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July 28, 1993

Professor Manning Warren
Gravina 21, 1st Floor
Calella de Palafrugell
17210 Girona, Spain

Re: Nevada Power Company v. Monsanto Company, et al.
USDC, District of Nevada Case CV-S-89-555-LDG (LRL)

Dear Professor Warren:

Greetings from stateside! Under cover of this letter, I am sending to you a rough outline of what we expect your areas of testimony to be in this case. Please feel free to add, delete or edit as you see fit. You did give me some helpful suggestions on how to write the statement, and if you have any more, please make them (this is my first attempt at these). If you have any questions, my direct line is (702) 386-3369. I will be calling you in a few moments to let you know that this telefax is coming.

I am also sending to you a copy of our proposed amended complaint in this matter. We will be withdrawing it in the next few days, but only to submit another because this version inadvertently left out a few things such as our third party fraud allegations against Monsanto. The tenor of the new one will be much the same as this, however, so you will have a good idea of this case. Please review this amended complaint and add anything to the outline of your statement as you see fit, and if you would indicate which items in the complaint (if any) on which you would feel comfortable in issuing an opinion, I would appreciate it. In addition, note anything mentioned in the Amended Complaint which you would like us to send to you.

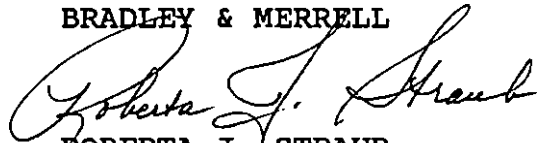
If you could make any changes to this and either telefax it back to me or call me with the changes, hopefully by tomorrow, I would be grateful.

Prof. Manning Warren
July 28, 1993
Page 2

I appreciate the time you will be spending on this case in the next few weeks, and if there is any help which I can offer you, or any documents which I can send you, just let me know. I had planned to get this to you via Federal Express, but due to some discovery problems, I find that I am having to telefax it to you.

Sincerely,

BRADLEY & MERRELL



ROBERTA J. STRAUB

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PROF. MANNING WARREN, III DRAFT OUTLINE

Background:

We need Professor Warren's testimony to show that the defendants' conduct at relevant times did not conform to then-current standards of corporate behavior. The standard of proper business ethics is the main reason for our retention of Professor Warren.

I. Professor Manning Warren, III

- A. University of Louisville
School of Law
Louisville, Kentucky 40292
- B. Gravina 21, 1st Floor
Calella De Palafrugell
17210 Girona Spain
- C. Currently the H. Edward Harter Chair of Commercial Law at the University of Louisville. Teaches Securities Regulation, European Community Law, Corporations and Commercial Transactions
- D. Bar Admissions:
 - 1. District of Columbia
 - 2. Alabama
 - 3. Kentucky
- E. Advisory Committees:
 - 1. U.S. Securities and Exchange Commission's Federal Advisory Committee on Market Transactions
 - 2. U.S. Congress Office of Technology Assessment Consultant on International Securities Markets
 - 3. Expert Witness on Shareholder Voting Rights, U.S. Senate Committee on Banking, Housing and Urban Affairs.
 - 4. Consultant on U.S. and International Securities Transactions, European Community Law and Commercial Litigation
 - 5. Drafter of the Revised Alabama Securities Act
 - 6. Reporter for the Public Finance Committee, Alabama Law Institute
- F. Professor Warren's specialty lies in corporations, their

operations, formations and their conduct in the communities in which they function.

- G. Professor Warren is a widely published author in the area of corporate conduct, corporate investments, securities regulation, corporate takeovers, and the European Economic Community.

II. Professor Warren will testify that (Opinion):

- A. The defendants' conduct in disclosing the hazards of PCBs and related compounds was not on par with accepted business standards or ethics
- B. Defendants' decisionmaking on the PCB issue did not meet the standards for proper business ethics
- C. *** Professor Warren: can you think of any other topic that should be under this category? Please fill in if you have any ideas.

