefore, would be as to Count 1, Specification 6-b.
25 That has debarment implications and other implications, and

1 that is why that is very specific as to Count 1, specifica-
2 tion 6-b.

3 MR. HARVEY: I have the indictment.

4 THE COURT: I have it.

5 All right. I will ask, "How do you plead to
6 6-b?"

7 MR. POPEO: Yes. "How do you plead to 6-b?"

8 THE COURT: All right.

9 END OF CONFERENCE AT THE BENCH

10 THE COURT: As I understand it, there is going
11 to be a plea to Count 1, Paragraph 6-b.

12 MR. POPEO: Correct, your Honor.

13 Just for the record, also, your Honor, there
14 is a power of attorney, which designates Mr. Kevin T.
15 O'Reilly as attorney-of-fact for the Grace Company to enter
16 the plea.

17 THE COURT: Is that right?

18 MR. O'REILLY: Yes, your Honor.

19 THE COURT: You are Mr. O'Reilly?

20 MR. O'REILLY: Yes, your Honor.

21 THE COURT: All right.

22 Mr. O'Reilly, I have before me a charge as
23 follows: "On or about February 5, 1982, at Woburn, Cambridge,
24 and Boston, in the District of Massachusetts, and elsewhere,
25 defendant W. R. Grace & Company did, in a matter within the

1 jurisdiction of the United States Environmental Protection
2 agency, knowingly and willfully make and use a false writing
3 and document, knowing the same to contain material false
4 statements and entries; in that defendant W. R. Grace &
5 Company did, on or about said date prepare," and this
6 is now Subparagraph b, which states, "Grace's February 5,
7 1982, letter indicates that only one 5-gallon pail of
8 acetone was purchased for the Woburn plant and that that
9 purchase occurred in 1978."

10 I am taking that as being the charge.

11 Do you understand that is the charge?

12 MR. O'REILLY: Yes, I do.

13 THE COURT: Do you understand that, on behalf
14 of the corporation, you have a right not to plead guilty
15 to this charge?

16 MR. O'REILLY: Yes, your Honor.

17 THE COURT: Now I have to be satisfied of two
18 things: First, that you understand the charge.

19 Do you understand it?

20 MR. O'REILLY: Yes, your Honor.

21 THE COURT: Do you understand that the penalty
22 that would be imposed in this case, the maximum fine that
23 is available to the Court, if you do plead guilty on behalf
24 of the corporation, is \$10,000?

25 Do you understand that?

7
1 MR. O'REILLY: Yes, your Honor.

2 THE COURT: I also want to make sure that as
3 you contemplate entering this plea that you are doing so
4 on behalf of the corporation voluntarily -- in other words,
5 that there is no one pressuring you, no one forcing you to
6 enter this plea. Is it a voluntary act on your part?

7 MR. O'REILLY: Yes, it is, your Honor.

8 THE COURT: Do you also understand that the
9 parties have agreed that the defendant has agreed through
10 your counsel, Mr. Popeo, that there will be no Presentence
11 Report in this case and that disposition will take place
12 immediately? Is that right?

13 MR. POPEO: Yes, your Honor.

14 MR. O'REILLY: Yes, your Honor.

15 THE COURT: And, having in mind that I have
16 read the charge to you, and I am satisfied that you do
17 understand the nature of the accusation and that you under-
18 stand the consequences of the guilty plea and that you
19 are contemplating this action on behalf of the Grace
20 Company voluntarily, I will now ask you how do you plead
21 to 6-b?

22 MR. O'REILLY: We submit an Alford plea of
23 guilty to Specification 6-b of Count 1.

24 THE COURT: All right. Do you have a basis
25 in fact you want to add to the record?

1 MR. HARVEY: Yes, your Honor.

2 Without belaboring the matter, I will
3 incorporate by reference the information contained in the
4 pretrial information memorandum, which was submitted to
5 the Court sometime ago, and which the Court is familiar
6 with.

