MEMORANDUM

TO: J. Randall Jones, Gary T. Foremaster

FROM: Charles H. McCrea, Sr.

RE: Nevada Power v. Monsanto Company et al; Defendants' Petition For Rehearing With Suggestion For Rehearing En Banc.

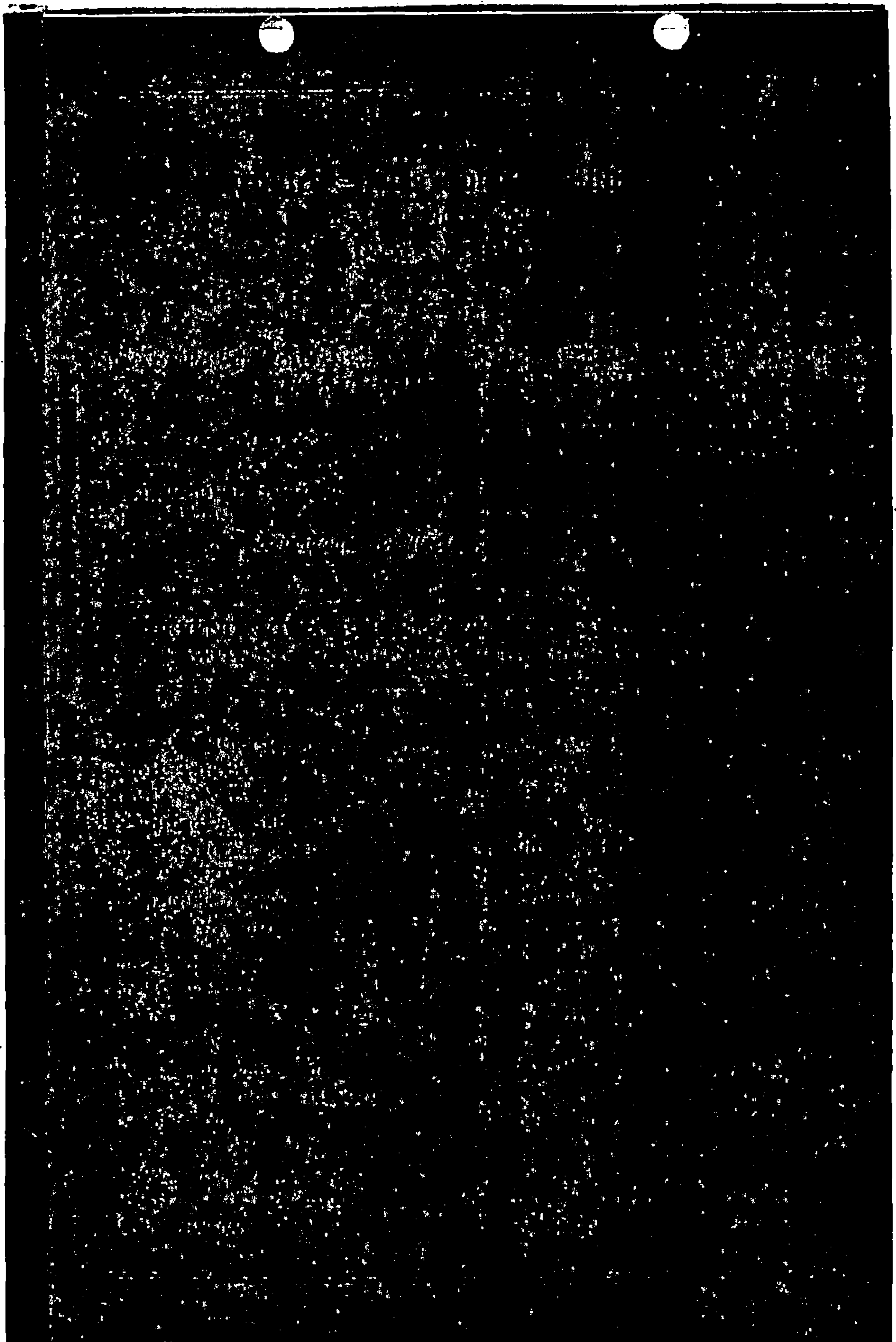
DATE: February 24, 1992

Attached is a copy of the subject Petition and Suggestion..

