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Date: April 23, 1992

To: Nevada Power Litigation Team (Bill, please forward)

From: P. Merrell

Re: Suggested motion for partial summary judgment

David called yesterday and sought my opinion on the advisability of a motion for summary judgment. As a tactical move, I believe a motion for partial summary judgment would be excellent, so long as it is confined to the issues of fraudulent concealment and liability for fraudulent misrepresentation and failure to warn, reserving the issues of damages and punitive damages for trial. I'd appreciate it if you would each play devil's advocate and share your thoughts.

As I read the Ninth Circuit's opinion, it has ruled that we have sufficient evidence to go to the jury on fraudulent misrepresentation and failure to warn. Whether it went that far on the fraudulent concealment or only ruled on the sufficiency of the complaint for that issue is less clear; however, the overlap of the misrepresentation ruling with fraudulent concealment issues has the effect of entitling us to go to the jury on that issue as well. I therefore see little risk in us filing a motion for partial summary judgment on those issues, certainly no greater risk than we will face at trial.

At the same time, the Ninth Circuit clearly has not said that the defendants are entitled to go to the jury on these issues. In fact, they have offered no evidence on these issues other than deposition testimony of Nevada Power officials.

From a procedural purists' point of view, the defendants might be entitled simply to argue that opposing inferences can be drawn from the facts already in the record. However, we are all agreed that they can not risk a fraud judgment, which would have disastrous repercussions for them. Therefore, I believe that they would have no choice but to bring forward their opposing theories and evidence.

Forcing them to identify their theories and evidence at this point gives us several advantages:

-- As a discovery device, such a motion would almost certainly be the best discovery response we will obtain in this litigation. They will be forced to bring forward whatever evidence they have of warnings, limited warranties, etc., and perhaps most importantly, their state of mind. I anticipate that they would have to establish their state of mind with affidavits of former high officials. Once they have done so, they can no longer effectively oppose us in taking those people's

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depositions. Furthermore, we learn what evidence we will have to meet at trial, without the normal tooth-pulling involved in discovery against multinational corporations.

-- By forcing them to prove that there is a jury issue, they undercut arguments for postponing trial; i.e., it's difficult to tell the judge in one breath that you have enough evidence to withstand summary judgment and in the next breath claim that you lack sufficient discovery for trial.

-- By taking the high ground, we flush out whatever summary judgment strategy they may still have up their sleeves at a time when their possible cross-motion for summary judgment will not delay the trial.

-- We take control of the litigation rather than waiting for them to throw the next punch, which would almost certainly be a blow aimed at delaying the trial.

-- We get an early opportunity to begin educating our judge to the new posture and realities of the case.

-- Defendants' outside counsel have almost without a doubt been instructed by now to provide the defendants' in-house counsel with copies of any dispositive motions and drafts of any proposed responses. By filing for summary judgment on the issue of fraud liability, we force a dialogue between outside and in-house counsel on the thinness of their evidence and their likelihood of success not only on summary judgment, but also at trial. This should spark consideration by in-house counsel of whether prolonging the litigation simply means giving outside counsel an opportunity to bill more hours. Thus, our motion would enhance the likelihood of prompt settlement. (Please be particularly critical of this forecast!)

-- Our motion would likely force the defendants to begin calling each other names, thus dividing the united front we have faced up to now. (We may wish to consider briefing the issue of conspiracy and its supporting evidence in the summary judgment motion and simultaneously moving to amend the complaint accordingly; this should force the defendants to point the finger at each other rather than risking summary judgment on the conspiracy issue.) (Note for any of you who have not researched conspiracy before. It is not a separate cause of action. It is a rule of evidence that allows us to attribute conduct of one defendant to the others, as well as a rule of liability establishing joint and several liability for separate acts taken in furtherance of the conspiracy's goals.)

- Our motion almost certainly would heighten tensions between outside counsel and their clients.
- If our summary judgment motion came hard on the heels of a settlement proposal, it would almost certainly result in in-house counsel wanting to cover their asses by taking both the proposal and their evaluation of the likelihood of success to company managers.
- If needed, we gain an opportunity to supplement the district court record with new evidence before the running of defendants' deadline for petitioning for certiorari. (However, query whether it could be considered by the Supreme Court; I believe it could but have not researched the precise issue.)
- We would all probably enjoy the reaction.

I'd appreciate whatever thoughts each of you may have on this subject. I am unavailable today, en route from Oregon to Knoxville. Beginning Friday, I will be available by telephone at (615) 525-7028 and by telefax at (615) 525-4679. There is three hours time difference from the West Coast.

Paul

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