

# Secrecy and justice in the ongoing saga of DBCP litigation

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Since the 1980s, banana workers from Central America and elsewhere have filed cases in the United States for sterility damages caused by exposure to the nematocide dibromochloropropane (DBCP) used during the 1960s and 1970s. These plaintiffs' efforts at holding fruit and chemical corporations accountable have been met with numerous obstacles. Many cases have been dismissed on the grounds that they would "more conveniently" be tried elsewhere, despite the fact that significant barriers exist to bringing such cases in many of these workers' home countries. Using this strategy, defendants including Dole Food, Chiquita, Dow and Shell Chemical have been mostly successful in avoiding any penalty for their part in exposing banana workers to DBCP without adequate protection or information. In fact, although a few cases have settled, the first DBCP case did not reach the trial stage until 2007. In that case, the damages awarded to the six Nicaraguan banana workers were \$5 million, an amount later reduced to \$2.3 million. In 2010, Dole successfully sought to dismiss not only that case, but other cases brought by Nicaraguan plaintiffs. The company claimed that there was evidence of widespread fraud among Nicaraguan plaintiffs, attorneys, and judges, as well as lawyers based in the US. However, many of those accused of fraud did not have a chance to respond to those allegations or cross-examine their accusers. In addition, allegations of fraudulent behavior on the part of defendants suggest that the story is more complicated. Instead of dismissing these cases — a *de facto* victory for the defendant — US courts should move forward with deciding these cases on their own merits; leaving juries to determine the veracity of plaintiffs and defendants' claims.

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## Background

Dibromochloropropane (DBCP) is a nematocide that was discovered in the mid-1950s. Manufacturers Dow and Shell discovered its adverse effects on the testes of laboratory animals by the end of that decade, and published their results in *Toxicology and Applied Pharmacology* in 1961.<sup>1</sup> Dole likely learned about DBCP's effect by October 1963, when Dr Earl J. Anderson summarized the 1961 article in a publication by the Pineapple Research Institute (PRI) of Hawaii, an organization Dole had belonged to for years.<sup>2</sup> (After Anderson left the PRI in 1966, he worked as a Research Director at the Dole division of parent company Castle and Cooke, later renamed Dole, presumably bringing his knowledge of DBCP toxicology with him. He worked for Dole or, after a merger, Castle and Cooke, until 1973.<sup>3–5</sup>) In 1964, the chemical was registered in the United States, but approved labels did not warn of potential reproductive risk.<sup>6</sup> By the 1970s, it was also used in banana plantations in several developing nations (including Costa Rica,

Philippine Islands, Honduras, Nicaragua, Burkina Faso, Ivory Coast). In the mid-1970s, studies conducted by the US National Cancer Institute showed the chemical caused cancer in animals and warned that DBCP was "very carcinogenic".<sup>7,8</sup>

The human health toll of DBCP was first made public in July 1977 when several male workers at Occidental Chemical Corporation manufacturing facility in Lathrop, California became worried about their inability to father children. Occidental workers had not been told about the risks they were running and that the protection systems in place were insufficient. After workers raised the issue with their union, the Oil, Chemical and Atomic Workers, they paired up with filmmakers David Davis and Josh Hanig, and discovered they were sterile. Davis and Hanig's documentary, "Song of the Canary" documented the workers' experience and gained public attention. It soon became evident that tragedy repeated itself in Shell and Dow factories.<sup>9</sup> In spite of the scientific literature, nobody had taken precautions. In response to worker sterility, regulation of DBCP in the US was strengthened. A temporary

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exposure limit for production workers was set by the Occupational Safety and Health Administration in 1977, followed by a stronger permanent standard in 1978.<sup>9,10</sup> However, DBCP could still be used in certain crops and could also be exported.<sup>11</sup> DBCP use continued in some banana and other farms in the developing world through the 1980s.

