B233497

IN THE

COURT OF APPEAL

OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION 2

JOSE ANTONIO ROJAS LAGUNA, et al.,

Plaintiffs and Appellants,

vs.

DOLE FOOD COMPANY, INC., et al.,

Defendants and Respondents.

APPELLANTS' OPENING BRIEF

Appeal from the Judgment of the Superior Court of the State of California
in and for the County of Los Angeles, Case No. BC312852
The Hon. Victoria Chaney, Presiding

REDACTED VERSION FOR PUBLIC FILING

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I. INTRODUCTION

This is an appeal from a post-judgment order vacating a judgment issued pursuant to a jury's verdict in favor of six reproductively sterile Nicaraguan men who asserted that their condition was caused by exposure to a harmful chemical known as DBCP manufactured in the 1970s by The Dow Chemical Company and used as a pesticide on banana farms by corporate predecessors of Dole Food Company, Inc. until 1980. The order which vacated the judgment was issued in response to a petition for writ of coram vobis filed in this court in case B216182, based primarily on evidence obtained pursuant to an extraordinary series of discovery orders issued in two other cases, *Mejia v. Dole* (LASC BC340049) and *Rivera v. Dole* (LASC BC379820.) A related appeal, B207718, is pending from the underlying judgment in this case, but is currently stayed.

The factual history of this case spans more than 40 years. Dozens of individuals are cited herein - parties, witnesses, lawyers, investigators and others - each of whom played a significant role in the unfolding of the unique legal process which led to the almost unprecedented order vacating a civil judgment by means of a writ of coram vobis. The procedural history directly leading to this appeal covers seven years, three trial court actions and two previous writ petition in this court. The court proceedings leading to the jury verdict and initial judgment in this case, known below as *Tellez v. Dole*

(BC312852) involved four months of trial. The post-judgment coram vobis process took 21 months to unfold. Dozens of hearings were held and hundreds of volumes of evidence and transcripts have been generated, both in this case and in the two cases which were used to gather the evidence which was relied upon as the basis for the ruling vacating the judgment herein. The vast majority of that evidence has little or nothing to do with appellants and their underlying claims, but relates to other Nicaraguan plaintiffs' DBCP claims in other cases.

Due to the magnitude of facts which must be correlated and assessed to properly evaluate the legal issues presented in this appeal this brief is divided into two sections. This first introductory section begins with an identification of the primary individuals and record components involved and then sets forth a *brief* outline of the salient factual events and legal issues so as to provide the court with a framework within which to view the more detailed factual recitation and full legal arguments which follow.

The second part of the brief contains a full recitation of the relevant facts and procedures with the detailed citation to the supporting evidence required for this court's thorough review, followed by legal arguments supporting appellant's case. For conciseness, some of the factual statements in this first section contain citations to the detailed portion of the brief where the supporting evidence is cited in detail rather than direct citation to the mass of supporting evidence.

A. IDENTIFICATION OF PARTIES AND OTHER KEY INDIVIDUALS

1. Defendants

Dole: Defendants Dole Food Company, Inc., Dole Fresh Fruit Company, Standard Fruit Company, and Standard Fruit and Steamship Company are all now related corporations which were jointly represented and between which no distinction is required in this brief. In the time frame relevant to the underlying case the corporate defendant was known as Standard Fruit, and another division was Castle & Cooke, but for simplicity these defendants and their subsidiaries are all referred to herein simply as "Dole."

Counsel: Dole was represented at trial by Jones, Day. (13RT 688) During the post-trial period in late 2007 the firm of Gibson, Dunn and Crutcher became associated as counsel and in 2008 replaced Jones, Day. (Ex. 28, p. 673, Ex. 4, p.109) In addition, Dole's Vice President and Chief General Counsel, C. Michael Carter, attended and participated in a significant way in many of the hearings and events referred to below, as did Dole's in-house director of litigation from 2007 through 2010, Rudy Perrino.

Field agents: Dole's investigators in Nicaragua were Latin American agents employed by a Texas-based firm, Investigative Research Inc. (IRI) (Ex. 188, p. 6923; Ex. 41, p. 983, Ex. 208, p. 7621, Ex. 230, p. 8268) Key IRI

employees whose activities in Nicaragua on behalf of Dole are discussed in this brief are field agents Luis Madrigal from Costa Rica and Francisco Valadez from Mexico, as well as IRI's American CEO, Oliver Douglas Beard. IRI's agents prepared "Memoranda of Interview," referred to below as "MOIs" describing what some witnesses told them.

Dow: The Dow Chemical Company is the other defendant still active in this case, and is referred to hereafter as "Dow." Dow manufactured DBCP until it was found to cause reproductive sterility in men in 1977. When Dole refused to comply with Dow's attempt to recall the chemical that year Dow negotiated an indemnification agreement with Dole as a condition of supplying DBCP to Dole. (See section II.A.3, below) Accordingly, Dow played a minor role in the post-trial litigation. Dow was represented in the trial court by Michael Brem of Schirrmeister Diaz-Arrastia Brem LLP of Houston, Texas and California counsel Richard Poulson.

AMVAC: The final defendant in the case was AMVAC Chemical Corporation. AMVAC settled with the plaintiffs and is not involved in this appeal. (Ex. 37, p. 808-809)

2. Plaintiffs in DBCP cases filed in California.

The term "California DBCP plaintiffs" as used herein refers collectively

to the following three groups of Nicaraguan plaintiffs who filed DBCP-related actions in this state against Dole and Dow:

Appellants. The trial of this action saw twelve Nicaraguan plaintiffs bringing claims against the defendants alleging reproductive injuries due to exposure to DBCP. Six plaintiffs won jury verdicts which were later reduced to judgments. (Ex. 15) Those six men are the appellants herein, and except as to discussion of their individual cases are referred to collectively as "appellants."

Unsuccessful plaintiffs in this action. The six plaintiffs who went to trial with appellants but did not obtain a verdict in their favor are referred to hereafter as "the unsuccessful plaintiffs." They currently have no American counsel and have not appeared in this appeal.

***Mejia* plaintiffs.** A substantial amount of attention and evidence was devoted to various plaintiffs in the other two California DBCP cases with Nicaraguan plaintiffs, *Mejia v. Dole* (*Mejia)* and *Rivera v. Dole* (*Rivera).* The two cases, which were handled jointly in the trial court, are referred to collectively hereafter as "*Mejia."* The plaintiffs in those cases (which somewhat confusingly include Mr. Tellez, the original eponymous plaintiff in this action whose case was later transferred to *Mejia)* are referred to as "the *Mejia* plaintiffs."

California plaintiffs' counsel: The California DBCP plaintiffs were represented by the Sacramento toxic tort firm of Miller, Axline and Sawyer. That firm is referred to as "MAS" hereafter. Lead counsel Duane Miller had previous experience in DBCP litigation involving Californians. (e.g. *Miranda v. Shell Oil Co.* (1993) 17 Cal. App. 4th 1651) But MAS had no contacts, personal knowledge or experience in Central America and none of the four attorneys at that firm spoke Spanish. (Ex 1, p. 11, Ex. 7, 227, 232) MAS' co-counsel was Juan Dominguez, a Spanish-speaking lawyer who ran a high-volume personal injury practice in Los Angeles with advertisements directed at Spanish-speaking clients and who first developed contacts in Nicaragua in 2002. (Ex. 64, p. 2707) Appellants were represented in the in the coram vobis hearings in the Superior Court and here on appeal by current counsel Steve Condie.

3. American lawyers representing plaintiffs in DBCP cases filed in Nicaragua.

In addition to the three referenced Nicaraguan DBCP cases which were filed in the Los Angeles Superior Court, more than 10,000 plaintiffs filed claims in Nicaraguan courts alleging harm from exposure to DBCP on Dole-affiliated banana farms. (Ex. 328, p. 12333) These plaintiffs are referred to herein as the "Nicaraguan DBCP claimants." Allegations regarding the activities of American and Nicaraguan law firms representing DBCP claimants

in Nicaraguan cases were central to most of the issues which arose in the proceedings under review here. The American counsel involved in Nicaraguan DBCP litigation were:

Juan Dominguez was responsible for a number of cases filed in Nicaraguan courts with approximately 4,000 claimants. (Ex 328, p. 12332) (MAS, however, was not involved in the Nicaraguan litigation.)

Provost*Umphrey. This law firm, referred to hereafter simply as "Provost," is based in Beaumont, Texas. Provost and an associated attorney from Houston, Benton Musselwhite, were responsible for approximately 4,000 Nicaraguan plaintiffs in DBCP cases filed in Nicaraguan courts--4466 according to Dole (Ex. 328, p. 12332) or 3709 according to Provost. (Plaintiff's Ex. 23, p. 3544, 3545) They did not file any DBCP cases involving Nicaraguan plaintiffs in California courts, but they did bring an action in federal court in Florida to enforce its first Nicaraguan judgments in a case called *Osorio v. Dole*. The Provost attorney most directly involved in events in this case was Mark Sparks. (Ex 328, p. 12332) Provost's investigator was a young American documentary film maker, Jason Glaser, who agreed to gather information for Provost as an "undercover" investigator after Provost's investigator in Central America died in 2007. Mr. Glaser testified in the coram vobis hearings. (See section F.45, below) The chief Nicaraguan investigator working with Glaser was Jorge Madriz. (CV10 1700, ex. 348 p.12850)

Girardi/Lack. California attorneys Thomas Girardi and Walter Lack were responsible for another 4,000 or so plaintiffs with cases in Nicaraguan courts. (Ex 328, p. 12333)

Carlos Gomez represented fewer than 1,000 DBCP claimants in Nicaragua. (Ex 328, p. 12333)

4. Nicaraguan lawyers involved in Nicaraguan DBCP litigation.

Secret testimony setting forth allegations about the activities of the Nicaraguan plaintiffs' lawyers who handled DBCP cases in Nicaraguan courts working in conjunction with (and financed by) the American lawyers listed above constituted a primary basis for the petition upon which the issuance of the coram vobis writ was based. (See Petition, paragraphs 43-59,2 AA 225 et seq) As relevant herein, those Nicaraguan lawyers were:

Antonio Hernandez Ordeñana, operating the law office known as "Oficina Legal Para Los Bananeros" or **OLPLB** in Chinandega, Nicaragua, who worked in conjunction with Juan Dominguez.

Marta Cortez and **Antonio Zavala,** who worked with Provost in Chinandega, Nicaragua, and **Jacinto Obregon**, who worked with Provost from an office in Managua, Nicaragua. (8CV 423, Plaintiff's Ex. 1.3.a, p. 63)

Walter Gutierrez, who worked with Lack and Girardi. (Ex. 213, p. 7743)

5. "The Alliance" A group of Nicaraguan non-lawyers met with attorneys and executives from Dole starting in 2006, culminating in a joint letter to the Nicaraguan government in which they set forth the terms they had agreed to with regard to setting up a non-judicial DBCP claims payment program as an alternative to the litigation being pursued by the Nicaraguan and American lawyers. The Nicaraguans who met with Dole's Vice President and Chief General Counsel C. Michael Carter [redacted] are Victorino Espinales, president of an organization called ASOTRAEXDAN, Jorge Sanchez, Vice President of ASOTRAEXDAN, Dennis Zapata, president of an organization called AOBON, and Melba Proveda, [redacted] and Manuel Hernandez[1], whose affiliation was listed as "Alianza Nacional." Ex. 266, p. 9461) As the group of Nicaraguans did not appear to have a joint name, in the return filed to defendant's petitions appellants advised the court that those individuals and their supporters would be referred to collectively as "The Alliance." (Amended Return, par. 11, 3 AA 538)

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1 [redacted]

B. THE RECORD ON APPEAL AND ITS CITATION HEREIN.

Trial transcript. Although this appeal deals most directly with proceedings which took place after the trial of this case, references to the trial (as well as pre-trial and post-trial hearings) occurred throughout the proceedings from which this appeal is taken, and also inform the substance of the events at issue in this appeal. Appellants have filed a separate request for judicial notice of the reporter's transcript of the trial and associated proceedings which formed the basis of the judgment which was vacated in the coram vobis ruling. That transcript was filed with this court in case B207718. The testimony in those 60 volumes is cited herein as "X RT Y" with X representing the volume number and Y the page number.

Trial Exhibits. Exhibits identified and/or admitted at trial are cited herein as "[parties] Trial Exhibit X"

Appellants' appendix. Appellants have filed herewith an appellants' appendix of documents filed in this action pursuant to Rule 8.124. The documents in the appendix are cited as "X AA Y" Note: on a number of occasions transcripts and exhibits found elsewhere in the record were resubmitted in support of various motions. Duplicates of documents already in the record have generally not been recopied in the appellants' appendix.

Coram Vobis Transcripts. The reporter's transcripts of the proceedings held in connection with the hearings held in the Superior Court on the order to show cause issued by this court in action B216182 which led to the order on appeal are cited herein as "X CV Y." Unfortunately, the pagination of the electronic version of the transcripts supplied by the reporters is not always identical to the pagination of the paper versions - frequently the page numbering is off by one page. Citations herein are to the page numbers in the digital version of the transcripts when they differ.

Coram Vobis Exhibits. In conjunction with the petition for writ of coram vobis filed by Dole and joined by Dow herein defendants and appellants have filed hundreds of exhibits. Defendants initially identified their exhibits as filed with the petition by letter - Exhibit A through Exhibit SSSS, with each exhibit bound in volumes behind tabs which were numbered 1 through 97. As the procedure unfolded the lettering convention was discontinued, and defendants' exhibits ended up simply being numbered, 1 through 408, with consecutive pagination throughout, pages 1 through 14,614, plus video recordings. Before defendants converted from letters to numbers, however, appellants had already begun numbering their coram vobis exhibits, which eventually comprised plaintiff's exhibits 1 though 27. To avoid confusion appellants refer to defendant's coram vobis proceeding exhibits herein simply as "Ex. X, p. Y" as was done below. Appellant's coram vobis exhibits are referred to herein as "Plaintiff's Ex. X, p. Y." (Plaintiff's exhibits were not

page-numbered consecutively when filed, but in the electronic collection of record evidence filed with appellant's brief they have had page numbers digitally added at the bottom to indicate "*Plaintiff's coram vobis exhibits page No.*" [1 through 3,682]) Exhibits identified and admitted during the coram vobis hearings were numbered consecutively at each hearing and are referred to as "CV Court's exhibit [date] X."