With respect to the Petition, Rule [F.R.A.P.] 40(a) provides in pertinent part, "Oral argument in support of the petition will not be permitted. No answer to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request."

Rule 35(b), which addresses the Suggestion For Rehearing En Banc, is even more high handed than Rule 41. Whereas Rule 41 specifies that "no answer to a petition for rehearing will be <u>received</u>," simply informing counsel that they will be wasting their time if they file an answer, Rule 35(b) admonishes counsel that "No response shall be <u>filed</u> unless the court shall so order," presumably subjecting counsel to reprimand or sanction for even attempting to make the suggestion.

What conclusion to draw from all of this? The court prefers supplicants (who obsequiously grovel for relief) to those (or their counsel) who have the temerity to make "suggestions" to persons of exalted rank unaccustomed to such effrontery.



STATEMENT OF THE CASE

Plaintiff Nevada Power seeks recovery of costs for replacement of electrical equipment containing PCBs, which it purchased between 1950 and 1970. Plaintiff began incurring these replacement costs in 1979, after it became convinced by EPA regulations that PCBs were "hazardous," and after EPA banned future production of PCBs. In 1989, ten years later, Nevada Power sued, claiming that defendants had intentionally misrepresented that PCBs were "safe" and/or failed to provide adequate warnings about alleged PCB dangers. Nevada Power also claimed in warranty, negligence, and strict liability, and for indemnity. The District Court granted defendants' motion for summary judgment on all claims.

Nevada Power appealed dismissal of its claims for fraud, failure to warn, and indemnity, but conceded that all other claims are time-barred. This Court unanimously affirmed dismissal of the indemnity claim, but by a 2-1 vote reversed the ruling on the fraud and warnings claims. The Majority Opinion acknowledges Nevada Power's admission that it believed PCBs were not safe, as defendants allegedly represented, more than ten years before filing suit. Nevertheless, despite plaintiff's admitted knowledge, the passage of time, and plaintiff's admission that all other claims for the same injury are time-barred, the Majority holds that summary judgment on the fraud and failure to warn claims is improper at this time because Nevada Power presented evidence that it may not have discovered defendants' alleged deceptive intent until 1988. The Majority remands for further proceedings. Judge Skopil, in dissent, votes to affirm the dismissal of the fraud and warnings claims, holding that discovery of defendants' alleged deceptive intent is not necessary to trigger the fraud limitations period because the statute started to run in 1979 when plaintiff admittedly believed PCBs were hazardous.

STATEMENT OF PURPOSE

Pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure and the Circuit Rules of the Ninth Circuit, defendants submit this Petition for Rehearing and Suggestion for *En Banc*

Rehearing. The Petition seeks rehearing of the Majority's ruling reversing dismissal of plaintiff's fraud and warnings claims. The Petition is filed pursuant to Rule 40 because the Majority has "overlooked or misapprehended" several "points of law or fact": (i) by applying the wrong Nevada statute of limitations to the warnings claim (Section I); (ii) by failing to follow clear Nevada statute of limitations law on the fraud claim (Section II); (iii) by applying a statute of limitations rule of decision that clearly conflicts with prior decisions of this Court (Section III); and (iv) by misstating and misconstruing, without any supporting citation, defendants' positions and arguments (Section IV).

En banc rehearing is appropriate because the Majority Opinion directly conflicts with opinions of this Circuit (Section III) and of at least two other courts of appeals (Senior IV). The Majority Opinion also "substantially affects a rule of national application in which there is an overriding need for national uniformity" because it exposes defendants in the Ninth Circuit to stale claims, eliminates the concept of repose, and encourages plaintiffs to bring unwarranted fraud claims in this Circuit.