In 1977, Castle and Cooke (Dole) threatened Dow with a breach of contract suit if the chemical manufacturer stopped selling them the compound.<sup>12</sup> Dow agreed to continue to sell the chemical to the fruit company if certain conditions were met;<sup>13</sup> in practice, Dole ignored most of those conditions.<sup>14</sup> Use elsewhere also continued. In October 1979, the US Environmental Protection Agency issued an “Intent to Cancel” DBCP that would bring an end to all uses in the US, with the single exception of the Hawaiian pineapple crop.<sup>11</sup>

In 1979, DBCP use was discontinued in Costa Rica after health officials discovered its adverse effects. Dole sent its remaining DBCP to Honduras, where there were no restrictions on the chemical.<sup>15</sup> According to an executive from another chemical company, Dole avoided legal problems by acquiring DBCP indirectly, through local importers.<sup>16</sup> Dole internal memos, produced in lawsuits, would show that Dole was applying DBCP in Nicaragua as late as 1980.<sup>17</sup> And in 1986, 1 year after all uses were discontinued in the USA, Dole used it in the Philippines.<sup>18</sup>

The testimony of dozens of banana workers, as well as internal documents of the fruit companies who used it, show that workers had no warning about the hazards of DBCP and were not provided with protective equipment. Despite worker reports consistent with high dermal and inhalation exposures,<sup>19,20</sup> Dole continues to maintain that “there is no reliable scientific basis for alleged injuries from the agricultural field application of DBCP”.<sup>21</sup> Both exposure and sterility have been documented in agricultural workers and there is no reasonable basis for believing that the chemical would affect workers differently depending on their job description. Indeed, epidemiological studies have shown high rates of sterility among former banana workers exposed to DBCP.<sup>22,23</sup>

### The Legal Battle

In the 1980s and 1990s, banana and pineapple workers from Latin America, Asia, and Africa filed lawsuits for DBCP exposure in US courts. Although there have been settlements in two notable case groups, for more than 20 years, none of these cases went to trial. Most were barred from proceeding under a legal doctrine known as called “Forum Non Conveniens”, which dismissed the cases under the theory that they should proceed in the plaintiffs’ original countries.<sup>23,24</sup>

In the new century, a controversial law dealing with DBCP cases was enacted in Nicaragua after widespread protest on the part of banana workers. “Special Law 364” facilitated the trial of DBCP cases, largely through the creation of special procedural rules. In 2001, the first lawsuits were filed under that law. In subsequent years, numerous lawsuits were filed by DBCP-affected former banana workers there, resulting in a number of judgments favorable to the plaintiffs.<sup>25</sup>

In contrast to their earlier assertions that cases should be tried in plaintiffs’ home countries, the fruit and chemical companies argued that these cases were invalid. According to the *New York Times*, Dole, Dow and Shell hired people who had been prominent in the Reagan and Clinton administrations to obtain the collaboration of the Bush administration in repealing Law 364.<sup>26</sup>

The US State Department reported raising the issue “at the highest level”, but would not confirm reports that then-Secretary of State Collin Powell had conveyed the message to his Nicaraguan counterpart. In 2002, then-US Ambassador to Nicaragua, Oliver Garza, put pressure on the Nicaraguan State Department, some ministries and the Presidency to obtain the repeal of Law 364. The pressure reached the Attorney General who issued an opinion criticizing Law 364, which he later sent to the Supreme Court of Nicaragua with a request to have it distributed to all courts in the country. Later, it was reported that certain attorneys for the multinational companies had been in the house of the president requesting “collaboration”.<sup>27</sup> Despite US pressure, months later the Supreme Court ratified the validity of Law 364.<sup>27–30</sup>

Despite this affirmation of the law, defendants refused to abide by Nicaraguan judges’ rulings, and plaintiffs began enforcement proceedings in the US and elsewhere. The Nicaraguan law meant that defendants in DBCP litigation were no longer likely to ask for Forum Non Conveniens dismissals for cases brought by Nicaraguans, as they no longer considered Nicaragua a “convenient” forum.<sup>31,32</sup>

In 2007, the first trial of a DBCP case brought by non-US citizens took place in California State Court. In *Tellez v. Dole*, a 12 person jury found Dole Food Company and Dow Chemical guilty and, in November, ordered them to pay over US\$5 million to six of the 12 Nicaraguan plaintiffs.<sup>33,34</sup> The corporations appealed the verdict, which was reduced in March 2008 by Judge Cheney, who dismissed punitive charges against Dole.<sup>35</sup> It was a historical decision opening the door to further litigation by affected Nicaraguans as well as giving hope to plaintiffs from other countries where DBCP had been used.