Additional documents. Appellants have filed a separate request for judicial notice, with the documents in question (other than the transcript of the trial of this case) attached thereto and sequentially numbered. Those documents are referred to herein as "RJN Y"

Reference to individual with dual surnames. In Nicaragua it is common for a person to have four names, the last two of which are both surnames. Generally the third name is the surname by which the person is addressed in "short form." (10CV 1676)

Antonio Hernandez Ordeñana of the OLPLB was frequently referred to by court and counsel below by his second surname, Ordeñana, but witnesses called him by his first surname, Hernandez. Accordingly, he is referred to as "Hernandez Ordeñana" hereafter. Victorino de Jesus Espinales Reyes, the leader of the group of Nicaraguans who entered into a contract with Dole, was referred to by his first name, Victorino, by multiple witnesses. Accordingly,

he is referred to as either "Victorino Espinales" or simply "Victorino" hereafter. Other Latin Americans with four names are identified by their third name when referred to by a single surname in this brief.

C. BRIEF FACTUAL OUTLINE.

1. 1970 - 1982: Dole's banana farms in Nicaragua and use of the harmful pesticide DBCP.

In 1970 Dole began farming bananas in Nicaragua. (See section A.1. below) In 1973 Dole began using the pesticide DBCP on its banana farms, and realized a dramatic increase in productivity and associated profits. (See section A.2 below) In 1977 DBCP was discovered to have caused reproductive infertility among male employees at the factories which produced DBCP in California, and DBCP manufacturer Dow attempted to recall all existing supplies of the chemical. (Plaintiff's trial Ex. 6) Dole refused to return its stocks of DBCP and threatened Dow with a breach of contract claim if Dow failed to continue to provide additional DBCP to Dole. (Plaintiff's trial Ex. 7) The parties entered into an agreement whereby Dole indemnified Dow against claims arising from the use of DBCP. (Plaintiff's trial Ex. 122) Dole continued to use DBCP on its banana farms in Nicaragua until 1980. (Plaintiff's trial Ex. 57) In 1982 Dole discontinued banana farming operations in Nicaragua. (See section A.4 below)

2. 1982 - 2011 DBCP litigation in the United States and Nicaragua.

Over the next 20 years Nicaraguans who had worked on Dole's banana farms during the DBCP spraying period attempted to bring claims for their injuries associated with exposure to the chemical, but were stymied by legal rulings which left them with no forum in which to effectively pursue their claims. (Section II.B.5, below) In 2000-2001 the Nicaraguan legislature enacted "Law 364" which provided a framework for Nicaraguans to seek compensation for DBCP related injuries through a specialized court procedure in Nicaragua. (Section II.B.6, below) Over the next several years thousands of DBCP cases were filed in Nicaraguan courts. (Ex. 384) In 2004 the California DBCP plaintiffs initiated legal actions in our courts, starting with this case. (Ex. 20, p. 530)

Numerous Nicaraguan cases went to trial in the courts of that country with the first judgments from those cases being issued in "Case 214" - known in this country as *Osorio v. Dole* (8CV 458) and "Case 215", known here as *Herrera Rios v. Dole*. This case - *Tellez v. Dole* - was the first case to go to trial in California courts, with the trial commencing in July 2007 and culminating in a jury verdict in November 2007. (54 RT 8682) After the verdict in this case was announced a secret witness was disclosed to the Court by Dole in connection with a new trial motion as to some of the prevailing plaintiffs - Witness X. Dole represented that Witness X would provide new

information which would justify the ordering of a new trial, but Witness X refused to testify as to his alleged new evidence and the new trial motion was denied. (Ex. 35, p. 800) Other post-verdict motions reduced the overall awards which were finally engrossed in the judgment, which was issued October 8, 2008. (Ex 15)

At the end of September 2008 Dole filed sealed declarations in support of a discovery motion in *Mejia,* seeking to secretly procure and present evidence of fraudulent claims made by the *Mejia* plaintiffs. (Ex. 4, 5) Dole sought and was granted leave to take depositions of witnesses in Central America with their identities and testimony disclosed only to the non-Spanish speaking lawyers at MAS, with an order preventing MAS from disclosing that information to anyone, a restriction which prevented them from undertaking any effective investigation into the witnesses, their veracity, or the stories they testified to. (Ex. 1, p, 17, 19) Over MAS' objection and unsuccessful writ petition (B211224) the "John Doe" depositions went forward over the next five months. (See Exhibits 54-70, 136, 236)

Based on the testimony of the secret witnesses the secrecy order was reaffirmed and extended, and in February 2009 the trial court stripped Mr. Dominguez of his rights and privileges as trial counsel under the "crime/fraud" doctrine based on evidence which he was never allowed to see. (Ex 213, p. 7759) Shortly thereafter he was dismissed by his clients. (See section II.D.27,

below) MAS attempted to dismiss the *Mejia* and *Rivera* cases or to be allowed to withdraw as counsel; the trial court not only denied both motions but threatened to find MAS in contempt of court for failing to act swiftly and aggressively enough against their own clients. (See section II.D.29, below)

In April 2008 the trial court held a hearing presenting testimony from Dole's agents and secret witnesses. MAS offered no opposition, argument or resistance. (See section II.B.30, below) Based on the uncontested evidence thus displayed, the trial court made a sweeping set of factual findings, declaring that a vast conspiracy existed among **all** of the plaintiff's attorneys[2], laboratory operators, local Nicaraguan judges and various supporting players opposed to Dole in Nicaraguan DBCP litigation. The court likened the conspiracy to a mythical Greek monster - a "chimera." (Ex. 8, p. 334-338) Based on those findings the court dismissed the *Mejia* and *Rivera* cases.

Dole and Dow then sought post-judgment writs of coram vobis in this court based on the uncontested evidence put on display in *Mejia.* (See section II.E.34, below) MAS' repeated requests to be allowed to withdraw from the Nicaraguan cases were finally granted and the petitions were reviewed by this court without opposition. (See section II.E. 35) In July 2009 this court issued an order finding that a prima facie case for granting post-judgment relief under

[2]Other than the now-compliant MAS.

coram vobis was set forth in the petitions, and directed the trial court to issue an order to show cause why this case should not be dismissed. (RJN 2-3) Briefing in the pending appeals in this case was stayed pending the outcome of that process. (See section E. 35, below)

New counsel appeared to represent appellants in the trial court proceedings initiated pursuant to this court's ruling on the unopposed coram vobis petition in August 2009. The opposition raised two issues: first, the failure of the evidence proffered by the moving parties to satisfy the basic requirements of coram vobis, and second, the propriety of utilizing the secret evidence which had been procured pursuant to a court order which prevented effective investigation into and bona fide adversarial testing of its truth. (See section II.E.36, below) Over the next nine months a series of preliminary hearings were held, during which the trial court continued to limit and deny appellant's requests for leave to undertake effective investigation into the secret witnesses, their testimony, and the money given to the secret witnesses by Dole. (See generally section E, below)

Factual show cause hearings were held in May and July 2010. At the end of those hearings the trial court issued an oral ruling from which many of the findings made in 2009 were deleted - including the dramatic findings describing the "chimera" conspiracy - and in March 2011 issued a written ruling which deleted additional findings it had made orally just eight months

before. (See section II.F.48, below) Settling on a much more modest set of specific factual findings than those articulated the previous year and presented to this court in the coram vobis petitions the trial court nonetheless ordered that the judgment won by appellants in their four month jury trial be vacated, finding that sufficient evidence had been presented to meet the standard for granting a statutory new trial motion. (7 AA 1396) Appellants filed this appeal from that order. (7 AA 1404)

D. BRIEF LEGAL OUTLINE.

1. The primary basis for the trial court's decision to vacate the judgment in this case was its finding that a massive fraud had occurred in Nicaragua in connection with the thousands of DBCP cases filed in that country which infected the judgment won by appellants; a "broad conspiracy that permeates all DBCP litigation arising from Nicaragua." (Ex. 98, p. 4553) Note: the vast majority of the evidence that will be discussed in the coming pages has nothing to do with the six appellants or their individual cases which were tried here in California. The essential ruling of the trial court was that one of appellant's California lawyers, Juan Dominguez, and his affiliated attorney in Nicaragua, Antonio Hernandez Ordeñana, were guilty of fraud in connection with thousands of cases brought in Nicaragua under Nicaraguan law, and that that finding justifies vacating the judgment entered pursuant to jury verdict in this case which was tried by MAS.

Throughout the fact-finding and decision-making process leading to the ruling under review in this appeal the court was operating under the assumption that that the thousands of Nicaraguan claims were all brought by men claiming to be sterile as a result of exposure to DBCP (9CV 1231) and that: "The total number of plaintiffs claiming to have been injured while working on a Nicaraguan banana farm formerly associated with Dole is many times the total number of people who worked on the farms during the entire time DBCP was used on such farms." (Ex. 98, p. 4651)

Both assumptions were wrong. The court was confused about both the number of employees who worked on Dole's farms over the entire time period and the fact that Nicaraguan law entitled anyone who lived or worked on a Dole banana farm between 1973 and 1980 (including both men and women who worked there and their spouses and children who lived with them in on-site housing) to file a claim for a variety of conditions linked to that chemical, including kidney disease, cancer, and psychological conditions. The number of people who lived and worked on Dole's banana farms and were legally entitled to file claims in Nicaragua is actually greater than the number of plaintiffs who filed claims in Nicaragua and the United States combined. But that fact was never actually litigated until July 2010 the trial court did not recognize the fundamentally erroneous premise it had been laboring under until after it had supervised an extraordinary fact-finding process over a two-year period and after it had announced its decision to vacate the judgment in

this case. (See sections II.F.41.a and II.F.48.a., below)

Flowing from its fundamental assumption that there were "many times" as many false claims as potentially valid ones in Nicaragua (and, necessarily, a massive conspiracy as would necessarily be required to recruit and train the assumed thousands of false claimants) the trial court crafted a procedure which produced the evidence relied on for the court's ultimate rulings. That procedure relied on secret testimony shielded from investigation by a court order which was expressly designed to encourage testimony which would support defendants claims of fraud. (2CV 20-21) What followed was a series of rulings which prevented any effective adversarial testing of those claims, which taken as a whole constituted an abuse of discretion and resulted in a procedure which failed to meet minimum standards of due process of law.

The "proof of the pudding" of the failure of the procedure overseen by the trial court as a reliable fact-finding process is the fact that numerous material findings which were declared to have been proven by clear and convincing proof in *Mejia* in 2009 were discarded after being proved false when exposed to even minimal public scrutiny after that decision was announced. (See section III A. 1, below) And Dole's "most important"John Doe witness, who was seen as a brave, credible, highly educated whistle blower by the trial court and whose testimony (key points of which were corroborated by two confederates) was relied upon and cited dozens of times

as a basis for numerous court rulings and findings which ultimately led to the ruling at issue in this appeal -- is actually a notorious Nicaraguan con man who lied about virtually everything he testified about. John Doe 17 fabricated stories designed to frame all American and Nicaraguan plaintiffs' lawyers (and Nicaraguan judges as well) in a mythical "chimera" conspiracy, the falsity of which remained hidden until portions of his fabricated testimony were made public after the trial court had ruled in *Mejia*. (See section II.D.22, below) That key witness is [redacted] whose [redacted] has been aided and funded by Dole, which has given him tens of thousands of dollars in cash and other consideration since he testified - with the approval of the American trial court in this case. (See sections II.E.38 and 39, below.)

The remainder of the secret evidence relied upon by the trial court to vacate the final judgment remains cloaked in secrecy - by court order - to the point that appellants cannot even check to see if the "John Doe" witnesses are who they claimed to be, or if any part of their stories can be verified or disproved. The restrictions on appellant's ability to defend against the claims brought in the secret proceedings emasculated the adversarial fact-finding process of our court system and are anathema to basic American principles of due process of law.

2. This case fails to meet the specific prerequisites for the issuance of

the writ of coram vobis. The trial court applied altered legal standards in order to circumvent requirements the case does not meet:

• The claims and evidence relied upon in support of the petition were all known to defendants before the end of the trial in this case, but they elected not to bring them to the attention of the court until after they lost.

•Every document cited as support for the writ was in Dole's possession before trial.

•Every significant witness was interviewed by Dole's agents before trial. [redacted] witness [redacted] United States [redacted] [redacted] not called to testify.

•The evidence fails to meet the coram vobis standard of compelling a different outcome in *this case*. As to some appellants the trial judge improperly reweighed evidence the jury had already considered in making its findings in order to justify vacating the judgment. (See section III.B, below) As to one appellant the trial court has acknowledged that the jury's verdict was "probably" correct. (12CV 2424)

3. The strategy effectively implemented by Dole and its counsel has been to subvert the fundamental functioning of the adversarial system of law by attacking and neutralizing any lawyer who represents Dole's opponents and vilifying any court, judge, lawyer or procedure in any foreign jurisdiction which doesn't help its cause. As Dole's "most important" witness put it, "their first action is to get rid of the law firms, because they don't want

lawyers." (Ex. 199, p. 14198) As Dole's counsel put it more subtly in a press release: "We work with our clients to develop not just defensive tactics, but rather *an affirmative strategy to ultimately end the litigation.*" (RJN 106) But "ending litigation" by neutralizing their opponent's lawyers, framing judges who don't rule as the client might like, and misrepresenting foreign legal procedures which are unfamiliar to American judges to make them appear to be "unfair" to American corporate defendants doesn't make conflict disappear, it just deprives the corporation's opponents the ability to seek recourse through legal means. Our courts should refrain from rewarding tactics which are disparaging and disrespectful towards foreign judges and legal systems and destructive to the principle that people should have access to a legal forum - with representation by counsel - to resolve their conflicts.

The trial which resulted in a judgment in favor of the six appellants herein was as hard-fought and fair as any in our courts. Throwing out that judgment and announcing that no Nicaraguan can sue any American company for injuries caused by its reckless and despicable business practices - not in America, not in Nicaragua, not *anywhere* - simply leaves that dispute to fester as it has for the past 30 years. The use of the most extraordinary of extraordinary writs, in a case which doesn't come close to meeting the standards for that writ, based on evidence which to the extent it has been exposed to bona fide adversarial testing has proved to be lies, would be a bad precedent for this court to set.

II. FACTUAL AND PROCEDURAL HISTORY OF THE CASE

A. The factual background of the underlying litigation.

As noted above, the underlying claims in this case arise from the application of the chemical DBCP to banana fields in Nicaragua.

