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FROM: W. Snyder

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Date: April 20, 1992

To: Jones, Jones, Close & Brown (Chuck McCrea, Chris Ballard, Doug Cohen, Randall Jones), Bill Snyder, David McCrea

From: P. Merrell

Re: Nevada Power Co. v. Westinghouse, et al
Notes from our telephone conference today

The conference began at 9:15 and for those of you filling out timesheets, lasted two hours and 15 minutes. By acclamation, Chuck McCrea was appointed moderator and I won the contest for recording secretary. I've attempted to collect my notes into discrete subjects, so this memo does not reflect the actual order of discussion.

Chuck began by opining that the purpose of the conference was to begin organizing for the trial on remand.

CERTIORARI:

Notwithstanding Chuck's opinion on the purpose of the conference, discussion turned almost immediately to other topics such as the prospects of the defendants petitioning the U.S. Supreme Court for certiorari and whether certiorari was available under the circumstances. Conference participants were split on whether certiorari was available at this time, but agreed that no one knew for sure; the question obviously will need to be re-searched if it becomes important. The issue apparently would turn on whether the Ninth Circuit's reversal of the trial court's dismissal transformed the appeal into an interlocutory appeal.

Bill asked whether there was any advantage for the defendants to settle the case prior to entry of the Ninth Circuit's mandate. There was agreement that settlement would not forestall entry and publishing of the opinion and that there probably was no advantage such as was suggested.

There was general agreement that the defendants might petition for certiorari and later dismiss the petition simply to obtain a delay. However, a question was raised whether a petition for certiorari would necessarily delay lower court proceedings. Chris was asked to research the topic. David suggested that Chris might contact John Pendergast to obtain his thoughts.

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and any research on the issue. Pendergast is the plaintiff's lawyer who won the Stroh Diecasting verdict against Monsanto in Wisconsin. He feels indebted to David and Bill for advice and documents he used in his case. His telephone number is (414) 271-7722.

Another question raised was how long the defendants have to petition for certiorari. Chris looked this up during the conference and reported late in the session that defendants have 90 days to file their petition. The period apparently runs from the entry of the Ninth Circuit's opinion, rather than from the entry of mandate. (Query, whether the latter point was researched?)

David suggested that if the defendants recommence litigation in the district court it might operate as a waiver of the right to petition for certiorari and that we could probably force them to file motions in the district court by filing discovery requests or noticing depositions. There was agreement that no one knew whether this was correct. However, we did agree that research on this topic could be held in abeyance since we intended to move vigorously in district court anyway.

POSTURE OF THE LITIGATION:

Although not a specific agenda item, most conference participants at one time or another expressed strong opinions that the defendants are now in a very difficult position and we are in a very strong position. They have no further recourse in the Ninth Circuit absent an unlikely event in the next few days, such as a new Supreme Court opinion conflicting with the Ninth Circuit's opinion. Odds of a petition for certiorari being accepted are highly unlikely.

Defendants can not afford to have a fraud verdict entered against them on remand, a verdict that would result in collateral estoppel decisions in defendants' litigation against their insurance companies and in a host of pending personal injury cases. Furthermore, with the Third Circuit's decision in the Paoli Railroad Yard litigation -- that workers who have blood levels of PCBs no higher than the general populations may still go to the jury on personal injury claims -- defendants are at extreme risk from a fraud verdict in light of the new study implicating PCBs as a causative agent in human breast cancer.

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Another case illustrating the dangers to the defendants is Gulden v. Crown Zellerbach, 890 F.2d 195 (9th Cir. 1989), which found a fraud and battery exception to a worker compensation statute for PCB-exposed workers. The general sentiment of the participants was perhaps best characterized by Randall, who remarked that defendants must "have a chill going down their spines." Cruder statements to the same effect were offered by other participants whose voices I could not identify.

DEFENDANTS' RULE 11 LETTER:

David suggested a response to the defendants' letter earlier in the proceedings threatening a Rule 11 motion. He pointed out that this is the fourth such letter he has received in PCB litigation against these companies and that such letters are being used offensively by more and more corporate defendants as an intimidation tactic. David suggested a Rule 11 motion in response.

Paul offered that while there is authority for imposing Rule 11 sanctions for groundless Rule 11 motions, the rule literally applies only to court filings. He and Randall also agreed that

Note from Paul to David: Upon reflection following the meeting, I am not so certain that a Rule 11 letter could not provide a basis for a cross-motion for Rule 11 sanctions, although I still do not think the time is ripe. As I recall, the Advisory Committee Notes on Rule 11 require a party to advise the opposing party and the court as soon as they become aware of grounds for such a motion. Obviously, merely notifying opposing counsel is insufficient, so there would be grounds for asking a court to treat the letter as a motion. The argument could be buttressed by the fact that a letter threatening legal process without sufficient grounds fits within the abuse of process tort, which Rule 11 codifies in substantial part. The fact that a Rule 11 letter is sent improperly only to opposing counsel and is not filed concurrently as a motion with the court is strong evidence that the purpose of the letter is intimidation for a collateral purpose.