ARGUMENT

I. REHEARING SHOULD BE GRANTED BECAUSE THE MAJORITY APPLIES THE WRONG NEVADA STATUTE OF LIMITATIONS TO PLAINTIFF'S FAILURE TO WARN CLAIM.

The Majority applies the statute of limitations for fraud claims, Nev. Rev. Stat. § 11.190(3)(d), both to Nevada Power's failure to warn claim and to its fraud claim, stating that the parties agreed that this provision applies to both claims. (Op. at 1179, 1181)[1] The Majority plainly errs on both counts. Section 11.190(3)(d) expressly applies only to claims for fraud and mistake, while Nev.

1 Citations to the Opinion filed February 5, 1992, are denoted "Op. ____." Citations to the Brief of Defendants-Appellees are denoted "Defs. Br. ____"; to the Brief of Plaintiff and Reply Brief of Plaintiff as "Pl. Br. ____" and "Pl. Reply Br. ____," respectively. Citations to the transcript of the argument on appeal are denoted "Argument ____." Defendants attach an Addendum to this Petition setting forth the relevant statutes of limitation. Citations to the Addendum are denoted as "Add."

Rev. Stat. § 11.220 applies to failure to warn claims. *See* Add. Moreover, all parties agree that § 11.220 applies to plaintiff's warnings claim. (Defs. Br. at 14; Pl. Reply Br. at 2).

By applying the wrong limitations provision, the Majority fails to follow the 1990 Nevada Supreme Court opinion in *Tahoe Village Homeowners Ass'n v. Douglas County*, 106 Nev. 113, 799 P.2d 556 (1990), which construes § 11.220 and makes clear that the pertinent discovery rule does not toll the limitations period until plaintiff discovers defendants' alleged wrongful knowledge.[2] In *Tahoe Village*, plaintiff claimed that defendant county wrongfully issued construction permits for real property it knew had construction defects. The claim required that plaintiff plead and prove defendant's knowledge of the defects at the time of the permitting. In considering whether the claim was time-barred, the Nevada Supreme Court held that the limitations period of § 11.220 begins to run when plaintiff discovered the defect and its injury.[3] *Id.* at 558. The Nevada court remanded for a factual determination regarding when the plaintiff learned of its injury. The *Tahoe Village* court did not discuss when, if ever, plaintiff discovered evidence concerning defendants' state of mind. Indeed, *Tahoe Village* clearly does not require plaintiff to discover defendants' alleged wrongful knowledge or intent to activate § 11.220. The limitations period begins when plaintiff discovers a defect and an injury.

The Majority does not discuss, or even cite, *Tahoe Village*, which applies directly to Nevada Power's failure to warn claim. As the Majority points out, Nevada Power knew of the alleged warnings defects (PCBs were not "safe" as allegedly represented), and knew of its injury no later than 1979. (Op. at 1179, 1181-82) Under the *Tahoe Village* standard, Nevada Power discovered its

2 None of the briefs on appeal discusses or cites *Tahoe Village*. Defendants cited (but could not discuss) *Tahoe Village* in their supplemental listing of authorities, and referred to it in oral argument. (Argument at 8)

3 As the court stated, "[t]he four year limitations period begins to run at the time the plaintiff learns, or in the exercise of reasonable diligence should have learned, of harm to the property caused by the construction defect." *Id.* at 558.

failure to warn claim by 1979, and the four-year limitations period of § 11.220 expired six years before Nevada Power filed the claim. Thus, by failing to apply § 11.220 and *Tahoe Village*, the Majority errs in reversing the district court ruling that Nevada Power's warnings claim is barred by § 11.220.[4]

II. REHEARING SHOULD BE GRANTED BECAUSE THE MAJORITY MISCONSTRUES THE NEVADA FRAUD LIMITATIONS STATUTE AND APPLICABLE CASE LAW.