1. Dole farms bananas in Nicaragua, 1970-1982

In 1970, Dole began farming bananas in Nicaragua. Dole operated through partnerships with wealthy Nicaraguan landowners, but controlled all aspects of the cultivation, harvesting, packaging and sale of the fruit. (*Republic of Nicaragua v. Standard Fruit Co.* (9th Circuit 1991) 937 F. 2d 469, 471-472) Dole's man in charge of operations in Nicaragua was David de Lorenzo, a young executive who would rise within the company. At the time he testified in the trial in this case he was the president and chief operating officer of Dole Food Company, Inc. (22 RT 2562)

Dole's banana farming operations in Nicaragua in the 1970's comprised 12 or 13 farms encompassing approximately 7,000 acres, with about 3,500 employees working at various jobs at any given time. (22 RT 2564) Many employees lived on the farms along with their families; some farms had on-site schools for the children of the workers. (Ex. 60, p. 2086) Based on the

employee turnover estimate provided by Dole's expert witness, it is likely that a total of between 15,000 and 20,000 men, women and children worked and/or lived on Dole's Nicaraguan banana farms in the period between 1973 and 1980 when DBCP was being applied to them. (Plaintiff's Ex. 24, p. 3566, 3567)

One banana farm which was central to much of the testimony in the coram vobis proceeding was called Candelaria. At Candelaria, the routine field workers responsible for weeding, harvesting, etc. were divided into three groups, each of which had its own manager and foreman. (Ex. 65, p. 2109) One foreman, Filimon Herrera, oversaw the irrigation crews during the dry season. (Ex. 65, p. 2089, 2107) In addition, there were workers who packed the fruit, clerical personnel, various levels of on-site managers, mechanics, etc. and worker's spouses and children who lived in worker's housing and attended the on-site school. (Ex. 137, p. 5994-96, 5999)

Irrigation of the Nicaraguan banana fields was only required during the dry season - roughly November through April. (Ex. 65, p. 2093, Ex. 54, p. 1256, 27 RT 3539) Confusingly, this season is referred to as "Summer" although Nicaragua is in the northern hemisphere. (21 RT 2367-2368) During the dry season water guns referred to "sprinklers" were set up on bases in the fields to perform essentially the same function as a rotary lawn sprinkler, only on a much larger scale. (Ex 65, p. 2100) The rotating heads could shoot the irrigation water hundreds of feet through the air, covering large areas with

relatively few devices.

2. 1973 - 1980: DBCP is applied to Dole's banana farms in Nicaragua and generates dramatic increases in crop yields.

In the 1940's a pesticide called DBCP was developed in the United States. In the ensuing decades it was marketed as a soil fumigant to kill nematodes - microscopic worms which live in the soil and inhibit the growth of plants. (See general discussion at 4 Int'l Bus. L. Rev 130, 132, Plaintiff's Ex. 15.20, p. 2237, 2239) DBCP was known in Nicaragua by the trade names of Nemagon and Fumazone. (21 RT 2543) The use of DBCP increased banana crop yields by 25 to 30%. (20 RT 2193) Other herbicides and pesticides typically had to be laboriously applied to each plant by workers carrying tanks on their backs (e.g. backpack application of Gramaxone herbicide described at 27RT 3634) DBCP was applied by injecting it into the water being sprayed out of the irrigating water guns at night, allowing it to rain down freely on the plants and soil. (20 RT 2115, 2132; 21 RT 2464-66) Workers entered the fields during the day following the night time application of the pesticide to work on the plants and still-wet soil without the protective clothing or gear recommended by the manufacturer. (Plaintiff's trial Ex. 14, Ex. 54, p. 1343) Dole began applying DBCP to its banana farms in 1973 and continued that practice until 1980. (Plaintiff's Trial Ex 57, Def. Trial Ex. 1042, 1056)

3. 1977: DBCP is found to cause reproductive sterility in men but Dole demands that Dow continue to supply it for use on its banana farms outside the United States

In 1977 workers in a California DBCP factory discovered that they shared an inability to father children and testing revealed that exposure to DBCP had destroyed or damaged their ability to produce sperm. (22 RT 2622, Plaintiff's trial Exhibit 5, Plaintiff's Ex. 15.16, p. 2145) Dow, which manufactured DBCP, sent out notices to its clients, notifying them of the danger and directing them to return any unused stocks of DBCP to Dow for safe disposal. (Plaintiff's trial Ex. 6) Dole *refused to comply*, and threatened Dow with a breach of contract claim if Dow failed to continue to supply the chemical under the parties' existing contract. (22 RT 2626, 2633 Plaintiff's trial Ex. 7)

The impasse was resolved by Dole agreeing to indemnify Dow against any damages which might result from the continued use of DBCP. (Plaintiff's trial Ex. 9, 122) In December 1977 Dow provided specific safety instructions for the use of the chemical in light of the discovery of its toxicity. Dole elected not to follow those safety rules in Nicaragua. (20 RT 2128-29, Plaintiff's trial Ex. 14)

In 1978 Dole was notified that a test of ten banana workers in Costa Rica had found that all of them had been rendered sterile by exposure to

DBCP. (22 RT 2585, 2601) A number of other studies confirmed that DBCP can causes certain types of male infertility. (Plaintiff's Ex. 15.16, p. 2144-45) Nonetheless, Dole sought and obtained additional quantities of the DBCP and continued to use it on its banana farms in Nicaragua until 1980 at the rate of tens of thousands of gallons per year. (22 RT 2596, Plaintiff's Trial Ex. 57, Plaintiff's Trial Ex. 73, 664)

4. 1979 - 1982: Regime change in Nicaragua; three years later Dole discontinues banana farming in Nicaragua due to a commercial dispute with the new government.

In July 1979, the Somoza family regime which had ruled Nicaragua since the 1930's was deposed by the Sandinistas[3]. Dole continued operations - including the application of DBCP to the banana fields - up to the end of 1980. (Plaintiff's Trial Exhibit 57) Dole briefly suspended operations in Nicaragua in December 1980 but in January 1981 resumed business and continued farming bananas in that country for 22 months until Dole was unable to finalize the terms of its agreement with the Nicaraguan government. Dole ultimately discontinued its banana farming activity in Nicaragua in October, 1982. (*Republic of Nicaragua v. Standard Fruit Co.* (9th Circuit 1991) 937 F. 2d 469, 472- 473)

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The Sandinista movement was named for Augusto Sandino, the man who led resistance against United States military forces which occupied Nicaragua in the 1930s. (http://www.state.gov/r/pa/ei/bgn/1850.htm#history)

B. Litigation of claims of harm caused by DBCP to workers and residents on Central American banana farms.

Nicaragua was not the only tropical nation in which bananas were grown, Dole was not the only fruit company growing them, and Dow was not the only chemical company supplying DBCP to the growers. Litigation involving various permutations of those elements arose after use of the chemical finally ended in the 1980's. As set forth below, the path to the courthouse was not smooth. Also, the funding of a violent Nicaraguan insurgency in the 1980's by American government officials working secretly in conjunction with opportunistic Nicaraguans soured relations between our countries and created suspicion and future enmities which would crop up in this case decades later.

5. 1982 - 2000: Plaintiffs' attempts to sue American corporations in the United States for damages caused by the use of DBCP in Central America are thwarted by *forum non conveniens* rulings.

In the years following Dole's departure from banana farming in Nicaragua, lawsuits were filed in the United States by plaintiffs from several Central American countries, including Nicaragua, seeking compensation for injuries due to exposure to DBCP. Those attempts were frustrated by the crafty utilization of the doctrine of *forum non conveniens* by the defendants. *(E.g., Delgado v. Shell Oil Co.,* (S.D.Tex. 1995) 890 F.Supp. 1324, 1362 *Delgado v. Shell Oil Co.* (5th Circuit 2000) 231 F. 3d 165, 4 Int'l Bus. L. Rev

130, 152-157 - Plaintiff's Ex. 15.10, p. 2259-2264)

The 1980s also saw what came to be known as "the Iran-Contra scandal." As documented in the official Tower Commission report, American operatives led by Oliver North secretly (and illegally) funneled money and arms to a group of Nicaraguan insurgents known as the "Contras" seeking to overthrow the Sandinista government. (Tower Commission Report, Part III, Arms Transfers to Iran; "Contra Diversion.") They were unsuccessful, but bitter divisions remained in Nicaraguan society which would resonate in the testimony of the secret witnesses in *Mejia*.

6. 2001: Nicaragua enacts "Law 364" to facilitate the resolution of DBCP claims.

The Nicaraguan legislature responded to the *forum non conveniens* stonewalling of the American chemical and fruit companies in 2001 by enacting "Law 364" - a statute which imposed harsh procedural requirements on American DBCP defendants if they were sued in Nicaragua. (*Osorio v. Dole* (S.D. FL 2009) 665 F.Supp.2d 1307, 1314-1315) The law had special provisions for male fertility claims, providing minimum damages for claimants suffering from the two conditions proven to be caused by exposure of men to DBCP: azoospermia - complete absence of spermatazoa and hence absolute reproductive sterility, and oligospermia - a sperm count which was below the threshhold for realistic ability to procreate (defined as "fewer than 20 million

sperm cells per ml of seminal fluid." - See Plaintiff's Ex. 15.16, p. 2145) In addition, the law authorized claims for other male reproductive maladies which have not been proven to be caused by DBCP - necrozoospermia, teratospermia, hypospermia and asthenozoospermia. (Ex. 312, p. 12137) The law also authorized the bringing of claims for a variety of non-reproductive ailments of both men and women which had been scientifically associated with, but not yet definitively proven to be caused by DBCP, including cancers and liver and kidney diseases. (Ex. 93, p. 4417-18,see Plaintiff's Trial Ex. 42, Plaintiff's Ex. 15.11, p.1987, Plaintiff's Ex. 15.14, p. 2032, Plaintiff's Ex. 15.15, p. 2126, 2128)

There was disagreement as to whether Law 364 gave DBCP defendants an absolute right to escape from its provisions if they allowed themselves to be sued in America, or if plaintiffs could force the defendants to defend in Nicaragua if they waived the harshest provisions. The plaintiff's firms which filed the thousands of DBCP claims in Nicaragua courts followed the latter path, waiving the harsher provisions of the law and asserting that by that waiver they could proceed in Nicaraguan courts regardless of the defendant's wishes. (*Osorio v. Dole, supra* 665 F.Supp.2d at p. 1318)

7. 2001 to 2009: DBCP litigation in Nicaragua

Plaintiff's lawyers seeking to handle DBCP cases in Nicaragua faced

daunting prospects, the first of which was identifying claimants who had been exposed to DBCP on banana plantations decades before. Banana farm workers were excluded from the Nicaraguan social security registration system in that era and Dole has consistently insisted that it had no records of its Nicaraguan banana farm workers from the 1970s. (2RT D49-51, Ex. 136, p. 6001) When Dole discontinued operations the company reportedly left all records of the identity of the workers on its Nicaraguan banana farms behind, and eventually they were apparently discarded. (Ex. 136, p. 6002-6003)

The court's oral findings in this case included the assertion that: "when the Sandinista Revolution overran the country[] Dole was forced to pull up stakes quickly and leave behind many records. (CV12, p. 2405) Similarly, the coram vobis petition filed by Dole states that Dole's records were "rendered unavailable by the Sandinista Revolution." (Petition at 77, see also *Mejia* oral findings at Ex. 98, p. 4558) The court's findings and Dole's representations to this court conjure up the image of a beleaguered mid-level manager regretfully jettisoning file cabinets full of records as he fled the country a step ahead of gun-toting insurgents. As is evident from the plain historical facts noted above in section A.4, the reality is far less dramatic. Dole continued farming operations in Nicaragua for years after Sandinista government took over, and its employment records were later discarded as a routine business practice either intentionally or through simple neglect, not because of "the Sandinista Revolution."

Regardless of the cause, Dole's abandonment of its records of its former banana farm employees created a problem for plaintiff's lawyers handling DBCP cases. Predictably, reports of individuals falsely claiming to have worked on the farms in the past were heard, as well as reports of scammers making a quick buck off of the gullible by selling information to assist bogus would-be DBCP claimants to "pass" as former employees. (Ex. 59, p. 2013, Ex. 54, p. 1320) Plaintiffs' lawyers sought to obtain information from Dole regarding the identity of former banana farm employees, and in particular any evidence which would help them screen out false claimants. As appellants' trial counsel Duane Miller put it at a pretrial discovery hearing: "If I develop credible information that one of my clients is lying to me and he's not a worker, I want to get him out of the case early before I spend money and time whether it's [defendants'] or mine." (Ex. 84, p. 4175) But Dole fought tooth and nail against every effort made by the plaintiff's counsel to obtain whatever information was in Dole's possession which would be helpful to plaintiffs' attorneys in identifying its former employees, with its counsel claiming that: "There's a huge potential for abuse if we were to give a list of every person that we are aware of that was ever a banana worker on any of these Nicaraguan farms." (Ex. 84, p. 4171, see also similar statements at 4170, 4173.)

The plaintiff's lawyers, deprived of any records or other information from the employer as to the identity of former farm workers, were forced to rely on personal attestation to try to weed out false claimants. In a country

with limited literacy and poor record keeping that meant that the job of identifying and communicating with legitimate claimants had to be performed on a personal level, either on a face-to-face basis or in group meetings.

a. The "capitan" system and the procedures instituted by plaintiff's lawyers to weed out false claimants. Provost, the first American law firm to take on DBCP cases in Nicaragua, initiated a system of "capitans[4]" - men who were paid a monthly stipend to identify potential DBCP claimants and then maintain communications with a specific group of them, serving as an information conduit in a country where many of the potential claimants could not read or write and few had telephones. (Ex. 65, p. 2872 - 2873) In an attempt to weed out phony plaintiffs, Provost required that each claimant produce documents signed by witnesses attesting that the claimant had worked on a Dole banana farm. (8CV 467-468, 473-475) Only after the claimant's employment history was thus verified would the firm undertake the expense of medical testing to ascertain if the claimant suffered from any condition linked to DBCP exposure. (8CV 434, 443, Ex. 84, p. 4175) When Dominguez set up shop in Nicaragua in 2002 in conjunction with the OLPLB he copied that system. (Ex. 66, p. 2917-2918)

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[4] This term was interpreted variously as "foreman," "group leader," or more commonly "captain" below. (E.g. Ex 34, p. 790) As none of those terms appear to be a precise translation the original Spanish term will be used herein to refer to these men.