## Complications Arise

Following the verdict, *Tellez* counsel filed two new lawsuits in Los Angeles, known as *Mejia v. Dole* and *Rivera v. Dole*. On 23 April 2009, an unusual decision by Judge Chaney dismissed the *Mejia* and *Rivera* cases before they could be heard.<sup>36</sup> Cheney's decision responded to charges by defendant Dole that plaintiff attorneys and workers had conspired to obtain damages from the defending enterprises. The charges of fraud revolved around two issues that have been central to the Nicaraguan cases: work history and sterility or childlessness.

Without the existence of definitive employment records, plaintiffs' particular work histories have become a subject of evidence and courtroom argument rather than an agreed-upon matter. Documentation of employment can be difficult, because many banana workers were employed only indirectly by Dole, as the transnational used contractors or "independent producers" to minimize its own risk while maintaining control over most aspects of production, including pesticide use. Further, it is unclear whether Dole maintained employment records on these workers in the first place.<sup>37</sup> In her decision, Judge Chaney stated that the documentary evidence of banana farm operations, including employment records, between 1979 and 1981 had been destroyed by the Sandinista Revolution.<sup>36</sup> This charge, to our knowledge never before raised in the DBCP litigation, reinforces Cheney's characterization of Dole as a victim and Nicaragua as a corrupt and lawless place. However, it seems to be wrong. In fact, Dole operated in Nicaragua through October 1982, well into the Revolutionary period.<sup>38</sup> It was the Sandinista government of the revolutionary era which regularized the labor situation of the banana workers who, until September 1982, never contributed to social security although, arguably, Nicaraguan law had required such contributions since 1956.<sup>39</sup> Although Dole and the Republic of Nicaragua have faced each other in litigation in the US previously,<sup>38</sup> to our knowledge, no evidence of Sandinista destruction of Dole records of any kind has ever before been presented. In any case, Cheney's pronouncements on the supposed destruction of records by the Sandinistas is not based on balanced evidentiary record, as plaintiffs did not have the opportunity to respond to these contentions.

Another contentious topic throughout the DBCP litigation has been the reproductive status of men bringing sterility claims. There is no question that DBCP causes infertility and sterility in human males.<sup>40</sup> The primary question is one of degree. In some cases, affected men have retained or recovered some capacity to father children.<sup>41</sup> In addition, some men may have adopted children through formal or informal channels. The fact that some plaintiffs have children despite

their exposure to DBCP has become a central issue in much DBCP litigation.

Dole built on the absence of employment records and the alleged presence of children in some plaintiffs to construct a narrative in which plaintiffs and their attorneys had systematically lied about plaintiffs' work history and sterility status. The company presented Judge Chaney with allegations that around the time of the *Tellez* judgment, a Nicaraguan offered Dole evidence of a fraud committed by plaintiffs and their attorneys. That witness, called "X", did not appear before the judge, but Dole maintained that his allegations had prompted the company to hire investigators to question people in Nicaragua. Eventually, Dole argued before Judge Chaney that it had witnesses ready to offer irrefutable proof of a large-scale fraud.<sup>36,42-45</sup>