The Majority's ruling that § 11.190(3)(d) is tolled until Nevada Power discovered defendants' alleged fraudulent intent is not the law in Nevada. No Nevada case has ever held that a plaintiff must discover evidence of defendant's alleged deceptive intent to trigger the fraud limitations provision.

A. Nevada Law Triggers § 11.190(3)(d) On Discovery Of Facts Contrary To The Alleged Representations That Are The Basis Of Plaintiff's Fraud Claim.

As Judge Skopil states in dissent, Nevada law triggers § 11.190(3)(d) on plaintiff's knowledge of its injury and of facts contrary to a defendant's representations. (Op. at 1188) Every fraud limitations case the Majority and Judge Skopil cite applies this standard.[5] Judge Skopil's dissent provides an excellent anal-

4 Moreover, the district court ruling produces a consistent statute of limitations result for negligence, strict liability, and warning claims. At argument, plaintiff admitted that its negligence and strict liability claims are time-barred and should not have been brought. (Argument at 22; Pl. Br. at 5-6) A failure to warn claim is a hybrid claim—it joins a strict liability claim with an element of negligence. Prosser, *Law of Torts*, § 99 at 697 (5th ed. 1984); *see also Jeffers v. Bob Kaufman Machinery*, 101 Nev. 684, 685, 707 P.2d 1153, 1154 (Nev. 1985) (failure to warn liability arose in negligence and/or strict liability). By applying the wrong limitations provision, the Majority fails to time-bar a warning claim when even plaintiff admits its negligence and strict liability claims are time-barred.

5 E.g., *Sierra Diesel Injection Serv. v. Burroughs Corp., Inc.*, 648 F. Supp. 1148 (D. Nev. 1986), *reconsideration denied*, 651 F. Supp. 1371 (D. Nev. 1987); *Oak Grove Investors v. Bell & Gossett Co.*, 99 Nev. 616, 668 P.2d 1075 (Nev. 1983); *Millspaugh v. Millspaugh*, 96 Nev. 446, 611 P.2d 201 (Nev. 1980); *Sierra Pacific Power Co. v. Nye*, 80 Nev. 88, 389 P.2d 387 (Nev. 1964); *Howard v. Howard*, 69 Nev. 12, 239 P.2d 584 (Nev. 1952).

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ysis of the seminal Nevada case of *Howard v. Howard*, 69 Nev. 12, 239 P.2d 584 (Nev. 1952), demonstrating that there is no Nevada requirement for a plaintiff to discover a defendant's deceptive intent to trigger § 11.190(3)(d). (Op. at 1188-89)

The Nevada Supreme Court has reaffirmed *Howard*. *Millspaugh v. Millspaugh*, 96 Nev. 446, 611 P.2d 201 (Nev. 1980). *Millspaugh* involved claims of fraud arising out of defendant's alleged misrepresentation concerning a deed for certain real property. Plaintiff executed a deed tendered by defendant, believing it conveyed the property on her death, when in fact the deed conveyed an immediate interest. Applying *Howard*, the *Millspaugh* court held that § 11.190(3)(d) begins to run when plaintiff discovered that the deed did not operate as represented. The *Millspaugh* court did not toll § 11.190(3)(d) until plaintiff discovered defendant's deceptive intent or knowledge.[6] As discussed above, *Tahoe Village Homeowners Ass'n v. Douglas County, supra*, further reaffirms the principles stated in *Howard*.

Because plaintiff's discovery of deceptive intent is irrelevant to the triggering of § 11.190(3)(d), the Majority errs by reversing on grounds that there is a fact issue regarding whether Nevada Power discovered defendants' alleged deceptive knowledge within the limitations period. In short, the Majority errs by finding a fact dispute on an issue that is irrelevant, as a matter of law, to § 11.190(3)(d).