The capitans were responsible for notifying potential claimants about meetings where they could sign up to be plaintiffs, securing their employment verifications, maintaining contact with the plaintiffs and later notifying them of when and where to show up for meetings, medical tests, etc. (Ex. 66, p. 3023, 3025, Ex. 34, p. 791-792) They did not always do a good job; a number of them were fired, including several who later [redacted]. (John Doe 13 [redacted]: Ex. 66, p. 3019-3020, John Doe 17 [redacted]: Ex. 399, p. 14188, John Doe 17 [redacted], Ex. 64, p. 2735, John Doe 11 [redacted], Ex. 58, p. 1896, one of the first three John Does, fired by OLPLB, Ex. 65, p. 2806-2806) Furthermore, some reportedly took "short cuts," getting dishonest individuals to sign false verifications of the employment of claimants - a much easier job than tracking down actual former co-workers of each of the claimants the capitan was responsible for. (Ex. 58, 1889-1892)

An apparent example of a fake "work certificate" is found in the file of appellant Claudio Gonzalez. Mr. Gonzalez reported in his interrogatory answers, deposition testimony and at trial that he had worked at the Candelaria farm and that the foreman was Filimon Herrera. (Ex. 268, p. 9778-9779, Ex. 117, p. 5198, 5199, 5234, Ex. 116, p. 5180) But while the "work certificate" in his file states that he worked at Candelaria, it is signed by "Cosme Zepeda," identified on the form as the "Mandador" of the Candelaria farm. (Ex. 142, p. 6098) But Cosme Zepeda (or Cepeda) actually worked at a *different* farm,

Las Mercedes, not at Candelaria. (Plaintiff's Ex. 3.7, p. 400) There is no notation on the document identifying the author of[5] the Claudio Gonzales "work certificate" but clearly it appears to be bogus. Whoever generated the document got the signature of a man who was willing to sign it - Mr. Zepeda - even though he did not even work at the farm he claimed to have been a supervisor at, and accordingly, could not have reliably confirmed Mr. Gonzalez' employment there.

Of course, the target of the fake certificate was the plaintiff's lawyers, not defendants or the court. The "work certificates" procured by the capitans were not designed to be admissible and were never offered as proof of employment by plaintiffs in this case to the court or to defendants. They were created as an internal screening mechanism to assist plaintiffs counsel to weed out false claimants in the absence of any employment records, not to serve as evidence. (8CV 467-468, 473-475) Dole had its own investigators who interviewed friends, neighbors and former co-workers of the plaintiffs to independently check their employment claims. (Ex. 30, p. 732) But unlike the records of plaintiffs' attorneys efforts which were disclosed, Dole successfully withheld the information gathered by its agents before trial. (Ex. 84, p. 4176-4177)

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[5] If the statements in the declaration of [redacted] are true, it is likely that he was responsible for the creation of this document. (Ex. 34 p. 790, 793)

b. Medical testing of Nicaraguan DBCP claimants. Once claimants had been identified and vouched for, the American firms underwrote the expense of having them tested for the conditions they claimed to have suffered as a result of exposure to DBCP. (8CV 434, 443, 450, Ex. 58, 1831-1832) For example, infertility claimants provided sperm samples to be examined by laboratory personnel. (Plaintiff's Ex. 22, p. 3411-3412) Plaintiffs with other issues would be examined to assess those claims. (Ex. 58, 1831, Ex. 312, p. 12149) This would eliminate more claimants - those who did not suffer from compensable ailments.

Again, the system was imperfect. First, a man might suffer from a compensable reproductive condition under Law 364, but it might have manifested after DBCP use had terminated, which would suggest some other cause. Accordingly, some former banana farm workers with fertility claims concealed the fact that they had fathered children in the 1980's and later. Dole had reportedly located birth certificates in Nicaragua which indicated that a number of Provost's clients in Nicaraguan cases were post-DBCP parents. (8CV 488) Mr. Musselwhite expressed regret at the coram vobis hearing that their processes had not been better able to screen those plaintiffs out. (8CV 490-491) One of [redacted] who claimed to have been an "afectado" (the term used to refer to those men harmed by exposure to DBCP) was [redacted] John Doe [redacted]. In fact, he had fathered [redacted] children [redacted]

[redacted] long after DBCP use was halted in Nicaragua in 1980, [redacted]

In addition to plaintiffs concealing children, there were reports of claimants adulterating their sperm samples by aging and/or heating them, and laboratory personnel falsifying infertility results. (Ex. 69, p.3449-3453) While azoospermia and oligospermia findings would not be altered by aging or heating (the sperm which are counted by the lab might be damaged or die, but would not simply disappear) other infertility conditions deemed compensable in cases brought in Nicaragua under Law 364 might be - necrospermia (dead sperm), asthenozoospermia (sluggish sperm) and hypospermia (low seminal fluid volume. [redacted]

Laboratory falsification of infertility results, however, would be an issue regardless of the conditions reported. In 2003 a laboratory technician named Bayardo Barrios who had a financial dispute with the Provost firm stated in an affidavit for defendants that in 2001 and 2002 he had falsified lab results at his fertility lab in Nicaragua for clients of Walter Gutierrez (who worked with Lack and Girardi) and for Provost. He claimed that technicians

at the Hospital España had falsified results as well. He specifically identified Victorino Espinales as a person who had procured a false report from him. (Ex. 384, p. 13829-13831) Learning of Barrios' statement, Provost was put to the expense of having every plaintiff with fertility test results from the Hospital España lab retested. (8CV 434) Appellants, who had been tested at Hosital España's lab as well, were also retested, first at another Nicaraguan lab, and later by American medical personnel. (Ex. 103, and see section II.B.9, below)

Note: there has never been any claim that appellant's *own* medical test results are not accurate; this discussion of the accusations of falsification of Nicaraguan lab reports is included because it was central to defendant's claims (and the trial court finding) that lab results intended for use by *other plaintiffs* in litigation *in Nicaragua* had been falsified constituted grounds for vacating *appellant's* judgment rendered in *our* courts. (12CV 2416)

Although anecdote-based claims of widespread fertility report falsification have been made by defendants, no evidence identifying a pattern of specific reports prepared by any lab, American or Nicaraguan, has been produced. In fact, the statistical prevalence of azoospermia and oligospermia in the test results submitted to Nicaraguan courts - put in evidence here by defendants - is *far lower* than the number which defendants' witnesses have claimed were generated fraudulently. (Ex. 314, p.12226) Defendants have the

data from the hundreds - probably thousands - of claims which have gone to trial in Nicaragua which would demonstrate any statistical pattern to support these claims and have not presented such evidence at any time; evidently the statistical evidence does not support the anecdotal claims of defendants' witnesses, otherwise they presumably would have presented it. (*Largey v. Intrastate Radiotelephone, Inc.* (1982) 136 Cal.App.3d 660, 672, Evidence Code section 412)

8. 2003 - 2004: Dole insists that the number of Nicaraguan DBCP claimants represented by attorneys is fraudulently inflated and files suit against hundreds of Nicaraguan plaintiffs.

Dole asserted that the number of DBCP claims filed in Nicaragua exceeded the number of potential legitimate DBCP claimants early on. In 2003 Dole filed a suit in federal court against hundreds of Nicaraguans claiming that they had conspired to seek fraudulent judgments in Nicaraguan courts for "feigned" injuries due to DBCP and alleging a violation of the federal organized crime (RICO) laws - *Dole v. Gutierrez* (Plaintiffs Ex. 27) The complaint noted that 9,652 claims had been filed in Nicaragua, and alleged that the claims were all baseless. (Plaintiffs Ex. 27, p. 3623) The lawsuit specifically identified but did not name as defendants every Nicaraguan and American plaintiffs' lawyer involved in DBCP claims, including Mark Sparks and another Provost attorney, Girardi, Lack, Musselwhite and Dominguez, as well as their associated Nicaraguan counsel,

including Antonio Hernandez Ordeñana (misidentified as Hernandez Orellana) (Plaintiff's Ex. 27, p. 3618) *Dole v. Gutierrez* was dismissed in 2004 (Plaintiff's Ex. 3.24, p. 921)

9. 2004 - 2007 DBCP litigation on behalf of Nicaraguan plaintiffs is initiated in California, starting with this case.

- **Dole does not raise its fraud claims in this lawsuit**
- **Dole undertakes thorough discovery and investigation into plaintiffs and their cases; its agents blanket Nicaragua interviewing witnesses about DBCP claimants.**
- **Appellants prevail at trial, the trial court strikes all punitive damage awards, reduces the verdict as to some plaintiffs, and enters judgment in a lesser amount.**

This case was filed in 2004, followed by *Mejia* and *Rivera* in 2005 and 2007. (Ex. 20, 21 & 22) After the cases were filed plaintiffs were shifted between them; for example, Mr. Tellez was shifted from this case to *Mejia*. (Ex 17, p. 518) Various plaintiffs' cases were dismissed by plaintiffs' counsel along the way for a variety of reasons, including the claimants' inability to obtain a visa to travel to the United States to be deposed as required by the court, failure to cooperate with discovery, and the plaintiff's death. (3 RT G34-36, 37) At the time of trial only appellants and the unsuccessful plaintiffs remained in this case; 13 other plaintiffs remained in *Mejia* and *Rivera* when those cases were dismissed in 2009. (Ex. 98, p. 4651) Unlike the Nicaraguan cases, the only medical conditions upon which the liability claims were based in this case were azoospermia and oligospermia. (Ex. 20, p. 531)

Defendants performed thorough discovery: interrogatories (e.g. Def. Trial Ex. 1290, 1302, 1325), document production (e.g. Ex. 142), and depositions of the plaintiffs and family members. (e.g. Ex. 107, 117) The plaintiffs were flown to Los Angeles, where they were seen by Dole's medical expert and new sperm samples were obtained and tested by Dole's own medical technicians. (35 RT 5186-5187, 41 RT 6402-6403, 6409, 42RT, 6452) Dole also had testicular biopsies performed on three plaintiffs, including appellant Calero Gonzalez. (35RT 5189, 41 RT 6252-6253)

In addition, Dole hired investigators to interview plaintiffs' friends, neighbors and co-workers in Nicaragua, spending over $1.6 million on investigators in the three years prior to the start of trial. (Ex. 388, p. 13909) (Dole did not disclose the extent of its payments to the investigative agency after that date.) As to just the six appellants Dole reported that its investigators performed 273 interviews of 239 discrete witnesses between 2005 and 2007. (Ex. 30, p. 713, 732) Prior to the start of the secret "John Doe" investigative process in 2008, Dole's investigators traveled freely throughout Nicaragua performing these interviews. (Ex. 230, p. 8277) While understandably many interviewees had no information about where a subject had worked 30 years before, quite a few of them confirmed such employment, either directly or by hearsay. (Plaintiff's Ex. 3.24, p. 931-932, 935-939) And many Nicaraguans freely - even enthusiastically - insisted that some DBCP plaintiffs had not worked at the farms they claimed. For example: "He is certain that

[unsuccessdul plaintiff] Daniel Altamirano ...was not employed at Candelaria." (Plaintiff's exhibit 3.7, p. 401, see also p. 404, 405, 410, 411, 413, 415 etc.)

In its answer to the complaint filed in this case Dole did not raise the allegations made in *Dole v. Gutierrez* as a defense. (Ex. 90, p. 4258 - 4264) And while Dole generally denied that the California DBCP plaintiffs' claims were legitimate, defendants never raised the claim that the California DBCP claimants were the product of fraud in this case until after losing the jury trial. (See *infra* section II.A.11)

This case went to trial in July 2007. Other than establishing Dow's manufacture of DBCP and Dole's use of the chemical before and after notice of its danger as discussed above, much of the trial was a "battle of experts" which need not be reviewed here over whether the plaintiff's infertility was caused by DBCP or something else.

Each of the appellants testified regarding his work experience in Nicaragua and his efforts to conceive children except appellant Calero Gonzalez, who suffered a stroke the year before trial and was unable to testify. Portions of his deposition were read to the jury, and a videotaped deposition of his older sister was played for them. (39RT 5963-5990)

The other five testified in their own behalf. In each case, defendants

cross-examined them at length and played for the jury portions of their videorecorded deposition testimony. Appellant Rojas Laguna testified for 17 pages of direct examination (34 RT 4963-4980) followed by 60 pages of cross-examination, including the playing of excerpts from his deposition. (34RT 4980-5040) Claudio Gonzalez was cross-examined for 23 pages (excluding redirect) with extensive playing of his deposition testimony. (37 RT 5593-5635) Mendoza Gutierrez was cross-examined for 25 pages. (24RT 3022-3050) Diaz Artiaga was cross-examined for 23 pages. (27RT 3612-3637) The cross-examination of Lopez Mercado consumed 27 pages of transcript. (21RT 2365 - 2398) The unsuccessful plaintiffs all testified as well.

In November 2007 the jury returned a verdict in favor of appellants and against the unsuccessful plaintiffs. Appellants were each awarded compensatory damages divided between Dole and Dow. (Ex. 16, p.478-479) After additional deliberation the jury awarded five plaintiffs $500,000 in exemplary damages against Dole. (Ex. 16, p. 485) The trial court later vacated the award of punitive damages and made other orders vacating parts of the compensatory damage awards to some, but not all of the appellants. (Ex. 15, p. 461, Ex. 16, p. 487, 507) Judgment was eventually entered on October 8, 2008. (Ex. 15, p. 463)

C. Dole enters into a contract with a cadre of Nicaraguans which gives them a financial interest in frustrating Nicaraguan DBCP claimants' ability to successfully seek redress in court, then prevails upon the trial court to allow evidence designed to sabotage the court cases to be presented in secret, with Dole's opponents prevented from investigating the witnesses or their testimony by court order.

Dole had high expectations of winning this case. A judicial finding that the plaintiffs had worked on Dole banana farms during the DBCP era but were not entitled to compensation would have been a significant factor in future litigation here and abroad, and in negotiating possible settlement of the disputes. While its trial counsel Jones Day was preparing for trial, its vice-president and general counsel C. Michael Carter was meeting with a rag-tag group of Nicaraguan ex-capitans and grifters led by Victorino Espinales to set up the framework for an administrative system for disposing of DBCP claims for less than 1% of their court value. All that was required for that system to take hold was for Nicaraguan claimants to be convinced that they would get nothing through litigation so they would fire their attorneys and accept whatever Dole saw fit to pay them.

When the trial resulted in a plaintiff's verdict for appellants Dole's new counsel prevailed upon the trial court to allow Dole to present witnesses for secret testimony attacking its legal opponents while forbidding plaintiff's counsel from investigating them. Once that ruling was obtained Dole proceeded to present a string of witnesses - many affiliated with Victorino,

others of unknown provenance - who presented wild tales of conspiracy and skullduggery by all of Dole's opponents in DBCP litigation, causing the trial court to form a sincere belief that everyone opposed to Dole in Nicaragua was vicious, corrupt and dishonest, a belief which would ultimately lead to the order under review in this appeal.

10. 2005-2007: Dole meets with a group of non-attorney Nicaraguans referred to herein as "the Alliance" and they jointly petition the Nicaraguan government for support of their plan to operate an extra-judicial process for paying DBCP claimants a fraction of the compensation they would be awarded if they won in court, as long as the claimants fired their lawyers and dropped their lawsuits.