However, Dole maintained that the witnesses felt threatened by US plaintiff lawyer Dominguez and his Nicaraguan partner, Antonio Hernández, who had filed the *Tellez*, *Mejia*, and *Rivera* cases. Dole asked that the 27 witnesses' identities be protected, and the Judge agreed. In addition, she agreed to Dole's request that Dominguez and Hernández be barred from their depositions on the grounds that the witnesses feared physical harm or intimidation from Dominguez, Hernández, and plaintiffs in the cases. The only attorneys allowed to participate on the plaintiffs' side were those of Miller, Axline & Sawyer, the firm that had worked with Dominguez in the California cases, but they knew very little of what was approaching. Each of the anonymous depositions was noticed 10 days in advance, with a prohibition against revealing the name of the deponent and against contacting their partner, Dominguez, to obtain information.<sup>43,46</sup>

Chaney seemed to accept the story offered by Dole's witnesses, despite the fact that, in contravention of usual practice, no meaningful cross-examination of their story was allowed. After considering the witnesses' testimony, she found that evidence on work history and sterility status, including medical tests, affidavits, and birth certificates (documenting whether plaintiffs had children after their exposure) had been widely falsified. She also appeared to accept without reservation the anonymous witnesses' testimony that plaintiffs had not worked in banana plantations and were recruited by "captains" receiving money from lawyers, as well as claims that medical evidence was falsified, and that many plaintiffs had fathered children and as such were not sterile as their suit had claimed. She focused much of her critique on the law firms who sued the transnational companies under Law 364, including Nicaraguan and US lawyers with no part in the *Tellez*, *Mejia*, or *Rivera* cases, and even Nicaraguan judge Socorro Toruño.<sup>43</sup> One of the most notable aspects of her analysis is Judge Chaney's

characterization of Nicaragua in derogatory terms, as a “curious social ecosystem”, casting not only Law 364, but also certain Nicaraguan institutions in derisory, paternalistic terms.<sup>36</sup>

Judge Chaney dismissed *Mejia* and *Rivera*, finding that fraud had been committed by eight American and Nicaraguan law firms, plaintiffs, doctors, labs, and three Nicaraguan judges.<sup>36,47</sup> In addition, she contacted Judge Paul C. Huck, who presided over a case called *Osorio* in which plaintiffs sought enforcement of a Nicaraguan verdict in a Miami federal court. Subsequently, Judge Huck suspended his decision pending Chaney’s verdict. In October 2009, he decided not to enforce the Nicaraguan decision, stating reasons other than the fraud found by Chaney.<sup>48</sup>

Following the *Mejia* decision, Dole filed to have *Tellez* vacated. In response, the Court of Appeals ordered that the case be revisited. In July 2009, Judge Cheney had been elevated to the Court of Appeals, but Dole requested she be sent back to the Superior Court to preside over the latest developments in *Tellez*. Dole’s request was granted, and based largely on the evidence presented in *Mejia*, Cheney ruled that the jury decision in that case did not hold.<sup>49</sup>

### Other Evidence Emerges

Judge Cheney’s interpretation was limited by her decision to bar the attorneys accused of fraud from responding to the charges against them. By failing to consider multiple sides of the story, she missed important aspects of the case and made some factual errors. For example, she made statements about civil procedure, trial length, and bond requirements that did not reflect actual practice in Nicaragua.<sup>1,50</sup>

Aspects of a story told by three of the anonymous witnesses had a certain Hollywood scent. According to their testimony, approximately 20 people related to the lawsuits participated in a secret meeting in March 2003. The brain was Judge Toruño, who gathered the remaining “actors” to coordinate the Nicaraguan

trials and their outcomes. One issue they supposedly addressed was the medical evidence offered in trials. The judge supposedly established that 40% of the medical evidence should show the most severe type of infertility, which we will call A; a 30% should show infertility of a type B; and the remaining 30% should show other damages. Dole’s attorney said that this meeting was necessary since up to then, 100% of the medical testing revealed that workers had the maximum level of infertility (A) which was not credible.<sup>42</sup> Although the meeting was not immediately germane to the *Mejia* and *Rivera* cases she was considering, as neither had been filed in Nicaragua, Chaney pointed to this supposed meeting as a central element of the fraud she believed was being carried out in Nicaragua.<sup>43</sup>