6 Nevada and California have identically worded statutes of limitation for fraud. *Compare* Cal. Civ. Proc. Code § 338(d) (Deering 1992) *and* Nev. Rev. Stat. § 11.190(3)(d) (1986). Nevada follows California case law construing the fraud statute. *Howard*, 239 P.2d at 588. As in Nevada, California triggers the fraud limitations period on discovery of facts contrary to a defendant's representation. California does not toll the statute until plaintiff discovers defendant's alleged deceptive intent. *Miller v. Bechtel Corp.*, 33 Cal. 3d 868, 875, 191 Cal. Rptr. 619, 623, 663 P.2d 177, 181 (1983) (affirming lower court ruling that statute begins to run when plaintiff could have discovered that value of property not as represented; no requirement that plaintiff have discovered deceptive intent).

In this regard, the Majority's reliance (Op. at 1183) on *Sierra Diesel Injection Serv. v. Burroughs Corp., Inc.*, 648 F. Supp. 1148 (D. Nev. 1986), *reconsideration denied*, 651 F. Supp. 1371 (D. Nev. 1987), is misplaced. *Sierra Diesel* does not toll § 11.190(3)(d) until deceptive intent is discovered; rather, that decision correctly applies Nevada law and follows the cases Judge Skopil discusses.

The *Sierra Diesel* lawsuit arose out of the purchase of defendant Burroughs' B-80 computer system in 1977. The system had trouble processing plaintiff's financial and accounting data as promised. Defendant proposed modifications to improve performance and then switched plaintiff to another system, but the difficulties continued. In 1982, an independent consultant inspected the system and reported that it was "impossible" for the system to perform the required multi-programming, and that the system "could never be modified so as to perform these tasks." *Sierra Diesel*, 648 F. Supp. at 1148. Plaintiff filed its fraud claim in 1984, two years later.

Defendant sought summary judgment under § 11.190(3)(d), claiming that the limitations period commenced when the system was first installed and did not perform as represented. Contrary to the Majority's description (Op. at 1183), the *Sierra Diesel* court did not determine, as a matter of law, that the system's initial difficulties provided sufficient evidence that defendant's representations were inaccurate. Rather, the trial court denied summary judgment because these initial problems with the system posed jury questions: whether these difficulties implied defendant's representations were false; whether plaintiff should have investigated; and whether an investigation would have revealed the false representations. *Id.* at 1151. However, whatever the significance of the system's early failures, the consultant's report triggered § 11.190(3)(d) as a matter of law because it unquestionably informed plaintiff that the computer systems would never perform as represented. *Id.*

In other words, the *Sierra Diesel* court holds that the independent report triggers § 11.190(3)(d) because it presents plaintiff

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with facts contrary to defendant's representations. *Sierra Diesel* is a ruling consistent with defendants' position and directly contrary to the Majority's holding, and it never states that § 11.190(3)(d) is tolled until a plaintiff discovers a defendant's deceptive intent. The consultant's report, while concluding the defendant's representations were false, did not claim or report that defendant knew that its systems would never perform as promised. Thus, consistent with well-established Nevada law, *Sierra Diesel* triggers § 11.190(3)(d) when plaintiff discovers the representations were false.

Here, as the Majority points out, in 1979 Nevada Power unquestionably believed that PCBs were hazardous, relying on information it obtained from EPA. (Op. at 1179) Defendants do not argue that any further knowledge or investigation was necessary to trigger the limitations statute. The independent information from EPA is just like the consultant's report in *Sierra Diesel*, and plaintiff's discovery of this information triggered § 11.190(3)(d) no later than 1979. As a result, the three-year limitations period expired in 1982, and the Majority errs in reversing the district court's order time-barring the fraud claim.