In 2006 Dole initiated formal meetings with a group of Nicaraguan non-lawyers led by Victorino Espinales for the purpose of negotiating an agreement for an extrajudicial process for settling DBCP claims which would exclude the participation of lawyers representing the claimants. (Plaintiff's Ex. 3.24, p 222, 229, 236) Victorino had organized a "camp" near the Nicaraguan government building in Managua where his followers demonstrated against Law 364 and the Nicaraguan government's handling of the DBCP issue. (10 CV 1680-1681) The meetings with Dole culminated in a letter addressed to the Nicaraguan government signed June 28, 2007 by Vice-President and Chief General Counsel C. Michael Carter on behalf of Dole and by Victorino Espinales and six other Nicaraguans representing the organizations ASOTRAEXDAN, AOBON, and "Alianza Nacional." (Ex. 266, p. 9460-9461)

As the Nicaraguan group did not appear to have a separate title appellants referred to this group of signatories and their supporters collectively in their return as "the Alliance" (Amended Return, par 11, Ex 3.24 p. 249)

The extrajudicial DBCP claims process contemplated by Dole was a system similar to one that the company had set up in Honduras, with payments for most claimants of just $100 and increasing to a maximum of about $3,000 for those rendered functionally infertile with oligospermia and less than $7,000 for those proven to have azoospermia and thus to be absolutely sterile. Dole expressed the opinion that those sums were appropriate given the low incomes in Central America. (Ex 266, p. 9455) In contrast, Law 364 required that compensation for those conditions be comparable to what an American jury would award, and in no event less than $100,000. (Ex 93, p. 4419) The California jury in this case awarded over $300,000 in general damages to each of the azoospermic appellants. (Ex. 16, p. 478)

The June 28, 2007 letter sets forth the terms agreed to between Dole and The Alliance. Generally, the terms were:

- An extrajudicial system would be established to set and distribute adminstratively-determined settlement payments to legitimate DBCP claimants.
- The Nicaraguan signatories - Victorino et al - were the sole legitimate

representatives of Nicaraguan claimants; any additional representatives would have to agree to the terms negotiated by The Alliance.

- "Only ex-workers of the contracted plantations of the company and those who were exposed to Nemagon **and who are not represented by United States attorneys may participate**." (Ex. 266, p. 9461 emphasis added)

Dole's Vice-President Carter explained the latter provision: "It was my intention, as stated in the Letter, to 'respect the representation contracts that any banana ex-worker may have with an attorney of the United States.'" (Ex. 266, p. 9453)

At the time the agreement between Dole and The Alliance was made Dole had been on record for years asserting that the number of Nicaraguan DBCP claimants who were represented by counsel was more than 100% of the potential legitimate DBCP claimants. (Ex 84 p. 4171; Plaintiffs' Ex. 27, p. 3614) Jason Glaser, who visited Victorino's camp, expressed "doubts about the people there," noting that many of the people in Victorino's camp were too young to have worked on a banana farm in the 1970s, and some were claiming improbable ailments. (10 CV 1680[6]) Accordingly, in order for The Alliance

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Note: The trial court erroneously ascribed Mr. Glasers' observations about the denizens of Victorino's banana camp to the entire "Nicaraguan populace" in its written dismissal order. 7 AA 1375, fn. 120

to sign up any significant number of clients to apply for pennies on the dollar under the new administrative protocol a large number of those claimants would have to have some reason to fire their attorneys and withdraw their much larger court claims. Not only did the contract require that a significant lack of "respect" be generated for the relationships between Nicaraguan DBCP claimants and their counsel, it required that the legal process be perceived as being incapable of ever succeeding in order for the far less generous compensation of the proposed administrative process to be attractive to claimants.

a. Members of the "Alliance" provide key support for Dole's efforts to terminate all of the court cases here and in Nicaragua so as to leave the Alliance/Dole deal as the exclusive means for Nicaraguans to obtain compensation for DBCP injuries. The Alliance members got to work quickly. The Dole/Alliance agreement was consummated just two weeks before the trial in this case was scheduled to begin. In fact, the trial was briefly delayed on its very first day while the Court inquired if MAS still represented the plaintiffs, in response to news articles published days before which suggested that the Nicaraguan DBCP claimants had fired their lawyers. The trial court read the news report into the record:

> Former Nicaraguan banana workers signed a petition Wednesday to fire their legal team of U.S. and Nicaraguan lawyers and negotiate directly with companies they accused of using a harmful [pesticide]

> Victorino Espinales, [ ] who leads workers exposed in the 1970s to the pesticide known as DBCP told the Associated Press that they didn't believe their lawyers could win a case soon to be argued in Los Angeles County Superior Court.
>
> "It's certain they will lose the case because similar previous cases in these courts failed" he said. (10 Trial RT 131-132; article is at Plaintiff's Ex. 15.33, p. 2947)

Victorino was wrong about the outcome of the trial, and that fact threatened The Alliance's plan to become the exclusive agents for disbursement of DBCP compensation in Nicaragua. If Nicaraguan DBCP claimants could obtain compensation through the court system in the full amount authorized by law they would have no reason to participate in the Dole-sponsored program for pennies on the dollar. Accordingly, as discussed below in sections II.C.11, II.D.17, II.D.22 and II.D.23, signatories to the Dole-Victorino letter and their allies played a central role in securing the dismissal of the California DBCP claimants' lawsuits, including the order under review in this appeal.

At this point the actions of the members of The Alliance have borne fruit and have made Victorino's prediction come true. The dismissal of this action in response to secret evidence brought to court by The Alliance and their associates has ensured that Nicaraguan DBCP claimants now have no recourse for their injuries through the courts and no viable option but to accept whatever they are offered under the extrajudicial settlement system, or get

nothing at all. That leaves the members of The Alliance as the only Nicaraguans authorized to secure compensation for their fellow countrymen affected by DBCP - and to be paid for doing so. The Dole/Alliance letter did not specify any limit on the financial benefit The Alliance would receive for their participation in the process.

11. November 2007 - February 2008: After the verdict in favor of appellants was announced Dole brings a new trial motion based on representations that Witness X would testify that the jury was wrong and that two of the appellants had not really worked on the Candelaria banana farm. The motion is denied when Witness X refuses to testify.

• Dole lays the groundwork for future secret proceedings by claiming that Witness X refused to testify because he was afraid, and conceals the fact that Witness X demanded $500,000 and additional consideration and left without testifying when payment of that sum was not approved by Dole's former counsel.

• Dole tells the court that Witness X is a disinterested, whistle-blowing stranger. He is actually [redacted] The Alliance [redacted].

The verdict in this case was announced November 5, 2007. (54RT 8682) Within days, [redacted] (Witness X) reportedly was interviewed by Dole's representatives in Nicaragua as a witness who would expose two of the prevailing plaintiffs - appellants Rojas Laguna and Calero Gonzalez - as fakes. Witness X had participated in the Dole/Alliance meetings [redacted] (Ex. 266, p. 9461) But that ongoing relationship was not disclosed by Dole. Rather, in a new trial

motion filed January 8, 2008 based on Witness X's claims, Dole represented to the trial court that: "...the Witness unexpectedly approached Fernando Medina Montiel, outside counsel for the Dole defendants in Nicaragua. [ ] Mr. Medina had met the Witness previously, but the two had not spoken beyond social small talk." (Ex. 30, p. 705, 725) (Dole initially dubbed [redacted] "The Witness" and later "Witness X." - Ex. 32, p. 760) No mention was made of Dole's contract with the group which included Witness X, [redacted] multiple meetings with Dole's Vice-President Carter and in-house director of litigation Rudy Perrino as well as Medina Montiel. (Ex 3.24, p. 1017, 1023, 1030, 1043)

Dole represented to the Court that:

- Witness X had actually worked at Candelaria, the farm Rojas Laguna and Calero Gonzalez had testified to having worked at, and they had never worked there.
- That appellants Rojas Laguna and Calero Gonzalez had "admitted" to Witness X that they had never worked on a Dole banana farm.
- That Witness X was a former capitan who had worked for Dominguez' Nicaraguan affiliate, the OLPLB, and had personally trained Rojas Laguna and Calero Gonzalez to lie about working at Candelaria from his own knowledge of it.
- Witness X would testify that a conspiracy to recruit and train phony plaintiffs existed in Nicaragua and the OLPLB was part of it.

--Ex. 30, p. 702-703, 715-718

Dole sought a protective order keeping Witness X's identity secret. It was granted. (Ex. 31) Witness X was transported to Los Angeles in January 2008, and brought to the courthouse in which the trial court was sitting, but did not enter the courtroom or chambers to testify. (57 RT p. 9510) Dole asserted that Witness X's "stunning admission against his own penal interest" lent credibility to his claims, and should allow the hearsay evidence of his "admission" into evidence even if he did not appear to testify and be cross-examined. (Ex 30, p. 702, 708-709)

Dole noted that none of the numerous other Nicaraguans who were interviewed by Dole's agents were "willing" to "admit" [Dole's terms] that Rojas Laguna and Calero Gonzalez had actually never worked on a Dole banana farm. (Ex 30, p. 705) Dole *did not disclose* to the court or opposing counsel the fact that it had *numerous* MOI's in its files recording witnesses who were willing - even eager - to "admit" that they did not think that *other* DBCP plaintiffs had worked at the farms they had identified, as noted in section II.B.9, above. Instead, Dole suggested that the lack of witnesses "willing" to "admit" that Rojas Laguna and Calero Gonzalez worked at Candelaria was evidence that Nicaraguans in general were afraid to "admit" the existence of such fraudulent claims. (Ex. 30, p. 705, 717, 726-727) The fact that Dole's files contained numerous such "admissions" - just not as to Rojas Laguna and Calero Gonzalez - was within the exclusive knowledge of Dole, which did not disclose it.

Given time and knowledge of his identity, plaintiffs' counsel uncovered evidence of Witness X's extensive contacts [redacted] with Dole, and the fact that he had previously claimed to have worked at a **different** banana farm, [redacted] not Candelaria. (Ex. 95, p. 4494, Plaintiff's Ex. 3.24, p. 897, 901) They made the fairly obvious observation that the most likely explanation for the lack of witnesses "willing" to "admit" that Rojas Laguna and Calero Gonzalez had never worked at Candelaria was that such "admissions" would be false, since they actually *had* worked there. (Ex. 95, p. 4492) But more direct contradiction of Witness X's claims was stymied by the order imposing secrecy on his existence and story.

As plaintiff's counsel noted:

> But for the protective order, plaintiffs would have gathered and offered at least the following additional evidence in opposition:
> a. Additional declarations from eyewitnesses to confirm that the protected witness worked at [redacted] and not the Candelaria plantation, during the years that plaintiffs Calero Gonzalez and Laguna were working on Candelaria.
> b. More declarations and almost certainly more documentary evidence establishing the protected witness's close ties to Dole.
> c. More detailed and more specific (and therefore stronger) declarations from Antonio Hernandez Ordenana, [redacted], and others, specifically refuting the statements purportedly made by the protected witness to Dole's declarants.
>
> (Plaintiff's Ex. 3.24, p. 799)

The trial Court did not lift the order imposing secrecy on Witness X's identity; it denied the motion brought on the inadmissability of the hearsay reports of what Witness X would supposedly testify to. (Ex. 35)

Dole represented that the reason for Witness X's refusal was due to Juan Dominguez' presence in the courthouse - fear that Dominguez would disclose his identity to others in Nicaragua who would harm him in revenge for his testimony for Dole. Dole presented the court with a declaration signed by witness X in which he asserted that before coming to the United States he was told by a man he identified as [redacted] that "it would be dangerous to testify against Juan Dominguez' people." Dole's interpreters initially translated this incorrectly as an assertion that Witness X was told that *he* would be in danger if *he* testified against *Juan Dominguez*. Mr. Dominguez was allowed to read this declaration - with the names redacted - and detected and pointed out the mistranslation personally, which was then verified by the court's interpreter. (57RT 9467-9470) Dole's counsel did not disclose any information to the court regarding any other possible motive for Witness X's refusal to testify until three weeks later, when under court order they admitted that Witness X had asked for $500,000 and other consideration for testifying, and that it was only after that demand was not met that Witness X decamped back to Nicaragua. (Plaintiff's Ex. 3.24, p. 905)

As to the conflicting theories about why Witness X refused to testify, when the coram vobis hearings began in this case the trial court stated "There are all sorts of explanations given. I'm not giving any of them any credit. I don't know what the reason was." (2CVA 14) The CV dismissal order, however, contains a footnote citing Witness X's claims of "fear" but no

reference to his demand for money. (Decision, p. 6, fn 25)

After Witness X returned to Nicaragua he spoke freely about his trip to the U.S., including his demand for payment for testimony. (11CV 1827-1828) The fact that he was "Witness X" was not a secret in that country, but it remained secret by court order in our courts, with the continuing order prohibiting plaintiff's counsel from talking to anyone about him. (11CV 1830, Ex. 60, p. 2200-2201) Contrary to the representations to the Court about the grave danger he could be in if his identity as a Dole witness, he was not killed - or, indeed, harmed in any way - by anyone in that country despite the fact that the very people his identity was supposedly being hidden from knew all about it. [redacted] Witness X [redacted] not only Rojas Laguna and Calero Gonzalez were fakes, but added appellant Jose Uriel Mendoza to his list. (Ex. 34, p. 793) [redacted] he reiterated his hope that Dole would provide him with financial assistance "because I have problems with my kidneys and need[] money for medical support." (Ex. 34, p. 796, 798.) That help was not forthcoming; six months later he passed away from kidney disease - a painful, lingering death. (11CV 1826)

[redacted] Witness X [redacted] claimed to have worked at the Candelaria banana farm. [redacted] "I came to know the foremen from this farm very well. They were Ruben Enriquez Sandino, Paulino Madrigal and

Daniel Torres." (Ex 34, p.795) In fact, Daniel Torres did work at Candelaria, but he was not one of the foremen - he was a mechanic, [redacted] described in detail in the deposition of [redacted], John Doe 19. (Ex. 136, p. 6016-6017) [redacted] the foremen at that farm were Guillermo Cardenas, Juan Castillo and Victor Gomez. (Plaintiff's Ex. 3.7, p. 404) Although [redacted] role as Witness X was well known in Nicaragua -especially among the people who supposedly would harm him (e.g. Transcript of Nicaraguan radio broadcast May 6, 2010 Ex. 349, p. 12873) plaintiffs were forbidden by the court's secrecy order from undertaking routine investigation into his claim of having worked at Candelaria. As discussed below at section II.E.36, plaintiff's current counsel sought permission to retake the deposition of a man who was confirmed as a witness who was capable of identifying Candelaria employees, who knew [redacted] (Ex. 60, p. 2198) but had never been asked about Witness X's claim of working at Candelaria on the record. That request would be denied. (2 CVS C79, C81, C86)

Although the new trial motion was denied, Dole had laid the groundwork for the series of assertions which would be used to justify the secret proceedings which commenced later that year; claims that widespread fraud was being committed in Nicaragua among those opposed to Dole; that the fraud was coordinated by a conspiracy of plaintiff's law firms in that country, that witnesses to the fraud existed but were afraid to testify about it

for fear of being attacked and killed, and that no legal process existed for compelling witnesses to testify in Nicaragua. Each of those claims was ultimately believed either completely or in substantial part by the trial court based on testimony from Dole's employed agents and selected secret witnesses. Each of those claims is contradicted by objective evidence which the trial Court did not learn of before ordering the secret evidence-gathering procedure and determining with sincere certainty that they were all true. (See section III.A.3, below) Even more significant than the groundwork laid for the procedural secrecy order Dole would successfully obtain in October of 2008; the substantive claims, while not admitted due to the lack of actual admissible evidence "curled the hair" of the trial Court, motivating a desire to see that the evidence Dole insisted was hidden in Nicaragua be exposed. (9CV 1283, and see section III.A.4, below.)

