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Date: April 17, 1992

To: Nevada Power litigation team

From: P. Merrell

Re: Filing and Order of Proof in PCB utility cases

David:

It struck me today that we need to be thinking ahead in the Nevada Power case to our trial order of proof and also be maintaining a separate filing system for the hotter documents. I have a suggestion for both.

Experience tells us that the chronology of guilty knowledge David prepared for the Nevada Power litigation was very effective with the Ninth Circuit. It seems to me that a chronological order of proof might be equally as effective with a jury. I'd therefore suggest that we take the existing summary of evidence, page number the supporting documents sequentially, and add any new documents at the end as we receive them and simply add new page numbers. At the same time, dictate a new summary to be added to the chronology for each new hot document, e.g., "By 1912, Westinghouse knew that..." The summary statements would be inserted in chronological order, but cross-referenced to the filing system page number. A comparable system has worked well for us in the Champion litigation.

When it comes time to produce our exhibit list, this way we've got our exhibits in order of presentation and ready for the exhibit stickers.

From a trial presentation standpoint, presenting the information chronologically has several advantages: (i) the information is presented in an orderly fashion that supports the "who knew what when" issue that is central to the case; (ii) the jury learns the "science" in the sequence that <u>defendants</u> learned it; (iii) the jury is not asked to swallow the enormity of PCBs' hazards in one gulp; (iv) by the time the jury does learn the extent of the defendants' knowledge, the dates are going to be blurred by the sum of the defendants' knowledge; and (v) it will be impossible for the defendants to have their experts claim credibly in rebuttal that PCBs are harmless, i.e., the jury already knows what the <u>defendants</u> believe and won't be listening to the defense experts on whether the products were actually defective. This order of proof transforms the case from a battle of the experts on the existence of a defect to a battle over <u>when</u> the defendants acquired <u>their</u> knowledge of the defect.

To illustrate the issues for the jury, we could begin to prepare a demonstrative chart. It would be a simple timeline. On list what they were simultaneously telling the utility industry and the world. This would graphically illustrate not only isolated instances of fraud but, more importantly, the continuity in the pattern of fraudulent misrepresentations warranting punitive damages. (It's important that we not allow them to claim that our evidence consists only of isolated incidences that could be attributed to lack of communication within the companies.)

This method helps us prepare for trial because we must be able to contrast the defendants' actual knowledge with their misrepresentations. (At this point, I've seen a lot of evidence of their knowledge, but not of their representations.) For example, we know that each time we place their actual knowledge on the left side of the timeline, we need to come up with contrasting evidence from the same time period to show what they were telling the world. I.e., preparing the timeline will tell us where we need to focus our remaining discovery and research.

I bring this up at this point because I believe it's very important that we begin blocking out our trial script so that we know very quickly what holes we need to fill in discovery. As part of that effort, I'd also like to see us list the Nevada elements of fraud, failure to warn, and punitive damages in a computer file and begin to summarize and reference under each element what proof we have in hand to satisfy the element. That way, as we add an element to the chronology, we can see what's left to flesh out in our prima facie case.

If this trial strategy is adopted, I'd also recommend that we begin educating a "state of the art" expert, i.e., someone who could testify to the general state of knowledge of the scientific and regulatory communities at relevant times, which would compound the effect of the defendants' fraud. I know of only one person who's done this kind of testimony on toxics and that's Sam Epstein. He's spendy and temperamental, but very good, highly qualified, and has a blood lust for Monsanto. Also, he's been closely involved with dioxin issues since the mid-1960s, so is already knowledgable on a closely-related chemical. Anyone else got any nominees?

-- Paul