In the future, I suggest responding immediately to such letters with a reply brief and cross-motion for sanctions, asking the court to treat the letter as a motion. (This assumes, however, that you have good grounds for whatever the defense is complaining

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the Ninth Circuit's ruling that both sides would stand their own costs on appeal was a signal that both sides had good grounds for their appellate arguments; thus, a Rule 11 motion would be unlikely to succeed. Paul suggested that we should reserve our Rule 11 motions for situations where we have a good chance of winning them and suggested exhibiting all the previous Rule 11 letters to such a motion if we had a clear opportunity later in the litigation.

Randall's adopted suggestion was to work the subject of the defendants' Rule 11 letter into our settlement proposal discussed below. He felt the matter could be handled subtly in a way that might heighten tensions between the defendants and their attorneys. The participants also agreed that the settlement proposal should also threaten the defendants with a Rule 11 motion if they abandon their statute of limitations defense, on grounds that they forced an appeal on an affirmative defense they never intended to use at trial.

SETTLEMENT PROPOSAL:

Participants speaking were unanimous on coupling the settlement proposal with strong pressure in the form of accompanying discovery requests, deposition notices, and a proposed scheduling order seeking an early trial date. (See also discussion of "discovery strategy" below.)

David suggested that we should be asking ourselves what defendants expect from us at this point and whether it's to our advantage to do something else.

Randall agreed to take the lead on a draft settlement proposal and scheduling order during the coming week or so, while David was unopposed in his bid for lead responsibility in drafting interrogatories and requests for admission and production.

Paul conveyed his partner Ralph Bradley's suggestion that we should avoid locking General Electric into the same drum with the other defendants because of their message prior to the Ninth Circuit briefing that they wish to settle should Nevada Power pre-

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vail on appeal. Ralph suggested instead that the G.E. lawyer who carried the message be approached informally to discuss prospects of settling G.E.'s liability separately. Randall enthusiastically supported the idea, pointing to his prior success in obtaining good settlements by dividing and conquering when one defendant was willing to settle. There was agreement, however, that a written settlement proposal should still go to all three defendants, with the informal approach to G.E. being made shortly thereafter through G.E.'s local counsel.

There was no opposition to Randall's suggestion that the other defendants not be contacted through local counsel. Instead, efforts will be focused on getting the settlement package to the defendants themselves, through their major law firm counsel.

Randall obtained general agreement on a degree of subtlety in the proposal, with a goal of driving a wedge between defendants and their outside counsel. To that end, the proposal will remind outside defense counsel of their obligation to forward the package to their clients. Randall suggested that the strength of the letter may affect our opinion on damages, and obtained consensus on leaving the amount demanded blank until the remaining participants review the draft.

An formal offer of judgment for compensatory damages plus a nominal amount for punitive damages was suggested; however, Paul was concerned that defendants might accept the offer when we were likely to obtain more through negotiation or judgment. Discussion moved on without resolution.

There was agreement that the proposal should threaten a Rule 11 motion should defendants abandon the statute of limitations defense, as discussed under the Rule 11 topic above. Paul offered that if defendants do not believe our ability to force the statute of limitations issue to be litigated, we could mention Nevada punitive damage caselaw allowing us to submit our attorney fees to the jury. By introducing testimony on the reasonableness of our hours, i.e., what we were working on, we could force litigation of the statute of limitations issue.

Bill reminded that we need to get approval from Nevada Power of the settlement amount offered. David's adopted suggestion was to have Nevada Power's CEO indicate his approval of the offer in writing, to be transmitted with the proposal. That resolves any

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doubts in the defendants' minds that the offer is firm and approved.

The issue of the amount to propose in settlement of the punitive damage claim drew a piecemeal response. Bill suggested that we should make it clear that we are aware of their settlements in the Independent Life and One Market Plaza cases, perhaps hinting that we have learned the amounts. David suggested that we point to the inevitability of the defendants having to call each other names at trial as part of the difficulty of their position. He pointed out that they had done so in the One Market Plaza case prior to settlement, noting that he has illustrative court documents from that case. David said there are some other prior settlements where the amounts can be discussed, others where the amounts have gag orders.