7 In the course of the investigation that EPA
8 undertook, your Honor, following the closing --

9 THE COURT: You may sit down, if you like,
10 Mr. O'Reilly.

11 MR. HARVEY: -- following the closing of
12 the municipal drinking water wells in Woburn, and par-
13 ticularly in November, 1981, test wells were dug in the
14 aquifer under the aegis of EPA, the aquifer being the sort
15 of water to feed the closed drinking water wells, one of
16 the chemicals identified when the samples of the test
17 wells was analyzed was acetone. Acetone is a hazardous
18 waste regulated by the Resource Conservation and Recovery
19 Act, which is the same statute pursuant to which the EPA
20 January 5, 1982, letter inquiry to the company was
21 generated.

22 EPA's letter expressly asked if acetone had
23 ever been generated, used or otherwise kept in the plant
24 site by Grace or any of its divisions. The company's
25 February 5, 1982, letter to EPA stated the following, your

1 Honor: Under the heading "Acetone" the letter reads: "One
2 5-gallon pail was purchased in 1978, used for wiping parts
3 prior to gluing/laminating." The letter further provides,
4 "Approximately two gallons of acetone remains of the 5-gallon
5 pail purchased in 1978." Bearing in mind, again, the
6 letter was written in 1982.

7 If the matter proceeded to trial, the
8 Government's evidence would have proved, in summary, that
9 acetone was also used at the plant, at least throughout
10 the early 1960s and mid 1970s. It was purchased in
11 containers of varying volume and its use was not restricted
12 to wiping parts prior to gluing/laminating.

13 The Government would also indicate and the
14 proof would be that acetone was purchased after 1978.
15 Specifically, your Honor, the Government would prove those
16 matters in three different ways: There would be testimony
17 from at least five employees of the company, there would
18 be documentary evidence in the form of internal memoranda,
19 and similar documents generated in the plant; and the
20 Government has obtained by a grand jury subpoena certain
21 fragmentary purchase records of the plant, and those records
22 would indicate the acquisition of acetone.

23 Those records are also corroborated by busi-
24 ness records of the suppliers.

25 Very briefly, your Honor, examples of the
specific documents the Government would introduce: A May 20,

1 1974, memorandum to the General Foreman of the plant from
2 the then General Manager, which includes the subject,
3 "Safety." It attaches a list of flammables used in the
4 plant, and it indicates acetone in two different locations
5 in the plant, one a 5-gallon container and one a 1-pint
6 container. In addition, the Government would introduce
7 a July 29, 1980, memorandum from the General Foreman of
8 the plant to the Environmental Control Officer at Cryovac
9 Division Headquarters. The subject is, "Hazardous Wastes
10 EPA Regulations." The memorandum indicates that a list
11 of chemicals it contains is typical of, and I quote,
12 "our normal inventory level and yearly purchases." It
13 indicates a gallon container of acetone and designates its
14 hazardous waste number within the EPA statutes.

15 I mentioned, your Honor, we would introduce
16 purchase records. The only purchase records we were
17 able to obtain from the company are from the period
18 May, 1973, to June of 1976. Those records themselves indi-
19 cate 65 gallons purchased by the company in eight separate
20 orders and contained in 15 separate containers.

21 Finally, your Honor, with respect to the uses
22 of acetone at the plant, the Government's evidence specifi-
23 cally would be that in the 1960s acetone was used to clean
24 paint spray guns, and in the mid '70s used to wipe off
25 parts on a so-called "Ozone Project," and in approximately

1 '78 acetone was used to clean circuit boards before
2 gluing, and in approximately '80 it was used for cementing
3 plexiglass, and used in the later time period I am address-
4 ing in general throughout the plant for the cleaning of
5 plastic and fiberglass parts.

6 In summary, your Honor, that would be the
7 crux of the Government's evidence, again incorporating
8 the Government's pretrial memorandum.

9 THE COURT: I am satisfied, as I say, that
10 the defendant, through Mr. O'Reilly, understands the nature
11 of the accusation against the company, that the defendant
12 has pleaded guilty voluntarily, that the defendant has
13 done so understanding the likely penalty to be imposed and
14 that there is a basis in fact for the charge and for the
15 plea. The plea is accepted.