III. Basis for Testimony

- A. Professor Warren will testify based on his education, his own research, the general literature, training, understanding of the current literature, and review of current literature on the subject.
- B. Professor Warren will also rely on publications which he has generated.
- C. Also rely on any current government publications?
- D. Any reliance on symposia and/or books?
- E. At the request of plaintiff's lawyers, Professor Warren will also review learned treatises of other experts or any other documents related to the case which they will provide.
- F. Professor Warren may also be asked to explain and define any terms of art which he or the defendants may use in their documents.

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Attorneys for Plaintiff
NEVADA POWER COMPANY
a Nevada corporation

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

NEVADA POWER COMPANY, etc.,	)	CASE CV-S-89-555-LDG (LRL)
	)	
Plaintiff,	)	PLAINTIFF NEVADA POWER
	)	COMPANY'S PROPOSED FIRST
vs.	)	AMENDED COMPLAINT
	)	
MONSANTO COMPANY, etc., et al.,	)	
	)	
Defendants.	)	
	)	

COMES NOW plaintiff Nevada Power Company ("Nevada Power"), by
and through its attorneys of record, Jones, Jones, Close & Brown.
Chartered, and for its claims for relief alleges as follows:

ALLEGATIONS COMMON TO ALL CLAIMS

1. Nevada Power is a corporation organized and existing
under the laws of the State of Nevada.

. . .

1 2. Nevada Power is a public utility subject to the
2 jurisdiction of the Public Service Commission of Nevada ("PSC").
3 Nevada Power supplies electric energy as a public utility to more
4 than 388,000 residential, commercial, industrial and other customers
5 located in Clark and Nye Counties, Nevada.

6 3. Defendant Monsanto Company, a foreign corporation,
7 ("Monsanto") has its corporate headquarters in St. Louis, Missouri.
8 At all times relevant hereto, Monsanto was the exclusive commercial
9 manufacturer and supplier of polychlorinated biphenyls (hereinafter
10 "PCBs") in the United States for use in capacitors and transformers.
11 Monsanto sold the PCBs to the other defendants, General Electric
12 Company, a foreign corporation ("General Electric") and Westinghouse
13 Electric Corporation, a foreign corporation ("Westinghouse") for use
14 as a dielectric fluid in transformers, capacitors and other
15 electrical equipment manufactured and sold by them. Monsanto was a
16 contributing member to the National Electrical Manufacturers
17 Association ("NEMA").

18 4. General Electric has its corporate headquarters in
19 Fairfield, Connecticut. It is and at all times relevant hereto was
20 engaged in the manufacture of electrical equipment, including many
21 PCB containing transformers and capacitors that are the subject of
22 this action. General Electric is a member of NEMA.

23 5. Westinghouse has its corporate headquarters in Pittsburgh,
24 Pennsylvania. It is and at all times relevant hereto was engaged in
25 the manufacture of electrical equipment, including many PCB
26 containing transformers and capacitors that are the subject of this
27 action. Westinghouse is a member of NEMA.

28 . . .

6. The electrical equipment which is the subject of this complaint contained and continues to contain varying amounts of mixtures known as Aroclor, Inerteen, and Pyranol sold by defendants Monsanto, Westinghouse, and General Electric, respectively. Aroclor is a primary ingredient of Inerteen and Pyranol. These mixtures contain, in varying proportions, the following: (1) man-made, toxic and environmentally persistent chemical compounds known collectively as polychlorinated biphenyls (PCB's), (2) trichlorobenzene, (3) tetrachlorobenzene, (4) preservatives, and (5) contaminants including highly toxic substances known as "dioxins" and "chlorinated dibenzofurans."

7. PCBs are man-made chemical compounds known to produce severe adverse health effects including cancer and birth defects in humans and animals exposed to them. PCBs also have a devastating impact upon the environment. Since they are not biodegradable, their adverse impact on humans, animals and the biosphere is long lasting and cumulative. PCBs have been determined to be a hazardous substance by Federal legislation and Federal regulations.

