

MEMORANDUM

TO: J. Randall Jones
FROM: C. H. McCrea
RE: Paul Merrell Memo of May 20 re Aldabe
DATE: May 20, 1992

I certainly agree with Paul that we should eschew any mention of conspiracy, much less amend our complaint to allege it as a cause of action. However, as long as we don't amend, I don't see Aldabe as a threat. It seems to me that the defendants, in order to have used Aldabe successfully in their 9th Circuit argument (and to use it successfully in a petition for writ of certiorari), would have had to assert that [1] they had conspired among themselves to defraud Nevada Power, [2] Nevada Power was injured by their **conspiratorial** fraud more than four years before it filed its complaint, and [3] therefore, Nevada Power cannot recover on its **non-conspiratorial** fraud claim. This would create the anomalous situation in which the defendants, by alleging their own tortious misconduct - conspiracy (with which they were not charged) - as an affirmative defense, could defeat, by alleging a second affirmative defense (statute of limitations), a claim for relief - fraud - with which they were charged. In other words, by asserting that they had made a conspiratorial effort to injure plaintiff jointly, they claim they should escape liability for their non-conspiratorial success in injuring the plaintiff **severally**. I find it difficult to believe that a court would embrace this logic.

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Insofar as a petition for certiorari is concerned, I question whether defendants can allege new facts (i.e., their own tortious misconduct - conspiracy) to obtain a review of the 9th Circuit decision.

This does not mean, of course, that a desperate defendant would not embrace this logic, whatever its chance of success. After all, these defendants embraced an even more spurious logic which the 9th Circuit did pick up on. This is the logic that PCBs are not dangerous, but Nevada Power since at least 1976 has known that they are dangerous.

It obviously would be foolish of us to amend our complaint to allege conspiracy; it would give the defendants an opening they can't make for themselves. Therefore, the less said about conspiracy, the better.

chm\nevpower\merrell.mmo

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CLIENT/MATTER: Nevada Power / Nevada

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NUMBER OF PAGES (including cover page): 34

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