I missed who said it, but someone (Chris?) said that punitive damages in Nevada are resolved on a clear and convincing standard, which might affect evaluations of the worth of the punitive damage claim. I recalled that the same was true of the fraud claim in Nevada, but pointed out that the standard of proof was not a real problem in this case because of the strength of our evidence. There was no dissent. (The failure to warn claim uses a preponderance of the evidence standard. Ironically, I thought we were likely to lose on that claim in the Ninth Circuit, but made the argument so we might have a lower standard of proof to work with on compensatory damages. So much for my predictions!)

David suggested that we assemble some research on prior punitive damage awards in Nevada to use for negotiating purposes. I didn't get it in my notes, but recall vaguely that Chuck agreed to take on that task.

Regarding the potential for raising the settlement by the attorneys agreeing not to sue these defendants in further PCB utility litigation, ethical limitations were discussed and apparently foreclose such an agreement.

DISCOVERY STRATEGY:

All participants agreed on a vigorous discovery effort. David will head the preparation of interrogatories and requests

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for production and admissions. David and Paul agreed to conduct depositions, but apparently there was no decision on who will prepare subpoenas and notices of deposition.

Randall pointed out that we have a limit of 40 each on interrogatories and admissions in Nevada federal court. His suggestion that we move for permission to serve more was adopted.

As a general tactic, we will first ask defendants to admit that documents are genuine; if they will not so admit, then we will schedule document depositions. This strategy requires that requests for admissions of authenticity should be served early on. Paul will fax David the approved form for admissions from the Federal Rules.

Bill will have responsibility for obtaining further documents from John Pendergast.

Suggested discovery topics include:

- Documents from the One Market Plaza and Independent Life cases.
- Industrial Bio-Test Labs documents in possession of City of Bloomington that were the subject of a City response to interrogatories filed by Monsanto in prior litigation. These can be subpoenaed from the City or requested from Monsanto.
- Records relating to Clarence Thomas' role at Monsanto (useful to induce settlement and/or head off appeal from final judgment). These relate to fraudulent Industrial Bio-Test reports submitted to EPA while Clarence Thomas had supervisory authority at Monsanto.
- Defendants' knowledge of mothers' milk contamination, which should be a good jury issue for punitive damages.
- Classified system of records at Westinghouse.
- Focus on naphthalenes. New Wisconsin documents show defendant knowledge by 1970 that PCBs were contaminated with chlorinated naphthalenes. Researchers in 1920s or so believed that the connection of naphthalenes with chloracne was so clear-cut that chloracne should be

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renamed perna disease, a contraction from perchlorinated naphthalenes. Also, an original 1934 British patent for PCBs involved chlorinating dibenzofurans to produce PCBs and naphthalenes.

- Depose G.E. lawyers who put pressure on Indiana Board of Health to alter the findings of their worker health study. (Randall pointed out the advantage of this discovery item to settlement with G.E. There was a query, however, whether G.E. would provide the evidence to be used against the other defendants as part of settlement.)
- Depose the G.E. official who met with plaintiffs in settling the Independent Life case.
- Depose C.E.O.'s of the defendants, probably later in the litigation. Paul recently won such an order in his pulp mill case and has a strong magistrate's opinion and legal research. We are required to show that the executives have personal knowledge of issues in the case, so we should be on the lookout for evidence of such knowledge.

TRIAL ORDER OF PROOF:

There seemed to be unanimous support for the chronological timeline order of proof suggested in Paul's last memo. David agreed to begin organizing material in this way.

OTHER POTENTIAL CLIENTS:

Consensus seems to be that we should continue sending them information, but not aggressively pursue retainer agreements while we're moving hot and heavy in the Nevada Power litigation. Estimates ranged from Randall's two months to Bill's 3-4 weeks before we are in a position to close these agreements.

Bill gave a summary of the estimated potential claims of the 10-15 potential clients we are in touch with: Southern Cal. Edison, \$100 million; B.C. Hydro and Ontario Hydro, \$30-\$50 million each; perhaps \$50-\$80 million for most of rest. Bill estimates that we could eventually represent \$300 million in

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compensatory damages, and leave the rest to others. His thinking is that higher amounts would force confrontation rather than settlement.

TOM KOTOSKE:

Chuck reported that Tom Kotoske has apparently contacted the Ninth Circuit and added his name to the court records as an attorney of record on the appeal. We are agreed and adamant that Kotoske's name should be kept off the published opinion. Whatever we send to the court should attach Kotoske's April 9, (year???) letter where he mentions being fired by David and David's April 10, 1992 letter to Kotoske (discussing shredding of documents), demonstrating that Kotoske does not represent Nevada Power ethically or in fact. David will prepare a letter to Kotoske and circulate it immediately for approval.

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