Although none of the meeting participants were allowed to counteract the secret witness’ story in Judge Cheney’s court, evidence contrary to their testimony soon appeared. Some alleged participants have denied they were at such a meeting, including Judge Toruño and a laboratory analyst.<sup>51–54</sup> At least one of the attorneys named by the mysterious witnesses has been able to prove — passport in hand — that he was not in Nicaragua at the indicated date.<sup>55</sup>

In addition, plaintiff attorneys argued that other facts did not line up. One of the attorney groups supposedly present at the meeting to fix medical evidence had actually filed their medical evidence months earlier. More importantly, their principal case had been decided in November 2002 in Managua, in another judge’s court. Other supposed meeting participants either did not have cases with Judge Toruño, or had already submitted half of their medical evidence. The most obvious discrepancy was that when all the evidence was handed in, 4.4% of plaintiffs had infertility A, 22.9% had infertility B, and the remaining 73% claimed other damages.<sup>55</sup>

The meeting seems even more unlikely, because during those months the different plaintiffs’ groups were quarrelling with each other. Dominguez had sued Provost Umphrey in the USA.<sup>55</sup> And friction was so strong in May 2003 that during an attempted Central American gathering of DBCP victims, in Managua, many of those invited — one of the authors (VB) included — were surprised to see that disagreement was so strong that three groups could not sit together at the same table. In my book published in late 2007, I (VB) wrote that “The workers are divided particularly at the time when they should be more united than ever”.<sup>56</sup>

Additional evidence countering the version given by the secret witnesses in California emerged after Cheney’s decision. In Nicaragua, four witnesses in ongoing DBCP litigation maintained that they had

<sup>1</sup> For example, she said of Law 364, “The companion law that works with it, the civil procedure that goes with it, that requires, I believe, that the defendants answer within I think three days, pay a \$ 15 million approximate bond in order to walk into the courtroom.” However, in many of the Nicaraguan judgments, the defendants were relieved from posting the bond. In the *Osorio* case which was taken to Miami for enforcement, the judgment clearly indicates that the enterprises did not post a bond. Judge Chaney also stated in her bench ruling that the DBCP trials lasted 14 days, making it impossible to present an adequate defense. She thought that defendants only had 3 days to answer, 8 to produce evidence and that in only 3 days later the judgment was rendered. In fact, the *Osorio* litigation Dole made its first appearance on August 5, 2003 and filed its answer on April 24, 2005. It is true there are 3 days to answer, but that term kicks in after all other summonses are finalized which, in this case, took several months. The 8 days concerning evidence are to offer the proof, once offered the time to produce it is not limited. In *Osorio* evidence was filed during a term that exceeded two months, from May 16 to July 25, 2005. Dole never complained in Nicaragua about not having time to produce evidence. Further, on June 2, 2005, Dole requested that the court issue a decision. Finally, judgment was rendered after the evidentiary term closed, when the court had several months to ponder the evidence.

been part of the group of 27 protected witnesses.<sup>57</sup> Their willingness to do so openly in Nicaragua suggests that Dole's request for a protective order in the US was not based on any real fear or concern on the part of the witnesses. Of four who testified in Nicaragua, one admitted to participating in research missions with the Dole investigators. The pay was \$300 per day of work and this witness even made contact with some of the Los Angeles plaintiffs. She reported that she gave a deposition at the Crown Plaza Hotel, in Managua. Moments before going in, one of Dole's agents instructed her to speak against Dominguez and Hernandez. At the end, she said, she was given \$200 of \$7500 that Dole lawyers promised her.<sup>58</sup>

Other witnesses reported receiving money from the Dole investigators. One remembered that during his deposition he was asked to state the names of his co-workers in banana plantations and he mentioned those he remembered.<sup>59</sup> Another witness reported being told by the Dole agents to deny that a certain plaintiff had been a banana worker, and offered a US visa, accommodation and a significant sum of money. When he initially refused, a Dole agent reportedly told him that nobody would learn his identity "since everything had been arranged with the American judge who presided over the claims, who would issue a protection order". Afterwards, he says, he was coerced, intimidated, and threatened to obtain his declaration.<sup>60</sup> The last of the four witnesses said that one of Dole's agents had offered a visa and a house to another compliant witness who had requested 2 million dollars.<sup>61</sup> There is more testimony from people who report being offered money to deny that certain others had been banana workers. The Dole investigators told them about a protective order that would give them anonymity, although some of these people were not called as witnesses.<sup>62-64</sup>