8. PCBs are the only chemical to be specifically banned, by name, by Congress. In October, 1976 Congress passed the Toxic Substances Control Act (15 U.S.C.A. § 2601 et seq.) by which it directed the Environmental Protection Agency ("EPA") to promulgate regulations banning the manufacture, sale and distribution of PCBs. By 1979 the sale, manufacture and distribution of PCBs were banned.

9. Nevada Power has incurred and will incur reasonable and necessary expenses for the removal, replacement, refitting and/or disposal of the PCB-containing electrical equipment which it purchased from defendants Westinghouse, General Electric, and other

companies, and which it placed at various locations throughout its system.

10. Nevada Power has been forced to tear down and dismantle portions of the real property comprising its utility plant by removing, replacing, refitting and disposing of PCB-containing electrical equipment and other PCB contaminated material. As a direct consequence thereof, Nevada Power has suffered and will suffer general and special damages in excess of \$50,000, including future damages to be determined at a later date.

11. That PCBs pose significant risks and dangers to humans and the environment has been known to the defendants since the 1930s. Nevertheless, defendants negligently, knowingly, and intentionally deceived and misled the public, government agencies, and Nevada Power in connection with Nevada Power's acquisition of the PCBs and PCB-containing electrical equipment which are the subject of this action by failing to warn that PCBs are unreasonably hazardous and unfit for use as transformer and capacitor fluids, failing to disclose the contents of the equipment, falsely representing that some equipment contained only mineral oil, and falsely representing that PCBs are not unreasonably hazardous and unfit for use as transformer and capacitor fluids. Nevada Power relied upon the false representations of the defendants, to its detriment.

12. General Electric and Westinghouse sold Pyranol and Inerteen to Nevada Power to replace transformer fluid which was lost through leakage, evaporation, spills, combustion and explosions. To whatever extent those replacement fluids may be proven to have contaminated Nevada Power's electrical equipment, the defendants are liable to

. . .

1 Nevada Power in punitive damages and for the cost of all proximately
2 resulting cleanup and repair and replacement expense.

3 13. From the early 1930s until 1977 (when the manufacture of
4 PCBs was banned) Monsanto produced approximately 1.4 billion pounds
5 of PCBs.

6 14. From 1954 to 1977, Monsanto sold approximately 267 millior
7 pounds of PCBs to General Electric and approximately 170 millior
8 pounds to Westinghouse.

9 15. General Electric and Westinghouse began using PCBs in the
10 manufacture of their transformers, capacitors, and other electrical
11 equipment in the 1930s and continued to do so into the 1970s.

12 16. In the 1930s, Monsanto's own in-house confidential
13 memoranda on material safety stated that PCBs were "highly toxic"
14 and caused severe adverse health effects to humans exposed to PCBs.
15 Monsanto became aware during the 1930s that PCBs had to be handled
16 and disposed of with extreme care to avoid human contact.

17 17. By 1938, Monsanto and Westinghouse had received warnings
18 from physicians that PCB exposure caused severe toxic results in
19 humans. At or about this time, twelve to fifteen scientific papers
20 were published that detailed the severe health risks to humans of
21 PCB exposure. These scientific studies were known to Monsanto,
22 General Electric and Westinghouse.

23 18. During the 1940s, scientific literature was published
24 warning the electrical industry, of which defendants are members, of
25 the severe toxic consequences to humans and animals of exposure to
26 PCBs.

27 19. In 1947, Monsanto and Westinghouse were warned again by
28 medical experts that exposure to PCBs was severely toxic to humans,

and that they should warn the public about the severe toxic consequences of exposure to PCBs.

20. During the 1950s scientific articles were published warning the electrical manufacturing industry including these defendants of the severe toxic consequences to humans and animals of exposure to PCBs. Both Monsanto and Westinghouse, as shown by their own in-house confidential memoranda, were fully aware of the contents of these articles warning of the adverse health consequences of exposure to PCBs.

21. During the 1960s the international scientific community published scientific studies that documented the global damage resulting from the unchecked disposal and other releases of PCBs into the environment. These studies were known to the defendants, yet they continued to sell PCBs and products containing PCBs to Nevada Power Company and to others, which sales substantially contributed to the continued build-up of PCBs in the environment and the cumulative hazard resulting therefrom, creating an indivisible wrong.