In the Witness X episode Dole first displayed the techniques which would succeed later: submission of damning verbal claims coupled with a demand that neither the claims nor their proponent be subject to verification or investigation, and concealment of adverse evidence in its exclusive possession so as to control the nature of evidence which the court would have available to it in making key procedural and substantive rulings.

12. October 6, 2008: The trial court grants Dole's motion for leave to take secret depositions of Nicaraguan witnesses for the next DBCP case, *Mejia v. Dole.*

• Any effective investigation by plaintiffs' toxic tort counsel MAS into the witnesses or their testimony is forbidden

• Juan Dominguez, the only plaintiff's lawyer who spoke Spanish and had familiarity with Nicaragua, was to be excluded

• The process would be "revisited" later as the trial court reviewed all of the evidence as it was obtained, not waiting for the ultimate hearings.

On September 30, 2008, Dole filed a set of declarations in the *Mejia* case under seal which were signed by various Nicaraguans, asserting that one or more of the *Mejia* plaintiffs had not actually worked on a Dole banana farm and was bringing a fraudulent claim. (Ex. 4, p. 133 et seq) Dole sought the right to depose witnesses in secret, claiming that the witnesses would not testify otherwise:

> Dole has arranged to depose three witnesses regarding certain Mejia plaintiffs' fraud on the Court. Because Dole lacks compulsory process to secure their attendance, these depositions depend entirely upon the willingness of the witnesses to voluntarily appear and testify. As a result, it is highly unlikely that these depositions will take place if Dole must serve deposition notices in the standard form [ ] If Dole must publicly reveal the names and contact information of the witnesses, then plaintiffs' counselor their agents or allies likely will contact the witnesses and dissuade them from testifying. Thus, notice that complies with these technicalities could actually prevent the depositions from ever occurring. Accordingly, the Court should authorize the taking of the depositions pursuant to the "John Doe" deposition notice filed concurrently herewith.

(Ex. 4, p. 119)

Note: The three witnesses had already agreed to appear for deposition, without asking for or receiving any promise of secrecy. And given the testimony of the witnesses, [redacted], in hindsight there is no objective reason to believe that they actually would not have done so. (Ex. 59, p. 2021-2022, 2052-2053) However, that question was never put to the test. Dole cited the precedent of Witness X, who, Dole asserted, was dissuaded from testifying due to "concerns for his life and safety." (Ex. 4, p. 120.) Dole also asserted that other witnesses had expressed similar concerns. Since the statements of witnesses to Dole's investigators were exclusively within Dole's possession, plaintiffs were helpless to prove the negative in response. Appellants would ultimately discover that numerous witnesses had freely expressed the opinions that some DBCP plaintiffs were bogus to Dole's investigators, and indeed, Nicaraguans testified to that opinion under oath in open court in Nicaragua, without any adverse consequences. But those discoveries would come much, much later. (See section II.D.37, below.)

The terms Dole insisted on were that neither plaintiff's counsel Juan Dominguez nor anyone in Nicaragua should learn that the depositions were taken, that the witnesses and their testimony be secret and only known to the four toxic tort lawyers from MAS. (Ex 4, p. 122, 124, 125) Acknowledging

that the process it was seeking would prevent the opposing party from being able to investigate the witnesses or their testimony and thus undertake effective cross-examination of them, Dole promised that "any prejudice to plaintiffs can be remedied - if plaintiffs desire - by conducting a follow-up deposition, which Dole will cooperate in scheduling." (Ex. 4, p. 119:26-27)

The *Mejia* plaintiffs filed opposition, noting that the application for secret depositions was based on hearsay and innuendo, and the lack of any admissible evidence supporting the assertion that the testimony of the witnesses could not be obtained through less extreme measures. (Ex 7, p. 218 et seq.) At the hearing on the motion on October 6, 2008, the trial court cited the "taint of fraud" arising from the allegations made in the Witness X episode, and indicated an intention to grant the motion, ruling that *allegations alone were sufficient* to justify the secrecy requested, and that actual proof of Dole's claims was not required. (Ex. 1, p 6:1-4, 5:11-17, 8:14-20)

When Dole had sought Mr. Dominguez' exclusion from participating with MAS in the Witness X situation earlier in the year, the trial court noted that:

> Mr. Dominguez has skills that Mr. Miller does not possess, and those skills include, number one, his intimate knowledge of Spanish, he is bilingual, I have heard him interpret, I have been very impressed with his interpretation skills, that's number one, and two, his intimate knowledge of things Nicaraguan as it

> relates to this case, and those two skill sets, his knowledge of Nicaragua and the Nicaraguan people and the banana plantation activities, and his abilities with Spanish are important in Mr. Miller's representation of the clients. I understand and believe that Mr. Dominguez' involvement and assistance with Mr. Miller is essential. (57 Trial RT 9482-9483)

On this second go-around, however, the trial court decided that Mr. Miller's innate technical skills were sufficient to protect the plaintiff's right to due process, despite his lack of knowledge of Spanish and Nicaragua. (Ex. 1, p. 7:22-27) Plaintiff's counsel Duane Miller objected vociferously to the exclusion of all members of the plaintiffs' legal team who spoke Spanish and were knowledgeable about Nicaragua:

> In order to get to the facts, we as a firm representing the plaintiffs need Spanish-speaking resources in Nicaragua. Throughout the entire history of this case we have relied on Mr. Juan Dominguez's office to provide us with that assistance. We do not have investigators that speak Spanish in Nicaragua available to us independent of those resources. (Ex. 1, p. 11-12)

> ...disabling one side from effectively responding on a next to nonexistent showing that an attorney is involved as opposed to something else going on really means that instead of having a full, adequate determination of the truth, we're going to have one side with their arm tied behind their back. (Ex. 1, p. 17)

Mr. Miller's protests fell on deaf ears. The Court issued an order authorizing secret depositions of Dole's John Doe witnesses on condition that

no one adverse to the defendants other than MAS be allowed to learn of the fact of the depositions, the identity of the witnesses, and the content of their testimony. Further, MAS was strictly ordered not to disclose any of those facts to anyone, anywhere, at any time, and specifically, not to their co-counsel Juan Dominguez and the Nicaraguan attorney who worked in conjunction with him, Antonio Hernandez Ordeñana. (Ex. 2, p. 74-75) MAS would receive notification of the identity of the John Doe witnesses shortly before the depositions took place along with any copies of the memoranda of their previous interviews (MOI) prepared by Dole's investigators who had recruited the witnesses. (Ex. 194, p. 7296) Any investigation into the witnesses outside of that limited data set was prevented by the order denying MAS the right to disclose to anyone the identity of the witnesses or the content of their statements, whether in the MOI's or in their depositions, which prevented any external investigation into their credibility and truth. As Dole's counsel would express it at a later hearing: "Once the depositions are done, we can come back to your Honor and we can figure out together what needs to be done to make it fair to the plaintiffs ... (Ex. 191, p 7157) The court did hold out the prospect of "revisiting" the order later, and allowing follow-up depositions if they were "later shown to be necessary." (Ex. 2, p. 77.)

MAS sought a writ from this court seeking to prevent that process from proceeding. (case No. B211224 Ex. 71) The petition was denied summarily. (Ex. 77) The depositions commenced in Nicaragua on October 11, 2008. (Ex.

59)

NOTE: Although the deposition process culminated in three days of hearings in April 2009, the trial court reviewed all of the evidence as it was gathered and made clear that its decision was based on all of the evidence, not just the portions selected for display at the hearing. Accordingly, the evidence is presented hereafter as it was produced, month by month.

13. Jumping ahead to April, 2009 and the findings made by the trial court based on the evidence produced pursuant to the secrecy order: The number of fraudulent DBCP claimants in Nicaragua is found to be "many times" the number of potential legitimate claimants, generated by a monstrous nationwide plot to commit fraud in Nicaragua - the "chimera conspiracy" - involving virtually every person who had opposed or inconvenienced Dole in connection with DBCP litigation.

At this point we jump ahead to the *outcome* of the John Doe deposition process, to better understand how things unfolded *during* the secret deposition process. After the depositions were concluded, the trial court held a three day dismissal hearing in April 2009 and made oral findings with regard to Dole's fraud claims, including the following:

> The total number of plaintiffs claiming to have been injured while working on a Nicaraguan banana farm formerly associated with Dole is many times the total number of people who worked on the farms during the entire time DBCP was used

on such farms." --Ex. 98, p. 4651

That finding would be repeated in the court's July 15, 2010 oral findings following the coram vobis OSC hearings in this case, and not abandoned until it was belatedly recognized as being based on false assumptions about Nicaraguan Law 364 governing DBCP claims --and simply untrue as a statement of fact – during the process of drafting the written coram vobis ruling in late 2010 and 2011. (See section F.41.a, infra)

As to how this flood of false claims came to exist? Clearly a conspiracy had to exist to facilitate the propagation of the presumed many thousands of false claimants. A "chimera" conspiracy:

> ...a chimera was a fire-breathing she monster with a head of a lion, a body of a goat, and a tail of a snake. A truly fearsome creature.
> ...
> Here, we also have a chimera that is really truly heinous and repulsive. It's been created from separate organisms cemented together by human greed and avarice.
> ...
> It's made up of groups of attorneys who actually designed this creature, which is the neural system, the brain of this creature. These attorneys have been both in Nicaragua and some in the United States.
>
> (Ex. 12, 335)

> Mr. Dominguez, Mr. Ordenana, and Mr. Zavala attended at least one meeting in which Nicaraguan judges, Nicaraguan and United States attorneys, captains who worked for those attorneys in recruiting pretend plaintiffs for DBCP cases, and representatives of laboratories that performed sterility tests on DBCP plaintiffs conspired to manufacture evidence and thereby fix cases in Nicaraguan courts. One such meeting took place in an exclusive neighborhood in Chinandega.
>
> Multiple John Doe witnesses credibly testified to having attended this meeting. These witnesses generally corroborate each other with respect to the identities of the primary participants in the meeting and its purpose and substance. The meeting was presided over by the Nicaraguan judge Socorro Toruño. I find this to meet the burden, clearly, of clear and convincing evidence, and probably much higher.
>
> ...
>
> During this meeting, Judge Toruño, lawyers from nearly all of the Nicaraguan law firms, and Mr. Dominguez, representing plaintiffs in DBCP litigation, conspired to manufacture evidence of sterility and otherwise fix those lawsuits in favor of plaintiffs.
>
> (Ex. 12, p. 351)

> I've told you that I'm using the standard of proof of clear and convincing evidence, ... I could have used beyond a reasonable doubt because, actually, everything, all the findings that I made I truly believe beyond a reasonable doubt. (Ex. 12, p. 341)

The trial court followed up with written findings which reiterated the same findings, albeit in less colorful language. The written findings described the above-mentioned conspiracy meeting thus:

> [The] meeting took place in approximately March 2003, at the home of Ramon Altamira in the Montserrat neighborhood of

> Chinandega, Nicaragua. Multiple John Doe Witnesses credibly testified to having attended this meeting, and these witnesses generally corroborate each other with respect to the identities of the primary participants in the meeting and its purpose and substance. The meeting was presided over by Nicaraguan Judge Socorro Toruño, who was the trial judge in at least two DBCP trials in Nicaragua that resulted in judgments totaling in the hundreds of millions of dollars against some of the same defendants that are currently before this Court in Mejia and Rivera. At the meeting, Judge Toruño and the lawyers in attendance conspired to manufacture evidence of sterility and otherwise "fix" those lawsuits in favor of plaintiffs. ... The meeting with Judge Toruño was also attended by U.S. lawyers[] Benton Musslewhite and Mark Sparks, a lawyer from the law firm of Provost Umphrey... (Ex 98, p. 4646)

The Montserrat conspiracy meeting was the one specific, identifiable event described in the *Mejia* findings which was eventually made public and therefore subject to investigation to verify whether it was true or not.

a. The framework of the conspiracy story constructed by the "chimera conspiracy" witnesses John Does 13, 17 and 18, including the Montserrat conspiracy meeting hoax, would not be exposed as fiction until the following year. The following year the same trial court issued findings in this case, expressly admitting that Mr. Musslewhite had **not** participated in any conspiracy meetings and acknowledging that "given the concern about the veracity of some of the John Doe plaintiffs, I no longer can say that Mark Sparks actively participated in the fraud against the defendants." (12 RT 2411)

All references to the "Montserrat conspiracy meeting" and numerous other claims, each found to be both significant and true by the "clear and convincing" standard in 2009, simply disappeared from the 2010 and 2011 findings.

The detailed descriptions of the purported conspiracy meetings and numerous other facts found to have been satisfactorily proven as true by the trial court in 2009 were promoted by a witness - [redacted] (John Doe 17) who was described by defendant's counsel as "Probably one of the very most, if not the most important witness..." (Ex. 208, p. 7612) His testimony was "corroborated" as to the Montserrat meeting by [redacted] (John Doe 18) and [redacted] (John Doe 13). Those three witnesses were each found to be credible in 2009, based on their "demeanor" when the video recordings of their testimony (via Spanish language interpreter) were viewed by the trial court.