The US film maker Jason Glaser, who is working on a movie about the case, also reported that he had located another one of the secret witnesses, who we will call "Adrian" here, who confessed that Dole paid him (Adrian) \$1500 per month and also paid for his lodging in a luxury hotel in Costa Rica.<sup>65</sup>

Other data suggest the full story has not been heard. Dole's attorneys maintained it was the appearance of a witness "X" at the time of the *Tellez* verdict which precipitated the investigation that revealed the alleged fraud.<sup>42,46</sup> However, the company had had intensive contacts with plaintiffs before "X" appeared in the scene. For example, one of the anonymous California witnesses who later testified in Nicaragua testified that he was contacted by Dole in 2005, which is 2 years before the appearance of "X".<sup>66</sup>

There exists judicial record of Dole contacting witnesses in early 2006. According to US law, it is illegal for a defendant corporation to contact a plaintiff without his or her attorney present. After attorneys complained about Dole's contact with plaintiffs in the DBCP litigation, the District Court of Jefferson County, Texas, issued a temporary injunction on 9 June 2006 which said:

*...[I]f the court does not issue the temporary restraining order, Plaintiff will be irreparably injured because Defendants, Dole Food Company, Inc., Michael Carter and James Teater through their officers, attorneys, investigators, agents, employees, representatives and others, under their direction or control, have willingly and intentionally interfered on purpose, with the contractual relationship between Plaintiff and Plaintiff's Nicaraguan clients.<sup>67</sup>*

The judge ordered them to refrain from "... interfering with contractual relationships and business relationships between Plaintiffs and their Nicaraguan clients ...". The injunction also prohibited Dole from making public statements encouraging banana workers to drop their lawsuits, repeal Law 364 or to perform any act against their attorneys.<sup>68</sup>

Dole's early contact with DBCP plaintiffs appears to have been geared toward weakening a vocal organization of DBCP-affected people, with the goal of avoiding litigation. The group, called the Asociación de Trabajadores y Ex-trabajadores Demandantes de Nema-gón (Association of Worker and Former Worker Nema-gón [Shell's brand name for DBCP] Plaintiffs, or ASOTRAEXDAN), was instrumental in organizing political pressure on the Nicaraguan National Assembly to pass Law 364. In 2005, a committee from this group negotiated with the Nicaraguan government, winning benefits for DBCP-affected people.<sup>69</sup> Months later, they reversed their strategy and began meeting with Dole.<sup>70</sup> On 28 June 2007, they signed a document together with Dole Executive Vice President and General Counsel Michael Carter, addressed to President Daniel Ortega.<sup>71</sup> One week later, they participated in a press conference with Humberto Hurtado of Dole Nicaragua.<sup>72</sup>

The turnaround in ASOTRAEXDAN perspective has generated controversy about the nature of the relationship between Dole and that group. One witness has declared in deposition that he met with Adrian and a Dole investigator who previously had offered him money for his testimony.<sup>73</sup> Ascertaining the veracity and timing of Dole's contact with Adrian and X could be instrumental in determining the merit of fraud charges and countercharges. This may prove difficult, because Adrian is currently being sought in

Nicaragua on unrelated charges and appears to have fled the country.<sup>66</sup>

While Dole has raised charges of corruption against the plaintiffs in this case, in other litigation at least one attorney retained by Dole has been sanctioned for unethical behavior. In late 2010, Andrea Neuman of the firm Gibson Dunn, was sanctioned for “blatant intimidation tactics” against an expert witness in a case involving claims brought by Ecuadorean farmers and indigenous people against Chevron for environmental damage caused by oil extraction.<sup>74</sup> Neuman also works for Dole on the DBCP litigation.<sup>42</sup>