22. In 1968, in Japan, hundreds of people ingested PCBs by mistake. The follow-up medical studies done on these people and their progeny document the severe adverse consequences to humans exposed to PCBs. This incident and the resulting studies were known to Monsanto, General Electric and Westinghouse.

23. During the 1960s, General Electric, as shown by its own in-house confidential memoranda, corresponded with Monsanto concerning the dangerous environmental consequences attending exposure to and disposal of PCBs. In October of 1969, General Electric published a paper, circulated to all of the defendants as

1 members of the electrical industry, entitled "PCB: An Industry
2 Problem," which described in detail the severe consequences to
3 humans of exposure to PCBs and the problems attending disposal of
4 PCBs.

5 24. During the 1970s, Monsanto warned all of the
6 co-defendants in this action of adverse consequences and dangers
7 associated with the exposure to and disposal of PCBs. Monsanto's
8 own in-house toxicologist, Dr. Kelley, warned Monsanto that PCBs
9 were dangerous and that Monsanto had a duty to warn about their
10 toxic effects.

11 25. In the 1970s, the Federal Government launched nationwide
12 hearings concerning the problems of PCBs. During these hearings,
13 NEMA, of which all defendants were members or contributing members
14 submitted to Federal agencies and hearing panels false documents
15 and false information in an effort to forestall a ban on PCBs.
16 More specifically, during the early to mid-1970s, Monsanto engaged
17 the services of Industrial Bio-Test Laboratories to conduct animal
18 toxicological studies regarding PCBs. These studies were
19 supervised by Paul Wright and Joseph Calandra.

20 26. Wright and Calandra were subsequently convicted under
21 Federal law of felonies concerning the submission of false animal
22 studies and reports (requested by Monsanto) to Federal agencies
23 with regards to Trichlorocarbarilide, an ingredient in deodorant
24 soaps. U.S. v. Keplinger, 776 F.2d 678 (7th Cir. 1985).

25 27. Both Wright and Calandra, at the behest of Monsanto,
26 falsified and forged PCB toxicological studies that all the
27 defendants used in an attempt to deceive Congress and Federal
28 . . .

1 agencies among others into believing that PCBs were harmless
2 chemicals that should not be banned.

3 28. From the 1930's to the 1970's, the defendants, through
4 mass media advertising, represented to the public and Nevada Power
5 that PCBs were safe and posed little if no danger to humans or the
6 environment.

7 29. The foregoing actions as set out in paragraphs 26 through
8 29, undertaken by all the defendants, were intentional and
9 specifically designed to mislead Congress, Federal agencies, Nevada
10 Power and the public into believing that PCBs are harmless
11 chemicals and that electrical equipment containing PCBs is safe.

12 30. The aforementioned conduct of the defendants was intended
13 to prevent the public and Nevada Power from suspecting that PCB-
14 containing electrical equipment presented any toxic hazards, and
15 led Nevada Power to believe that there was no need to conduct
16 independent inquiry or investigation into the toxicity of PCBs or
17 the safety of PCB-containing electrical equipment. This conduct
18 also induced Nevada Power to purchase PCB-containing electrical
19 equipment from the defendants General Electric and Westinghouse.

20 31. Nevada Power used reasonable care and due diligence in
21 acquiring PCB-containing electrical equipment, was ignorant of the
22 defendants' fraudulent and deceitful conduct before 1988, and
23 previously had no reason to suspect that the defendants were
24 engaged in a campaign of deceit and fraud to conceal the toxic and
25 dangerous consequences of exposure to PCBs and the attendant PCB
26 disposal problems, that they knowingly, intentionally, and
27 negligently made false representations and failed to provide
28 adequate warnings at the time of purchase and sale.

32. Nevada Power relied on the defendant's misrepresentations that the PCB-containing electrical equipment was safe and presented no significant danger to humans or the environment. Based upon this reliance, Nevada Power purchased PCB-containing electrical equipment from defendants General Electric and Westinghouse, and from other companies.