But the testimony of the chimera conspiracy witnesses was false. There was no "Montserrat conspiracy meeting." As discussed in greater detail in section II.D.17, below, in addition to the sworn denials by alleged participants in the meetings after the claim was made public, the purported purpose of the Montserrat conspiracy meeting as described by the John Doe witnesses - the public order given by a Nicaraguan judge to Nicaraguan laboratories to falsify evidence in specific ways - was wildly inconsistent with what those

laboratories actually did in the real world. And the chimera conspiracy witnesses' testimony also included matching descriptions of the simultaneous presence of two American attorneys at meetings in Nicaragua on multiple occasions when they were *actually never both in that country at the same time* during the period in question. (Plaintiff's Exhibit 16, p. 3034-3035) The multiple "corroborating" descriptions of this meeting - which the trial court identified as a "linchpin" of the defendant's fraud case (Ex. 219, p. 7861) were flatly inconsistent with objective, verifiable evidence of what actually did happen and what could not have possibly happened in the real world.

14. October 2008: The first "John Doe" depositions.

But the Montserrat story did not appear at first. The first "John Doe" depositions took place on October 11-12, 2008, less than a week after the order authorizing that they take place in secret was argued in Los Angeles. (Ex. 59, 60, 65) It is not clear from the record which of the three witnesses was "John Doe 1," which was "John Doe 2" and which "John Doe 3," so they will be discussed by name.

[redacted]) He did not remember *Mejia* plaintiff [redacted] as a former worker at

[redacted] (Ex. 65, p. 2126) He **did** recognize *Mejia* plaintiff [redacted] as a bona fide former [redacted] employee in the 1970s [redacted], but did not remember him [redacted]. (Ex 65, p. 2127-2128) He did not recognize *Mejia* plaintiffs [redacted] (Ex. 65, p. 2131-2132) Although he had told Dole's agents that he **did** recognize [redacted] as a former [redacted] employee Dole's counsel did not ask him to testify about that at his secret deposition. (Plaintiff's Ex. 3.7 p. 27) Nor did they ask him about the claims of [redacted] (Witness X) or [redacted] (John Doe 17) to have worked at [redacted].

Dole's agents in Nicaragua [redacted] asserted that Antonio Hernandez Ordeñana had paid [redacted] then directed him to recruit men who had not worked on banana farms as plaintiffs. (Ex 4, p. 138) His actual John Doe testimony, however, was that that he recruited [redacted] bona fide former banana farm workers as plaintiffs, was encouraged to find more, and was paid [redacted] per month for his work as a capitan. Despite aggressively leading questions he did not testify that he was ever instructed to recruit plaintiffs who had not worked on a banana farm, contrary to the text of the declaration prepared for him by Dole's agents. (Ex. 65, 2798, 2799:10 - 2800:20) [redacted]

[redacted] (Ex. 65, p. 2805:1 - 2806:25)

He testified that he did not recognize *Mejia* plaintiff [redacted] (Ex 65, p. 2810) He also did not recognize a picture of [redacted]; when told that [redacted] had identified [redacted] as a former worker on the [redacted] farm his response was: "He would be able to recognize him, because he spent more time among them." (Ex. 65, p. 2783, 2844)

Another John Doe witness, [redacted] did not recognized *Mejia* plaintiff [redacted]. (Ex. 59, p. 2010:23 - 2011:11) He testified that no one had tried to discourage him from speaking with Dole's agents or from identifying people who he didn't think had worked on Dole's banana farms, [redacted]

Plaintiff's counsel Mr. Miller made a point of preserving his objection to the restrictions placed on plaintiffs on the record:

> ...because the Court previously said that she would revisit the issue of this gentleman's deposition after the Court had an opportunity to review the transcript, I'm relying on that to give me another opportunity to ask questions of the witness after I

have some opportunity to investigate, which I have not had pursuant to court order up to this time. And I wanted the record to reflect that. (Ex. 59, p. 2064)

15. November, 2008: After the first three secret depositions provided little evidence supporting Dole's expansive fraud claims Dominguez was allowed to review the transcripts of those depositions • More depositions were authorized from which Dominguez would remain excluded if defendants objected.

Those first three depositions, although they raised factual disputes about the bona fides of some of the *Mejia* plaintiffs' claims of employment on banana farms, failed to provide compelling support for Dole's claims of widespread fraud. Juan Dominguez was allowed to see the transcripts, although still under strict orders not to let anyone else other than MAS learn of the content of the depositions or the identity of the deponents. (Ex. 194 p. 7238, 7244) The court authorized another round of depositions, with Dominguez barred from knowing anything about them in advance; defendants had five days after the deposition to object to his seeing the transcripts. If they objected, he would not be allowed to see them until a hearing was held. (Ex. 194, 7237-7238)

The trial court took pains to stress that any violation of the secrecy order could result in **financial penalties and incarceration** of the offending lawyer and that if the court found Dole's accusations to be true Dominguez

would be reported to the State Bar and if MAS was guilty they would be kicked off the case. (Ex. 194, p. 7238-7239)

16. November 2008: Three more John Doe depositions.

Three more depositions were taken in late November, 2008. The first two were [redacted] (John Doe 14) [redacted]. (Ex. 57, p. 1673, 1676 1772) [redacted] capitans would go out into the countryside and gather claimants together for scheduled on-site intake sessions in various locations. The claimants would line up to see the clerical staff who would interview them about their work and reproductive history and help them fill out questionnaires. [redacted] some of the capitans, including [redacted] (Witness X) [redacted] some of the claimants weren't really former banana farm workers, and that the captains had coached them on how to answer. (Ex. 57, p. 1689, 1694)

[redacted] complained that Hernandez Ordeñana "only gave raises to [redacted] and that he had a bad temper[redacted]

[redacted]" said to Mr. Hernandez Ordeñana: "'You know, gosh, there's a lot of fraud going on in this case.' And he would say 'Why?' [redacted] 'Well, because a lot of these people were not banana workers.'"

[redacted] Hernandez Ordeñana's response to that was: "Well, so if they don't come out affected [i.e. suffering from a DBCP-related malady], that's fine." (Ex. 57, p. 1757)

[redacted] Roberto Rosales, a representative from Mr. Dominguez' office in the United States, flew down to Nicaragua periodically to interview claimants. He would close some of the claimants' files afterwards. [redacted] Mr. Dominguez said that "this was a lawsuit for banana workers, and if they were affected banana workers, they could win it" but that "he didn't know what the other ones were doing." (Ex 57, p. 1761- 1762)

[redacted] (John Doe 11) [redacted] work [redacted] as a capitan [redacted] Dominguez told him that he "needed captains who could look for people who really were banana workers" and that he would be paid [redacted] per month. (Ex. 58, p. 1806) However, the capitans decided that [redacted]

[redacted] (Ex. 58, p.1805) He claimed that Mr. Hernandez Ordeñana promised to pay him [redacted] for each plaintiff he recruited. (Ex. 58, p. 1808) However, he never received [redacted]. (Ex. 58, p. 1916-1917)

John Doe 11 testified that Mr. Dominguez made it "very clear there for the Nicaraguan lawyers to do the very best that they could. But as it turned out, they did just the opposite." [redacted] told him that Mr. Ordeñana had instructed them to bring in plaintiffs "whether they had been banana workers or not." (Ex. 58, p. 1814) [redacted]

He testified that his procedure as a capitan was to travel to a town and announce that there would be a meeting the following day at a given location for people to get information about the lawsuits. (Ex. 58, p. 1819-1820) When potential plaintiffs arrived the next day they would fill out forms about their age, how many children they had, and so on. The forms would then be taken back to Hernandez Ordeñana at the OLPLB offices in Chinandega. (Ex. 58, p. 1823) The corrupt capitans collected money from the prospective claimants, which they kept for their personal use. (Ex. 58, p. 1828-1829)

John Doe 11 wanted to notify Mr. Dominguez about the

"abnormalities" but never got the opportunity to do so. (Ex. 58, p. 1837-1838) [redacted] Victorino Espinales stated that he would "bring down" the OLPLB office which was working with Mr. Dominguez on DBCP litigation after Mr. Dominguez indicated that [redacted]. (Ex. 58, p. 1924-1925)

John Doe 11 [redacted] with Hernandez Ordeñana [redacted] (Ex 59, p. 1838, 1918-1919) He testified both that he was fired and that he quit [redacted]

A third deposition was also taken in November 2008 - the deposition of [redacted], which is discussed below. After the depositions were concluded the defendants exercised their right to object to Juan Dominguez seeing the transcripts. A hearing was held on those objections on December 8, 2008.

D. The court-ordered secrecy facilitates perjury which convinces the trial court to increase the level of secrecy and impose a series of increasingly draconian orders on plaintiff's counsel, effectively destroying any possibility of bona fide adversarial testing of Dole's claims.

The content of the first five secret depositions was equivocal - no evidence had been presented which suggested that any of appellant's American

attorneys had participated in any improper conduct of any sort, and the evidence against the Nicaraguan attorneys and capitans was of questionable reliability given the overt hostility of the witnesses to those they accused. But the sixth deposition transcript contained the testimony of [redacted] (John Doe 13), the first of the "chimera conspiracy" witnesses to testify, and it set in motion a series of events which would result in the elimination of all critical examination of or opposition to Dole's claims in *Mejia*.

As later candidly stated by Dole's "most important" witness, John Doe 17: Dole's "biggest problem [was] the attorneys. First they went for Dominguez..." (Ex. 396, p. 14163)

To attack its "biggest problem" Dole recruited John Doe 17 and his two sidekicks, John Doe 13 and John Doe 18 to accuse all American DBCP plaintiff's lawyers, all Nicaraguan plaintiff's DBCP lawyers, Nicaraguan judges, laboratory operators and numerous others, of participating in a conspiracy to falsify evidence, intimidate witnesses, and commit a massive fraud on our court - the "chimera conspiracy." Based on this testimony, additional restrictions were placed on plaintiff's counsel. Juan Dominguez was stripped of his rights and privileges as counsel for plaintiffs under the "crime/fraud" doctrine based on his purported participation in the fictitious Montserrat conspiracy meeting. MAS was required to act as nominal plaintiff's counsel without any ability to actually defend against Dole's claims while

working under the threat of being sanctioned and held in contempt of court for failing to act swiftly and aggressively against their own clients. The adversarial system collapsed and the proceedings devolved into a theatrical presentation of Dole's stage-managed conspiracy story, followed by the trial court's republication of everything Dole's witnesses claimed as official findings which the trial court declared to have been proven by "clear and convincing" evidence "and I really think beyond a reasonable doubt." (Ex. 12, p. 341)

17. December 8, 2008: After reading the transcripts of two and a half November depositions, the trial court is on the verge of authorizing Dominguez to see them, but Dole's counsel urges the court to read the last half of the deposition of John Doe 13, with the desired result: Dominguez is demonized and excluded from the process.

Defendants objected to Juan Dominguez seeing the transcripts of the November depositions, and a hearing was held to address that objection on December 8, 2008. At first, things did not go well for the defendants. The trial court indicated that it had read the transcripts of the depositions of John Does 11 and 14 and half of the remaining transcript, and did not see a basis for keeping the information from Mr. Dominguez. The court noted that "nobody has really said, from what I've read so far, that Mr. Dominguez has been actively involved in the fraud"... "If there is something that has come up in the last set of depositions, apart from you said that they're afraid -- I understand

the people are afraid, but it sounds like it's more of a general fear -- and I don't know of anything that really directly points at Mr. Dominguez" (Ex 199, p. 7356)

But the half of the last deposition which the trial court had not read was the key to Dole's motion. The part the trial court had not read contained John Doe 13's exposition of the story of the soon-to-become infamous "Montserrat conspiracy meeting." Dole's counsel urged the court not to decide until reading this "critical," "mind-boggling" testimony - "perhaps the most significant testimony that has emerged to date" and specified pages 83 to 96 of the deposition, in which the Montserrat conspiracy meeting story made its first appearance. (Ex. 199, p. 7357, Ex. 66, p. 2961-2974)

John Doe 13 claimed that he agreed to testify because of a "restless conscience" which would not let him sleep. (Ex 66, p. 2946) Apparently his conscience didn't restrain him from testifying in detail under oath about an entirely fictitious event.

a. The "Montserrat conspiracy meeting" story is told for the first time with immediate and dramatic impact on the fact-finding process.

According to John Doe 13, he was summoned to a meeting in the Montserrat district of Chinandega in March 2003 while he was still working

[redacted]. In attendance at this meeting were Nicaraguan lawyers from every legal group representing Nicargauna DBCP claimants, American lawyers Mark Sparks and Benton Musselwhite representing Provost, Carlos Gomez, Juan Dominguez and Antonio Hernandez Ordeñana, and Walter Gutierrez on behalf of Lack and Girardi, along with numerous capitans and representatives of virtually every Nicaraguan fertility lab. (Ex. 66, pp 2963-2970)

Nicaraguan judge Socorro Toruño presided, instructing all of the Nicaraguan laboratories performing sperm tests on DBCP claimants to falsify the results to ensure that the tests came back in the following specific proportions: 40% of the claimants tests were to be reported as showing azoospermia; 30% oligospermia, and the remaining 30% "uncertain." (Ex 66, p. 2970-2972) The stated reason for this instruction was to provide "credibility" for the outcome of the Nicaraguan DBCP cases she was hearing in her court. (Ex. 66, p. 2963-2964, 2970) Judge Toruño threatened to send anyone who disclosed the existence of the conspiracy to jail. (Ex. 66, p. 2973) At the end of the meeting a man named Robert Roberts who was affiliated with Provost gave a pep talk, then each of the capitans was handed $50 and they went home. (Ex 66, p. 2977-2979)

In addition, John Doe 13 directly implicated Juan Dominguez in a variety of other unethical acts, in direct contradiction to the testimony of John Does 11 and 14 described above. According to John Doe 13, Mr. Dominguez

initially "didn't know anything at all." (Ex 66, p. 2916) [redacted] (Ex. 66, p. 2918-2919, 2921) He was not modest about it: " [redacted], because Mr. Hernandez and Mr. Dominguez knew nothing." (Ex 66, p. 2919) He testified that both Hernandez Ordeñana and Juan Dominguez gave [redacted] capitans "carte blanche" to recruit anyone they wanted, whether they had worked on a banana farm or not. (Ex 66, p. 2927, 2929) He admitted that he [redacted]; he was evasive about the facts surrounding the termination of his employment there. (Ex. 66, pp. 3019, 3020, 3023, 3025)

At the time of the deposition of John Doe 13 and at the hearing on December 8, 2008, the only counsel adverse to Dole who were allowed to participate were MAS, who did not speak Spanish and had no familiarity with Nicaragua. They - and the trial court - had no way of knowing who this witness was or any way to assess the reliability of his testimony by any means other than by watching his demeanor while he testified. The trial court would later find that: "The Court finds [redacted] testimony to be credible based on his demeanor while testifying, the level of detail in his testimony, his response to cross examination and other evidence corroborating his testimony." (Ex. 98, p. 4642) His "demeanor" was undoubtedly impressive - Dole's counsel would later stress how credible he appeared, noting his [redacted] appearance.