16 So we have the disposition now.

17 MR. POPEO: May I submit some evidence for
18 the record on the basis of the Alford plea?

19 THE COURT: By way of disposition?

20 MR. POPEO: Yes.

21 THE COURT: On the question of disposition?

22 MR. POPEO: Yes, your Honor.

23 THE COURT: I will hear you on disposition.
24 I take it the Government's recommendation is the \$10,000
25 fine?

1 MR. HARVEY: Maximum fine of \$10,000, your
2 Honor.

3 THE COURT: All right. You want to be heard?

4 MR. POPEO: Yes, your Honor,

5 First, your Honor, I would state for the
6 record we concede there is an adequate factual basis
7 for the acceptance of the plea; however, the reason the
8 Alford plea has been tendered is that the specific item in
9 question, acetone, was the subject of the inquiry on
10 January 15, 1982, by the Government, and it called for
11 22 years of records.

12 At the time the inquiry was made the employees
13 had a two-week period, which extended to February 5th,
14 within which to respond to the Government's inquiry, which
15 was not only on this basis, but a whole subject matter of
16 inquiry.

17 At the time also, your Honor there was no
18 regulation of the EPA which gave any guidance as to what
19 the nature of the response should be. Indeed, the only
20 regulation of the EPA relevant to the subject matter
21 permitted reliance on best memory, and the letter specifi-
22 cally stated that the employees were relying on their best
23 memory in furnishing this material.

24 When, in fact, at a later time when an extensive
25 investigation was in progress by the company, they learned

1 of the underreporting, they so informed the Government.

2 So, your Honor, the employees, none of whom
3 have been indicted, have all asserted that they were of
4 an innocent state of mind. The company can only act
5 through those employees. Nevertheless, your Honor, what is
6 clear is that the response was inaccurate, and that our
7 records, if searched with the type of diligence that took
8 place later, would have disclosed that innacuracy; however,
9 your Honor, no member of management was aware of the
10 inaccuracy. It is against company policy and contrary to
11 policy to file any report that would have contained such
12 an inaccurate statement.

13 As a result, your Honor, the company believes
14 that it had an innocent state of mind in the employees
15 who are the only persons through whom the company could
16 act. That is shown by the other events, as follows,
17 your Honor: Many of these employees were Woburn residents
18 and drank town water. They drank the water at the plant.
19 They grew vegetables in the very location where this sub-
20 stance was allegedly disposed of. They used it for recrea-
21 tional purposes. Indeed, no one suspected in the least
22 that they had committed any act that would have been
23 hazardous; and, indeed, this substance did not show up in
24 Wells G and H, which are the wells that are the matter of
25 the EPA inquiry.

1 As a result, your Honor, we strongly contend
2 that the company in submitting a guilty plea is, in fact,
3 innocent, and they do maintain their innocence. They
4 recognize that there is a factual basis for which a fact-
5 finder could find the contrary, and that is in the record,
6 and it was provided by the defendant itself; and, in that
7 sense, your Honor, and on the question of disposition, we
8 submit those facts.

9 THE COURT: All right.

10 MR. HARVEY: If I may just very briefly, your
11 Honor, state for the record that the extension granted by
12 EPA was to February 15, 1982. The company filed its answer
13 ten days before that, and the only other thing is that the
14 company never amended its response as to the chemical
15 acetone.

16 THE COURT: All right. I understand the pos-
17 ture. There is a basis in fact for the plea.

18 What I am going to do now is impose the maxi-
19 mum sentence of \$10,000.

20 MR. HARVEY: Thank you, your Honor.

21 MR. POPEO: Thank you, your Honor,

22 (Whereupon court was adjourned.)

23 CERTIFICATE

24 I, Barbara Sakurai, Official Court Reporter,
25 U. S. District Court, do hereby certify that the foregoing
is a true and accurate transcript taken down by me in the
aforementioned matter and transcribed under my direction.

Barbara Sakurai