FIRST CLAIM FOR RELIEF

(Fraudulent Misrepresentation)

33. Nevada Power restates and realleges the allegations in paragraph 1-32 as if set forth fully herein and incorporates them by this reference, and states this claim for relief in the alternative to its other claims for relief.

34. As a direct and proximate result of Nevada Power's reliance on the fraudulent misrepresentations of the defendants and its resulting purchase of PCB fluids and PCB-containing electrical equipment, Nevada Power has incurred general and special damages in excess of \$50,000 for the testing, removal, replacement, refitting cleanup, and/or disposal of PCBs, PCB-containing electrical equipment, and material contaminated by PCBs due to leaks, spill, explosions, and other mishaps involving PCBs obtained in reliance upon the fraud of the defendants.

35. Defendants General Electric and Westinghouse knew that mineral oil transformers they sold to Nevada Power were contaminated with PCBs, yet they failed to warn Nevada Power that the transformers were contaminated.

36. Defendants General Electric and Westinghouse sold PCBs manufactured by defendant Monsanto to plaintiff Nevada Power for the purpose of replenishing fluid lost from electrical equipment

1 through evaporation and leakage, and for replacing degraded or
2 spilled fluids. The defendants are, each and every one of them,
3 jointly and severally liable to Nevada Power for costs entailed in
4 disposing of PCB fluids and material contaminated by them. To
5 whatever extent the evidence shows that the defendants' failure to
6 warn Nevada Power of the dangerous and defective nature of PCBs
7 contributed to the contamination of Nevada Power's electrical
8 equipment during servicing, the defendants are jointly and
9 severally liable to Nevada Power for its expenses incurred in
10 cleaning up spills from contaminated equipment, and in eliminating
11 contaminated equipment and fluids from service.

12 37. Because the defendants' conduct complained of herein was
13 fraudulent, malicious, or otherwise oppressive, Nevada Power should
14 be additionally awarded punitive damages in excess of \$50,000, the
15 actual amount commensurate with the evidence.

16 SECOND CLAIM FOR RELIEF

17 (Strict Liability)

18 38. Nevada Power restates and realleges the allegations in
19 paragraphs 1 through 32 and incorporates them herein by reference,
20 and states this cause of action as an alternative to its other
21 claims for relief.

22 39. Defendant Monsanto was negligent in failing adequately to
23 warn plaintiff Nevada Power of the hazards of PCBs it either knew
24 about or should have known about. Defendants General Electric and
25 Westinghouse, as revendors of defectively hazardous PCB products
26 manufactured by defendant Monsanto, are strictly liable for damages
27 proximately resulting from the wrongdoing of defendant Monsanto in
28 general and special damages in excess of \$50,000 for the testing,

removal, replacement, refitting, cleanup, and/or disposal of PCBs, PCB-containing electrical equipment, and material contaminated by PCBs due to leaks, spills, explosions, and other mishaps involving PCBs obtained from the defendants.

40. Because the conduct of the defendants was fraudulent, malicious or otherwise oppressive, Nevada Power should be awarded punitive damages in excess of \$50,000, the actual amount of which to be determined at trial.

THIRD CLAIM FOR RELIEF

(Strict Products Liability)

41. Nevada Power restates and realleges the allegations in paragraphs 1 through 32 and incorporates them herein by reference, and states this claim for relief in the alternative to its other claims for relief.

42. The electrical equipment and PCB fluids complained of herein were defective in that they did not contain an adequate warning.

43. The defendants are strictly liable to Nevada Power in general and special damages in excess of \$50,000 for the testing, removal, replacement, refitting, cleanup, and/or disposal of PCBs, PCB-containing electrical equipment, and material contaminated by PCBs due to leaks, spill, explosions, and other mishaps involving PCBs obtained from the defendants.

44. Because the conduct of the defendants was fraudulent, malicious or otherwise oppressive, Nevada Power should be awarded punitive damages in excess of \$50,000, the actual amount of which to be determined at trial.

. . .

