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VIA FACSIMILE

TO: *Chuck McCrea*

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TO: Chuck McCrea
FROM: Paul Merrell
DATE: May 25, 1992
RE: Nevada Power v. Monsanto

Chuck:

Following pages are for the draft motion for summary judgment and supporting brief.

As you will note on the brief, the typist needs to insert the text from Exhibit A to our opposition to summary judgment in the district court. Each paragraph in that text needs a paragraph number and following it, an introductory phrase like we did in the appellate brief, e.g., "By 1938, Westinghouse knew" etc.

Because our evidence on General Electric's early knowledge was thin in the original motion, it would be helpful to add the Bates deposition from the Independent Life litigation labeled as new evidence that was not previously entered in the record, referring to his testimony that G.E. knew PCBs were injuring its own employees by the early 1950s. I suggest at the end of the statement of facts.

When the brief is served, you may wish to consider a somewhat apologetic covering letter, noting that we do want to negotiate a settlement, but the judge's trial date dictates that we have no choice but to proceed with pre-trial motion practice.

By the way, the trial in my Tennessee pulp mill case is set for August 3 as well.

Best wishes,

Paul Merrell

NEVADA POWER V. MONSANTO, et al DISTRICT COURT CAPTION AND LIST
OF COUNSEL, I.E., JONES, JONES, MCCREA & MCCREA, AND PAUL MERRELL

**MEMORANDUM IN SUPPORT OF
PLAINTIFF MOTION FOR PATIAL SUMMARY JUDGMENT**

The Court of Appeals held that Nevada Power's evidence establishes a jury question on the issue of the defendants' fraudulent concealment of plaintiffs' causes of action sounding in fraudulent misrepresentation and failure to warn. Important to this motion, defendants never brought forward any evidence that: (i) they did not fraudulently misrepresent their products and fail adequately to warn Nevada Power regarding the defective nature of their products; (ii) they did not fraudulently conceal those causes of action from Nevada Power. Thus, partial summary judgment is appropriate on the issue of defendants' liability. The controlling law is set forth in the Court of Appeals' opinion. Slip Op. at 4009, citing Lubbe v. Barba, 540 P.2d 115, 117 (Nev. 1975); and Oak Grove Investors v. Bell & Gossett Co., 668 P.2d 1075, 1080 (Nev. 1983) (respectively stating elements of fraudulent misrepresentation and failure to warn).

**I.
SUMMARY OF CASE**

Nevada Power Company filed suit to recover the costs of defective equipment manufactured by defendants Westinghouse and General Electric using PCBs (polychlorinated biphenyls) supplied by defendant Monsanto. Nevada Power also sought an award of punitive damages. This Court dismissed all claims for relief on statute of limitations grounds. On appeal, the Ninth U.S. Circuit Court of Appeals reinstated the claims for fraud and

failure to warn, ruling that Nevada Power was entitled to take to the jury its evidence that defendants had fraudulently concealed those causes of action.

II. MATERIAL FACTS NOT GENUINELY IN DISPUTE

The Ninth Circuit held that the following facts, addressed in Nevada Power's opening brief on appeal, created a jury question on the issues of liability remaining in this case. Those facts are supported by documentary evidence of record in this Court, referenced to the record in Appendix A to Plaintiff's "Opposition to Defendants' Joint Motion for Summary Judgment and Judgment on the Pleadings and Request for Oral Argument." Clerk's Record numbers 58-73, 77. Plaintiffs believe that the following facts establishing liability are not genuinely in dispute:

1. The genuineness of the below-referenced documents was not previously disputed, either in the trial court or on appeal, and is not now genuinely in dispute.

2. In 1938, doctors warned Monsanto and Westinghouse of the toxicity of PCBs. Exh. 9, pg. 21-45; Exh. 10, pp. 25-65.

3. Etc.

CHUCK -- NEED TO PICK UP REST OF THE CHRONOLOGY WITH REFERENCES FROM OUR OPPOSITION APPENDIX A (REPRINTED AT TAB 14 OF THE APPELLATE EXCERPTS OF RECORD, AND PUT THEM IN NUMBERED PARAGRAPHS.

III. CONCLUSION

There is no reason trial of this matter should be complicated by facts that are not genuinely in dispute. Therefore, Nevada Power asks the Court to enter partial summary judgment on the issue of liability for compensatory damages.

RESPECTFULLY SUBMITTED this _____ day of _____,
1992.

SIGNATURE BLOCK AND LIST OF PLAINTIFF COUNSEL

CERTIFICATE OF SERVICE

NEVADA POWER V. MONSANTO, et al DISTRICT COURT CAPTION

PLAINTIFF MOTION FOR PATIAL SUMMARY JUDGMENT

Plaintiff Nevada Power Company moves for partial summary judgment on the issue of defendants' liability for Nevada Power's remaining causes of action, reserving for trial the amount of compensatory damages and the issue of punitive damages. The relief requested is warranted under Fed. R. Civ. P. 56 because: (i) the controlling law has been established by the Court of Appeals; and (ii) there are no material facts genuinely in dispute.

Partial summary judgment is particularly appropriate in this case because it would narrow the issues for trial to punitive damages and the amount of compensatory damages.

This motion is supported by its concurrent memorandum and specified evidence of record.

SIGNATURE BLOCK and LIST OF COUNSEL