B. The Majority Misapplies The Plain Meaning Of § 11.190(3)(d).

The Majority's holding that discovery of deceptive intent is necessary to trigger § 11.190(3)(d) tolls the statute until plaintiff has discovered all elements of a cause of action. (Op. at 1185-86) However, the plain language of § 11.190(3)(d) activates the limitations period when plaintiff discovers the "facts constituting the fraud." As all of the above cases hold, this statutory wording does not require that plaintiff discover all elements of its fraud cause of action.

By contrast, where the Nevada legislature intends to trigger the limitations provision only after a plaintiff discovers all elements of its cause of action, it says so unambiguously. *See* Add. For example, Nev. Rev. Stat. § 11.207(1) (for malpractice actions) begins to run when "plaintiff sustains damage and discovered or through the exercise of reasonable diligence should have discovered *the material facts which constitute the cause of action*" (emphasis added). Nevada case law construes this statutory language to mean that a cause of action for malpractice accrues only when plaintiff discovers all elements of the claim.[7] The Nevada legislature has never amended § 11.190(3)(d) to incorporate a similar requirement. Thus, the different statutory language of § 11.207(1) and § 11.190(3)(d), and the different judicial interpretations of these provisions, confirm that Nevada law does not toll § 11.190(3)(d) until plaintiff discovers defendant's intent. *See* Add.

C. The Majority Misstates Defendants' Position On Several Points.

Contrary to the Majority's statement (Op. at 1182), defendants do not concede they lied to plaintiff, or that before 1988 Nevada Power lacked knowledge of all facts needed to plead fraud. Defendants deny they lied to plaintiff, and have only stated that the issue of the truth or falsity of the alleged representations is irrelevant to the statute of limitations issues. (Defs. Br. at 23-26; Argument at 6). Defendants also claim that plaintiff could have, and should have, filed its fraud claim in the early 1980s at the latest. (Defs. Br. at 16).

Defendants have never argued, as the Majority states (Op. at 1182), that beginning in 1979 Nevada Power *should have discovered*, with proper diligence, the facts necessary to trigger § 11.190(3)(d). To the contrary, defendants have repeatedly argued that the uncontroverted evidence shows that by the early 1980s at the latest, plaintiff *had actual knowledge* of the facts necessary to trigger § 11.190(3)(d). (Def. Br. 223-26; Argument at 2-6)

7 *Oak Grove Investors v. Bell & Gossett Co.*, 99 Nev. 616, 622, 668 P.2d 1075, 1078-79 (Nev. 1983); *Sorenson v. Pavlikowski*, 94 Nev. 440, 443, 581 P.2d 851, 853 (Nev. 1978).

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III. THE PETITION FOR REHEARING OR *EN BANC* REHEARING SHOULD BE GRANTED BECAUSE THE MAJORITY OPINION CONFLICTS WITH PRIOR DECISIONS OF THIS COURT THAT DO NOT REQUIRE KNOWLEDGE OF DEFENDANTS' INTENT TO TRIGGER THE STATUTE OF LIMITATIONS FOR FRAUD.

The Majority's interpretation of Nev. Rev. Stat. § 11.190(3)(d) directly contradicts at least two previous decisions of this Circuit construing the identically worded California fraud statute of limitations (Cal. Civ. Proc. Code § 338(d) (Deering 1992)). *Jablon v. Dean Witter & Co.*, 614 F.2d 677 (9th Cir. 1980); *Stitt v. Williams*, 919 F.2d 516 (9th Cir. 1990) (Pregerson, J.). In both cases the Ninth Circuit affirmed summary judgment orders dismissing time-barred fraud claims. In both cases this Circuit held that plaintiff's discovery of the falsity of defendant's representations activated the California fraud limitations statute: in *Jablon*, the trigger was plaintiff's knowledge that the prices of certain securities had declined instead of increased, as defendant stockbroker predicted (*Jablon*, 614 F.2d at 682); in *Stitt*, the statute ran when plaintiffs learned that their partnership interests were smaller than defendant represented (*Stitt*, 919 F.2d at 523). In neither case did this Court link the trigger to discovery of alleged deceptive intent.

