To: Ellen Mortensen

Fm: Paul Merrell

Re: Nevada Power v. Monsanto, et al

Date: January 28, 1991

Ellen:

It would be extremely helpful if you could find the time during the next few days to research an issue on this case. The question:

> Is the potential reach of equitable indemnity (i.e., implied contractual indemnity) potentially as broad as the permissable scope of express contractual indemnity?

Context: Defendants in this case are arguing that equitable indemnity can not apply on our facts, where an electrical utility seeks indemnification from its equipment suppliers and the supplier's manufacturer of PCB dielectric fluid for expenses incurred in replacing defective equipment as required by EPA rules. Our theory of indemnity is equitable indemnity, arising from the fact that the defendants knew that the equipment was hazardous prior to purchase and sale, but fraudulently misrepresented the hazard at the time of purchase and sale; therefore, Nevada Power was blamelessly made strictly liable for replacement costs that ought, as a matter of fairness, to be shifted to the parties who are the actual cause of the problem. See generally, Hydro-Air Equipment v. Hyatt Corp., 852 F.2d 403 (9th Cir. 1988); Tromza v. Tecumseh Products Co., 378 F.2d 601 (3rd Cir. 1967);

One of defendant arguments against indemnity is that EPA orders award no "damages" to a third party that are necessary to form the basis of an equitable indemnity action. However, we have found cases where the word "damages" in insurance policies has been found to encompass expenses of the type involved here, raising a duty for an insurer to defend a company potentially subject to EPA clean-up orders from the time that a company first receives notice that EPA is contemplating issuing such orders. Moreover, two of our defendants are now suing their insurance companies, seeking an order that the insurers must indemnify them under their insurance (indemnification) contracts for clean-up of their own contaminated sites necessitated by EPA rules and orders. Interestingly, the defendants in those cases also seek a declaration that the insurance carriers will be required to contractually indemnify them for losses of the type they will incur if they lose our lawsuit.