FOURTH CLAIM FOR RELIEF

(Negligent Failure to Warn)

45. Nevada Power restates and realleges the allegations contained in paragraphs 1 through 32 as though set forth fully herein and incorporates them by this reference, and makes this claim in the alternative to its other claims for relief.

46. Defendants knew or should have known that the PCBs and the PCB-containing electrical equipment were inherently and unreasonably dangerous and defective. Because of this, the defendants had a duty to warn all users and potential purchasers of PCBs and PCB-containing electrical equipment, including Nevada Power, of the defective and dangerous nature of such equipment.

47. Defendants breached this duty by failing to warn Nevada Power and other users that this equipment was defective and unreasonably dangerous.

48. Defendants' failure to warn Nevada Power was the direct and proximate cause of Nevada Power's being damaged in excess of \$50,000 for the removal, replacement, refitting and/or disposal of the PCB-containing electrical equipment, PCBs fluids, PCB-contaminated equipment, and other material contaminated by the defendants' products. These damages include future damages, the amount of which should be determined at trial.

49. Because the conduct of the defendants was fraudulent, malicious or otherwise oppressive, Nevada Power should be awarded punitive damages in excess of \$50,000, the actual amount of which to be determined at trial.

. . .

. . .

REQUEST FOR RELIEF

WHEREFORE, plaintiff Nevada Power Company prays for judgment as follows:

1. For general, special and punitive damages, including future damages, in excess of \$50,000 on its First Claim for Relief (Fraudulent Misrepresentation).

2. For general, special and punitive damages, including future damages, in excess of \$50,000 on its Second Claim for Relief (Strict Liability).

3. For general, special and punitive damages, including future damages, in excess of \$50,000 on its Third claim for Relief (Strict Products Liability).

4. For general, special and punitive damages, including future damages, in excess of \$50,000 on its Fourth Claim for Relief (Negligent Failure to Warn).

5. A finding that each defendant is jointly and severally liable for all damages awarded to Nevada Power Company.

6. For such other and further relief as is just and equitable.

DATED: June 7, 1993

BRADLEY & MERRELL

By: _____

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28 P:\USERS\LSG\PLD\AMEND.COM

CERTIFICATE OF SERVICE

I hereby certify that on the 7TH day of June, 1993, the foregoing PLAINTIFF NEVADA POWER COMPANY'S MOTION FOR LEAVE TO AMEND COMPLAINT was served on the following parties:

KEY:

F - Via fax

FE - Via Federal Express

H - Via hand delivery

FE

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11 Attorneys for Plaintiff
NEVADA POWER COMPANY
12 a Nevada corporation

13
14 UNITED STATES DISTRICT COURT
15 DISTRICT OF NEVADA

16	NEVADA POWER COMPANY, etc.,	)	CASE CV-S-89-555-LDG (LRL)
17	Plaintiff,	)	PLAINTIFF NEVADA POWER
18	vs.	)	COMPANY'S BRIEF IN SUPPORT
19	MONSANTO COMPANY, etc., et al.,	)	OF ITS MOTION FOR LEAVE TO
20	Defendants.	)	AMEND COMPLAINT

21
22 I.

23 INTRODUCTION

24 Plaintiff Nevada Power Company ("Nevada Power") has moved
25 concurrently for leave to amend its complaint pursuant to Trial Rule
26 15 of the Federal Rules of Civil Procedure. This brief is intended
27 to support and supplement that motion. The original complaint was
28 . . .

1 filed on July 7, 1989. Nevada Power has filed no previous motions to
2 amend its complaint.

3 II.

4 POINTS & AUTHORITIES

5 Foman v. Davis sets the bounds of judicial discretion in ruling
6 on a motion for leave to amend a complaint. In Foman, the Supreme
7 Court stated:

8 If the underlying facts or circumstances relied upon by
9 a plaintiff may be a proper subject of relief, he ought to
10 be afforded an opportunity to test his claim on the merits.
11 In the absence of any apparent or declared reason - such as
12 undue delay, bad faith or dilatory motive on the part of
13 the movant, repeated failure to cure deficiencies by
14 amendments previously allowed, undue prejudice to the
15 opposing party by virtue of allowance of the amendment,
16 futility of amendment, etc. - the leave sought should, as
17 the rules require, be "freely given."