IV. THE MAJORITY OPINION DIRECTLY CONFLICTS WITH OPINIONS OF THE SIXTH AND TENTH CIRCUITS, WARRANTING AN *EN BANC* REHEARING.

Pursuant to the Federal Rules of Appellate Procedure 35 and Circuit Rule 35, *en banc* consideration on a petition for rehearing is appropriate where the opinion is (i) in direct conflict with an opinion of another court of appeals and (ii) the opinion "substantially affects a rule of national application in which there is an overriding need for national uniformity." As demonstrated below, defendants have met the above standards and request that the appeal be reheard *en banc*.

The Majority states that " '[i]n diversity cases, whether an issue is one of law for the court to decide or one of fact for the jury to determine is governed by federal law.' " (Op. at 1182 n.2) (quoting *Deland v. Old Republic Life Ins. Co.*, 758 F.2d 1331, 1335 (9th Cir. 1985)). In this case, the Majority concludes that the sufficiency of a plaintiff's knowledge of its fraud claim, for statute of limitations purposes, is a jury question, even where the plaintiff knew both the alleged falsity of the representations and its injury within the limitations period. (Op. at 1183-84) This conclusion is in direct conflict with the decision of the Sixth Circuit in *Electric Power Bd. v. Monsanto Co.*, 879 F.2d 1368 (6th Cir. 1989), *cert. denied*, 493 U.S. 1022 (1990) ("*EPB*") and the decisions of the Tenth Circuit in *Jones v. Ford Motor Co.*, 599 F.2d 394, 399 (10th Cir. 1979) ("Jones") and *Ohio v. Peterson, Lowry, Rall, Barber & Ross*, 651 F.2d 687, 695 (10th Cir.), *cert. denied*, 454 U.S. 895 (1981) ("Peterson"), each of which granted summary judgment barring fraud claims where plaintiffs admitted they knew that defendants' representations were false but allegedly did not know of defendants' "state of mind" or intent within the limitations period.[8]

As the dissent notes, *EPB* was "a case almost identical to the one before us" (Op. at 1189) involving the sale of PCB equipment to electric utilities many years before the complaint was filed. Like this case, *EPB* involved a fraud claim alleging that General Electric, Westinghouse, and Monsanto intentionally misrepresented the safety of PCBs. In addition, the *EPB* plaintiffs alleged that defendants had fraudulently concealed the alleged hazards of PCBs in an effort to toll the statute of limitations. Although plaintiffs admitted monitoring the federal PCB regulations since the 1970s, they claimed no knowledge of alleged PCB dangers, or defendants' "state of mind" or intent regarding defendants' misrepresentations about PCBs until three years before filing their claim.

8 The Majority's Opinion also directly conflicts with the Supreme Court's recent holdings on the important role of summary judgment, which declare that Rule 56 is not a disfavored procedural shortcut to be rejected in favor of a trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). *See also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

The Sixth Circuit in *EPB* affirmed the dismissal of all the utilities' claims, including the fraud claim, as time-barred because the utilities learned of the alleged PCB dangers—the facts allegedly misrepresented—many years before filing their claim. Where the plaintiff knew the falsity of the representations within the limitations period, the Sixth Circuit held that plaintiff's knowledge of its fraud claim is *not* a jury question—the opposite of the Majority's ruling in this case. The *EPB* plaintiffs knew little of defendants' "state of mind," just as Nevada Power asserts here, and the Sixth Circuit concluded, as a matter of law, that plaintiffs' lack of knowledge concerning defendants' fraudulent *intent* did not preclude summary judgment dismissing a time-barred fraud claim.[9]