Lawyer on both sides of the California litigation have filed complaints with the State Bar of California against their opponents. In February 2011, the State Bar closed a complaint against Dole defense counsel Scott Edelman, Rudy Perrino, and Charles Carter.<sup>75</sup> The bar stated that the information on which the complaint was based was the subject of a protective order, and that Cheney’s existing findings “would be difficult to overcome for purposes of our proceedings”. In addition, that complaint named a non-US citizen as the recipient of a bribe, and the State Bar determined that this person, for reasons not given, “could not be considered a reliable witness sufficient enough to carry the State Bar burden of proof”. In March, the bar notified Dominguez through his attorney that they had “completed the investigation of the allegations of professional misconduct and determined that this matter does not warrant further action”.<sup>76</sup> The bar’s primary obstacle to undertaking an investigation of the Dole attorneys — the secrecy of witness testimony — is the same obstacle that has prevented full access to justice for the Nicaraguan plaintiffs.

Also in March 2011, Judge Cheney issued a final, but redacted, decision in *Tellez* that exonerated two US lawyers, Mark Sparks and Benton Musselwhite, who had no role in *Tellez* but whose secret witness testimony had implicated in the alleged fraud in Nicaragua.<sup>49</sup> Cheney found that that secret testimony against the two lawyers was baseless, but she did not explain only parts of the testimony were unreliable, while the remainder retained its credibility in her eyes. Although neither of those lawyers had a direct role in the cases heard by Cheney, the stakes are high for their own litigation. As Sparks related in March, “[I]f the appellate court affirms Judge Chaney’s dismissal, this could have a ripple effect across thousands of cases under the direction of his own law firm, Provost Umphrey”.<sup>77</sup> While the appeal is still underway, the California developments have already appeared to have an impact on that litigation — Provost Umphrey settled all of its 33 Nicaragua- and 5 US-based cases against Dole in what Dole’s CEO called a “business-based solution” to [the] dispute.<sup>78</sup>

While the details of the settlement were not made public, it is reasonable to assume any payment by Dole was far less than the total claims of \$9 billion.<sup>79</sup>

As of late 2011, attorney Steve Condie was preparing an appeal of the order vacating the *Tellez* judgment, with arguments likely to be presented in late 2012 (personal communication).

## Conclusion

Judge Cheney’s dismissal of *Rivera* and *Mejia*, and her overturn of the *Tellez* jury decision, as well as the dismissal of the *Osorio* case in Florida constitute *de facto* victories for Dole. However, there is enough evidence casting doubt on Dole’s own actions in these cases to call into question the wisdom of these decisions. It is difficult to determine what is true among the many claims and counterclaims. For this reason, we believe that, although they may be complicated and expensive, it is essential that these cases be tried on the merits.

This is especially true because of these cases’ impact on other litigation — because of Cheney’s decision, it is unlikely that any other Nicaraguans will be able to bring DBCP-related cases in the United States; indeed her findings on that nation’s supposed “curious social ecosystem” are likely to be cited by any defendant facing claims from any Nicaraguan citizen. That would mean that an entire class of people could be denied access to justice on the grounds of testimony of anonymous individuals who were not cross-examined, and who in some cases have apparently admitted that their testimony was paid.

In addition, it appears that claiming fraud may become a regular strategy of corporate defendants facing claims by non-US citizens in US or their own national courts. In February 2011, Chevron denounced a verdict against it in Ecuador as “the product of fraud”.<sup>80</sup> The lawyers for Chevron are the same as those who represent Dole in the California DBCP litigation.<sup>81</sup>

Given uncertainties and open questions that remain, these cases should not have been dismissed on the basis of undisclosed and uncountered testimony. Moving forward, the appellate court considering *Tellez* should reject the notion that secret evidence can form a legitimate basis to reverse a decision duly made by a California jury. All courts hearing DBCP cases should ensure that all evidence is heard and refuse to allow secrecy to interfere with the administration of justice.

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