18 Foman v. Davis, 371 U.S. 178, 182, 9 L.Ed. 2d 222, 226 (1962). The
19 passage of time since the filing of the original complaint is not
20 grounds for denial of leave to amend in the absence of demonstrable
21 prejudice. Howey v. United States, 481 F2d 1187 (9th Cir. 1981).

22 The authors of the treatise Federal Practice and Procedure state:

23 "Quite appropriately the courts have not imposed any
24 arbitrary timing restrictions on a party's request for
25 leave to amend and permission has been granted under Rule
26 15(a) at various stages of the litigation: following
27 discovery; after a pre-trial conference; at a hearing on a
28 motion to dismiss or for summary judgment; after a motion
to dismiss has been granted but before the order of
dismissal has been entered; when the case is on the trial
calendar and been set for a hearing by the district court;
at the beginning, during, and at the close of trial; after
a judgment has been entered; and even on remand following
an appeal."

29 Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d §
30 1488 (citations omitted).

31 . . .

1 No trial date has been set in the case at bar. Defendant
2 Monsanto Company, General Electric Company, and Westinghouse Electric
3 Corporation have aggressively pursued discovery on all issues raised
4 in the proposed amended complaint. They did move for a protective
5 order regarding Nevada Power's discovery into their knowledge of
6 certain PCB contaminants and combustion byproducts - the dioxins and
7 chlorinated dibenzofurans - but that matter was resolved in favor of
8 Nevada Power by the Magistrate Judge's Order of May 17, 1993, and the
9 time for seeking reconsideration has passed.

10 The defendants cannot plausibly argue that the proposed
11 amendments would be prejudicial. All damages accruing from the
12 defendants' failure to warn and intentional misrepresentation
13 (fraud) regarding the marketing and sale of PCBs have been at issue
14 from the onset of discovery following remand. Nevada Power gave
15 formal notice of its intent to seek damages in the range under
16 discussion in its interrogatory responses of October 16, 1992, by
17 including in its interrogatory responses the detailed report of its
18 primary damages expert. Since that time, defendants have taken
19 extensive discovery of the facts underlying Nevada Power's theory of
20 recovery, through fact and Rule 30(b)(6) depositions, through
21 supplemental interrogatories, and through numerous requests for
22 production. Defendants are adequately prepared to present the
23 relevant facts to the jury.

24 While the original complaint only specifies damages regarding
25 the United States Environmental Protection Agency's (EPA's)
26 regulations requiring replacement of electrical equipment containing
27 fluid with over 500 parts per million PCBs, it has been clear to all
28 defendants from the onset of this lawsuit that Nevada Power's damages

proximately resulting from their conduct alleged in the original complaint are more extensive than those presently regulated by EPA. Equipment filled with fluids containing any detectable trace of PCB is regulated to some extent. Moreover, EPA is only one source upon which Nevada Power relies on for guidance on what measures are prudent to minimize its potential liability; protect its customers and their families, guests, students, and patrons; and to preserve the wholesomeness and integrity of the human environment, which is already burdened by pollution caused by defendants' PCBs.

The Ninth Circuit, heeding the guidance of the U.S. Supreme Court, has mandated that the district courts freely grant leave to amend pleadings in the absence of the so-called "Leighton factors," which cannot be shown to substantially exist with respect to Nevada Power's motion for leave to amend its complaint. These factors are bad faith, undue delay, prejudice to the opposing party, futility of amendment, and whether plaintiff has previously amended his complaint. Ascon Properties, Inc., v. Mobil Oil Co., 866 F.2d 1149, 1160 (9th Cir.1989), citing DCD Programs, Ltd. v. Leighton, 833 F.2d 183, 196 (9th Cir.1987).