The Majority Opinion in this case also conflicts with the Tenth Circuit decisions in *Jones* and *Peterson* for the same reason that it conflicts with *EPB*. In both *Jones* and *Peterson*, neither of which was addressed in the Majority's opinion, the court granted summary judgment dismissing a fraud claim as time-barred because plaintiff's claim accrued when it discovered the representations at issue were false. In both cases that knowledge alone triggered the fraud limitations period. In neither case did the Tenth Circuit require knowledge of defendant's "state of mind" or in-

9 Moreover, the Sixth Circuit rejected plaintiffs' fraudulent concealment claim as legally deficient because plaintiffs knew about the alleged dangers of PCBs within the limitations period. As with fraud, defendants' "state of mind" is legally irrelevant to fraudulent concealment. As the Sixth Circuit stated:

> [e]ven if the defendants took "affirmative action" to conceal the hazards of PCBs in their use in electrical equipment, the utilities cannot meet the second requirement for making out a claim of fraudulent concealment . . . [because they] knew or should have known of the [alleged] hazards of the use of PCBs in electrical equipment at least four years before their suit was filed. Thus, they cannot show that they failed "to discover the operative facts that are the basis of [their] cause of action within the limitations period."

EPB, 879 F.2d at 1377-78 (citations omitted).

tent as a pre-condition for accrual. As the *Peterson* court expressly stated:

> Although *scienter* is a necessary element of a § 10(b) private action, in many cases *scienter* will emerge only as an inference from the facts before the jury. This circumstance cannot be used as a basis for emasculating the statute of limitations.

Peterson, 651 F.2d at 695.[10]

In short, a clear conflict exists between the Majority Opinion and at least three decisions from other circuits. Because this conflict affects the federal standard for summary judgment on all fraud claims where a statute of limitations defense is asserted, the lack of national uniformity jeopardizes the "twin policies of protecting defendants from defending stale claims and promoting repose." (Op. at 1190) The Majority's Opinion virtually precludes summary judgment for many fraud claims barred in the Sixth and Tenth Circuits, inevitably leading to forum shopping and a procession of fraud claims in the Ninth Circuit.

CONCLUSION

For the foregoing reasons, defendants respectfully request that this Court grant its Petition and order a rehearing or, in the alternative, order rehearing *en banc*, of the Panel's February 5, 1992 Order reversing the District Court's Order dismissing Nevada Power's fraud and failure to warn claims as time-barred under the applicable statutes of limitations.

10 The differences between the Majority Opinion in this case and these three decisions cannot be attributed to any unique aspect of Nevada law on accrual. The Nevada rule as to accrual of a fraud claim is set forth in *Howard, supra*. This same rule applies under Tennessee law, as the Sixth Circuit construed it in *EPB*, as well as under the Federal statute which the Tenth Circuit construed in *Peterson* and *Jones*.

DATED: February 1

Respectfully submitt

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DATED: February 18, 1992.

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CERTIFICATE OF MAILING

I hereby certify that on the 18th day of February, 1992, two copies of DEFENDANTS-APPELLEES' PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC were served on the following by mailing a copy thereof, first class mail, postage prepaid, to:

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ADDENDUM

ADDENDUM

Relevant Nevada Statutes of Limitation

N.R.S. § 11.190. Periods of limitation.

3. Within 3 years:

. . .

(d) An action for relief on the ground of fraud or mistake, but the cause of action in such a case shall be deemed to accrue upon the discovery by the aggrieved party of *the facts constituting the fraud or mistake.* [emphasis added]

N.R.S. § 11.220. Action for relief not otherwise provided for.

An action for relief, not hereinbefore provided for, must be commenced within 4 years *after the cause of action shall have accrued.* [emphasis added]

* * *

N.R.S. § 11.207. Malpractice actions against accountants, attorneys, veterinarians.

1. No action against any accountant, attorney or veterinarian to recover damages for malpractice, whether based on a breach of duty or contract, may be commenced more than 4 years after the plaintiff *sustains damage and discovers or through the use of reasonable diligence should have discovered the material facts which constitute the cause of action.* [emphasis added]

Nevada Revised Statutes (1986)