Nevada Power is proceeding in good faith. It has not unduly delayed filing its motion for leave to amend; indeed, it could be argued that the motion would be more timely filed after the case has had a few more months to evolve and gel. The extent to which the defendants' fraud and failure to warn about PCBs and related compounds has damaged Nevada Power becomes clearer as discovery proceeds. The precise mechanism of harm is likewise being clarified through discovery and preparation of the case for trial. For example, the defendants have suggested during depositions that Nevada

1 Power may have added PCBs to mineral oil transformers during routine
2 maintenance. Nevada Power is not in a position to admit or deny this
3 allegation at the present time, but its proposed amended complaint
4 makes clear Nevada Power's position that the issue is moot. Nevada
5 Power can prove that it safeguarded against contaminating mineral oil
6 with PCBs as soon as it became aware that PCBs and related compounds
7 are harmful to human health and the environment. The complaint
8 alleges that if, because of the defendants' fraud or failure to warn,
9 Nevada Power added PCBs to any mineral oil transformer regardless of
10 brand name, the defendants are liable to Nevada Power for all
11 proximately resulting expense, and are also liable in punitive
12 damages. In other words, had any defendant shared its superior
13 knowledge of PCB hazards, Nevada Power would not have added PCBs to
14 its mineral oil transformers even if that is what happened. This is
15 just another way in which the defendants, through their fraud upon
16 the public, the government, and Nevada Power, and through their
17 failure to warn of hazards known to them, have damaged Nevada Power.

18 The defendants cannot plausibly contend that the proposed
19 amendments would substantially prejudice them. Their discovery has
20 incisively probed all the issues raised in the amended complaint. No
21 continuance or extension of discovery is necessary to accommodate the
22 amendments. Furthermore, no statute of limitations issue is
23 involved. In considering a motion to amend where the time for filing
24 an original action would have passed, district courts analyze the
25 current and proposed amended complaint "to determine whether they
26 share a common core of operative facts sufficient to impart fair
27 notice of the transaction, occurrence, or conduct called into
28 question." Martell v. Trilogy Ltd., 872 F.2d 322 (9th Cir. 1989).

1 The core of operative facts in this case involve the defendants'
2 fraudulent misrepresentations, failure to warn, and fraudulent
3 concealment regarding the true nature of PCBs and related compounds,
4 and Nevada Power's reliance thereon and proximately resulting
5 damages. The defendants have long been aware that they may be held
6 liable for all damages accruing from their conduct, and have
7 conducted their discovery accordingly; so obviously, the facts
8 alleged in the original complaint were sufficient to impart such
9 notice. Actual knowledge is required when Rule 15(c)(3) is applied
10 to add defendants, but not when amendment is sought under Rule
11 15(c)(2).

12 Moreover, Nevada Power had no way of knowing that the defendants
13 knowingly and intentionally sold Nevada Power PCB-contaminated
14 mineral oil transformers prior to 1976 (when they first admitted it)
15 until that fact was recently brought to Nevada Power's attention
16 during collaboration with attorneys involved in lawsuits similar to
17 the one at bar.

18 Concluding the analysis of the Leighton factors, Nevada Power
19 notes that the proposed amendments are not futile, and this is the
20 first time it has sought leave to amend its complaint.

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28 . . .

1 There being no sound reason to deny plaintiff Nevada Power
2 Company's motion for leave to amend complaint, the motion should be
3 granted.

4 DATED: June 7, 1993

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of June, 1993, the foregoing PLAINTIFF NEVADA POWER COMPANY'S BRIEF IN SUPPORT OF ITS MOTION FOR LEAVE TO AMEND COMPLAINT was served on the following parties:

KEY:

F - Via fax
FE - Via Federal Express
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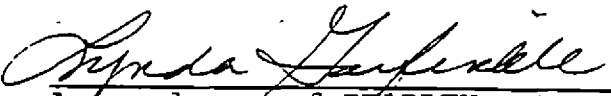
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DATE: July 28, 1993

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El Profesor Manning Warren
Gravina 21, 1st Floor

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PHONE #: 011 3472 614197

FROM: RJ Straub

CLIENT/MATTER: Nevada Power v. Monsanto

CLIENT/MATTER NO.: 11927.2

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letter
rough draft/outline of statement
Proposed Amended Complaint.

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