(Ex. 221, p. 7889) MAS continued to protest the process by which the evidence was being generated without any opportunity for plaintiffs to investigate it before the court acted on it, but to no avail. (Ex. 66, p. 3059: "I have been prevented from doing any investigation or from even talking to people about this witness. I can't mention his name. Therefore, I cannot meaningfully investigate.")

Of course there was no actual evidence corroborating John Doe 13's testimony other than the matching stories which would later be told by his confederates John Does 17 and 18, and there was substantial evidence which debunked it. But the only participant in the process at that point who had the opportunity and ability to gather such evidence was Dole, which did in fact have access to the obvious key evidence which exposed the fundamental implausibility of the Montserrat conspiracy meeting story. The basic premise of the meeting - that Judge Socorro Toruño wanted to have Nicaraguan fertility labs falsify the results of Nicaraguan DBCP claimants so as to produce 40% azoospermia, 30% oligospermia, and 30% something else - was a matter which could be readily compared to what Nicaraguan laboratories did before and after March 2003 in order to see if their actual conduct was consistent with the described orders.

The defendants had a huge body of data to look to - the lab reports used as evidence in the thousands of DBCP claims brought to trial in Nicaragua in

which they were defendants. And in particular, Case 214, the case presided over by Judge Toruño, for which the newly falsified test result were supposed to provide "credibility." But the actual lab results in Case 214 - or *Osorio v. Dole*, the name it was given in Florida federal court where Provost sought to enforce it - would not be made more "credible" by having Nicaraguan labs falsify their results to show 40% of them with azoospermia and 30% with oligospermia because the percentage of claims in *Osorio* in which either of those conditions was reported by a lab was **less than 30% - combined.** (Ex. 312, 314, plaintiff's Ex. 1.2, p. 46-47) Dole's lead agent in Nicaragua had interviewed Claudia Salazar, one of the lab operators from Chinandega, a year before the *Mejia* dismissal hearing and asked her about the Montserrat conspiracy meeting story. She told him then that the story was bogus and explained why it made no sense. (Plaintiff's Ex. 1.3N, p. 276) The basic premise of the conspiracy meeting is simply irreconcilable with objective facts which were known to defendants – but they chose not to disclose that information to the trial court or opposing counsel. (Indeed, defendants have provided no evidence of the percentages of azoo- and oligospermia lab results in any of the many cases they were involved in in Nicaragua other than those of *Osorio*.)

After the story was taken out from under the cloak of secrecy and made public in April 2009 a flood of additional evidence ensued debunking it. Virtually every person alleged to have been present denied it. (Plaintiff's Ex.

1.3 A, H, I, M, N, 8 and 11) Beyond the "he said-she said" realm lay the fact that Juan Dominguez and Benton Musselwhite, both memorable characters whom John Doe 13 [redacted], were positively identified by him as participants in this meeting. But Americans entering Nicaragua have to get a visa stamp for their passport, enabling proof of their dates of entry into that country. A qualified expert recently retired from United States Immigration and Customs Enforcement reviewed Dominguez and Musselwhite's passports and was able to determine that not only were those two men never both in Nicaragua on the same day in March 2003, but that: "In my opinion based upon my review of the passports of Charles Benton Musslewhite and Juan Jose Dominguez those two men were never legally in Nicaragua at the same time at any point between September 9, 2002 and August 2003." (Plaintiff's Ex. 16) In sum, no objectively verifiable fact connected with the Montserrat conspiracy story ever checked out as true. The court findings of a wide-ranging conspiracy - and specifically, the Montserrat conspiracy meeting - were quietly dropped from the rulings made in this case in 2010 and 2011.

But prior to the conclusion of the *Mejia* proceedings in April 2009 neither the court nor MAS had any way of obtaining that evidence due to the secrecy order issued by the trial court on October 8, 2008. The one person who might have been able to derail what was about to happen following the December 8, 2008 hearing in reliance on the perceived truth of John Doe 13's testimony was Juan Dominguez, who would have known immediately that

John Doe 13 was a perjurer. But he was excluded from learning about the testimony, a ruling which was made precisely *because of* the perjured testimony. (Ex. 199, p. 7347-7348)

Reading the Montserrat conspiracy meeting testimony of John Doe 13 had an immediate and electrifying effect on the trial court. Not only was allowing Juan Dominguez to review the depositions now out of the question, the court went so far as to agree to pick up the telephone and call the federal judge in Florida who was hearing Provost's enforcement action there in *Osorio v. Dole*. (Ex. 199, p. 7361-7363) While Judge Huck was not in (it was nighttime on the east coast) the trial court made plans to communicate to him: "that I have recently come into possession of some information that may have impact on his case; that I have a protective order in place, I would like to know whether he is interested in receiving this information..."(Ex. 199, p. 7363) The evidence gathered under the secrecy order ultimately was transmitted to Judge Huck. (Ex 177, p. 6518)

John Doe 13 [redacted] committed perjury [redacted] as well, falsely [redacted]

18. More depositions are taken in December 2008 without significant impact on the proceedings.

Several more secret depositions were taken in December. Two were were former banana farm workers who testified that they did not remember certain *Mejia* plaintiffs from the farm (John Does 5 and 8, Ex. 58 and 70.) One knew one of the plaintiffs and didn't think he had worked on a banana farm in the 1970s (John Doe 6 - Ex. 56) One [redacted], [redacted] who testified that [redacted] lab results were all on the up-and-up but that [redacted] suspected that others at a lab [redacted] cheated, although he did not observe them working and could not state "with certainty if they analyzed those samples or not." (John Doe 12, Ex. 55, p. 1429, 1435, 1535) Ironically, another John Doe witness, [redacted] would later file a declaration stating that [redacted] performed legitimate lab work, but [redacted] suspected that others - *including* [redacted], John Doe 12 - had not. (Ex. 52, p. 1135.) Dole did not appear to have any difficulty recruiting witnesses willing to testify in secret that their own behavior was above reproach but that they *suspected others* of wrongdoing.

a. John Doe 9 testifies falsely that [redacted] fathered [redacted] At a hearing on October 31, 2008, Dole's counsel showed the court testimony from the deposition of [redacted]

[redacted]

[redacted] Dole had a declaration from [redacted] stated that [redacted] was actually [redacted] father and sarcastically accused the plaintiff of "forgetting" about "a [redacted] child [redacted] Dole's counsel insisted:

> ...we have a group of plaintiffs with testimony like this, and plaintiffs don't come together and organize themselves by themselves, this has to be lawyer driven, it just couldn't otherwise be the case, and every indication we have is that Mr. Dominguez is on the ground orchestrating this.
>
> –Ex. 192, p. 7209

The court issued an order stating: "The Court has grave concerns that [redacted] has a post-exposure child and must ensure that only reliable evidence comes before the jury, thus the Court strongly suggests that genetic testing of [redacted] take place... If genetic testing does not take place, the Court will hold a hearing to make a threshold determination whether [redacted] has a post-exposure child ..."

[redacted]

A paternity test was arranged. The results were negative: [redacted] in fact was *not* the biological father of [redacted]) (John Doe 9's deposition transcript was one of two John Doe transcripts not submitted to this court with Dole's coram vobis petition.)

b. John Doe 15 tells four different versions of the same story at different times. The December witness Dole placed most stake in was John Doe 15, [redacted] told a story with four distinct versions:

1. In March 2006 John Doe 15 met with Dole's investigators [redacted] saying the following: [redacted] All this was false, and I recognize that it was a lapse in judgment to have said so." (Plaintiff's Ex. 3.9, p. 457)

2. [redacted]

[redacted]

left out the fact that that claim was what [redacted] as stated [redacted] Dole's investigators. (Ex. 61, p. 2328)

4. [redacted] *had* been paid [redacted]

John Doe 15 also told an elaborate, contradictory and confusing story about [redacted]

[redacted]

In sum, this witness [redacted] definitely was working with Madrigal [redacted] one version of [redacted] story. There is no evidence that [redacted] on behalf of Dominguez (or anyone else affiliated with plaintiffs) other than [redacted] contradictory statements. [redacted] admits [redacted] lied about that. [redacted] lied to Dominguez about "almost everything" in order to get money from him ([redacted] also lied to other people at the OLPLB for money as well. (Ex. 61, p. 2359)

19. Bolstered by the Montserrat conspiracy story told by John Doe 13, Dole's counsel presses for a court order stripping plaintiff's counsel Dominguez of his attorneys' rights and immunities under the "crime/fraud" doctrine.

- **Plaintiff's request to "revisit" the secrecy order is rejected**
- **Dole also files a motion seeking sanctions against MAS.**

Defendants followed up on the impact of the Montserrat conspiracy meeting tale woven by John Doe 13. Dole quickly moved to take the

deposition of plaintiff's counsel Juan Dominguez, set for March 2009, as well as all of the people who worked in the OLPLB offices in Nicaragua. (RJN 8-20.) MAS objected, noting that MAS did not represent Mr. Dominguez or the other proposed deponents, that none of the deponents had been allowed to learn the basis for the asserted crime/fraud exception, and that:

> Dole has taken the position that the attorney-client privilege, which would be implicated by virtually every substantive question at the proposed depositions, is overcome by the crime-fraud exception. Each of the proposed deponents and their counsel must have an opportunity to respond to Dole's crime-fraud allegations, and their ability to do so is currently impeded by the protective order.
>
> (1.05.2009 Plaintiff's opposition RJN 31)

Dole followed up with additional documents setting forth the specific evidence and rationale relied upon to justify deposing its opposing counsel. Those claims were based almost entirely on the Montserrat conspiracy meeting story and other claims made by John Doe 13. (See Defendants Prima Facie Brief... RJN 39-47) --John Doe 15's story was featured as well.)

The trial court overruled MAS' objections and granted Dole's motion as to the various Nicaraguan targets of the motion:

> Defendants seek to depose 10 individuals associated with plaintiffs' counsel. No evidence suggests all 10 individuals were involved in all wrongdoing alleged, but enough exists to suggest that each was involved in at least some of the wrongdoing. The court therefore finds defendants have made a prima facie

> showing that attorney services were sought for the purpose of perpetrating fraud. As the alleged wrongdoing goes to the foundation of the litigation, the court finds *any question that may be put to the 10 deponents that is relevant to the litigation* will necessarily be reasonably related to the contemplated fraud.
>
> (Ex. 201, p. 7400)

The trial court denied plaintiff's request to modify the protective order prohibiting any party to the protective order from revealing the substance of a John Doe Witnesses' anticipated testimony or testimony to anyone on the grounds that plaintiff's desire to perform additional investigation did not constitute "good cause." (Ex. 201, p. 7391, 7426-7427) The court denied MAS' request for disclosure of the MOI's of Dole's investigators' interviews with witnesses Dole elected *not to* recruit for secret depositions, and further, limited MAS' right to talk to *their own clients*, as follows:

> Plaintiffs are permitted to contact the Ordeñana law firm to set up a schedule for all plaintiffs to be interviewed by the Miller, Axline &Sawyer law firm. During those interviews, the Miller, Axline & Sawyer law firm may request answers to the various discovery requests that are outstanding and it is permissible to ask plaintiffs open-ended questions about their circumstances (e.g., when the claim to have worked on a banana farm asking where did they live, how much money did they make, what did they do, who were their compatriots there on the banana plantation, who was their captain, and who was their supervisor). It is, however, not permissible to ask specific questions to plaintiffs that would reveal information protected under this Court's protective order, including if they used any

> forged documents, faking lab results, or asking about individuals identified by the John Doe witnesses.
>
> Ex. 201, p. 7391

In sum, MAS was free to conduct an investigation which might produce evidence which would support Dole's claims, but was expressly prohibited from undertaking any investigation which might expose Dole's witnesses testimony as having been false.

Dole turned its guns on MAS, as well. On December 22, 2008 Dole filed a sanction motion against MAS accusing the attorneys in that firm of having leaked secret information and being guilty of "witness tampering" which was deserving of "civil and criminal penalties." (Ex. 352, p. 13023, 13025-13042) The hearing of the motion would be repeatedly continued, while defendant's counsel continued to accuse plaintiffs' counsel of violating the court's order, and MAS, to protect themselves, "voluntarily" cut back all communications with the Nicaraguan counsel assisting their cases to "the absolute minimum." (Ex. 81 p. 4049) The motion was eventually dropped after defendants prevailed in *Mejia* after a hearing in which MAS presented no opposition to defendant's claims. (See II.D.31, below.)

20. It having become clear that MAS would not be able to get any evidence or information from Nicaragua via Dominguez and the Nicaraguan attorney they had worked with previously, MAS hires an investigator to see if they can prove their client's cases independent of those sources while still restricted by the secrecy order.

On October 24, 2008, the court expressed the belief that MAS could adequately investigate Dole's witnesses and their claims by hiring an out of town investigator to drop into Chinandega to ascertain the truth of their testimony despite the restrictions of the secrecy order which would prevent him from actually asking anyone about them. (Ex. 191, p. 7122, 7140) On October 31, 2008 MAS' Duane Miller noted:

> [I]f I hired an investigator here in Los Angeles and sent him down there, and never had access to information from Mr. Dominguez, the odds that I could get him up to speed and doing productive work and helpful work in any reasonable period of time would be basically zero because he would know literally nothing, and it would take a significant period of time before that individual got to the point where he or she could actually help; for, among other reasons, when a complete stranger goes down there, it takes time for them to introduce themselves to the environment. There are no addresses, no phones most of the time.
>
> (Ex. 192, p. 7224)

Mr. Miller wanted to have some way of having his investigator check with Juan Dominguez for background information, but the court denied that request. "Mr. Miller, you may not send somebody down there right now to go questioning the people until you and I have had a chance to confer further."

(Ex. 192, p. 7225)

After the December 8, 2008 hearing it would have been obvious to MAS that they would not be able to rely on getting any information from Nicaragua that would be acceptable to the trial court as they had previously, relying on Juan Dominguez and the OLPLB to act as intermediaries with their Nicaraguan clients. Accordingly, they undertook to hire an investigator to undertake investigations for them in Nicaragua while reporting directly back to MAS. However, the trial court's strict and specific limitations on any investigators MAS might hire and what they could do remained in effect. Any investigator hired by MAS had to be approved by the court, and must be restricted by the same criteria as MAS, i.e. he could not disclose *or allow the inference of* secret witnesses' identities or testimony, and additionally:

- Could not be "from the area" where the witnesses lived.
- Could not speak to local plaintiff's counsel - about anything.

After imposing those restrictions the trial court added: "I would caution you, Mr. Miller, to look at that ice that you're skating out on, because I would not like to see you fall through it. I'll leave it as a general analogy. I'm sure you can figure out what I'm talking about." (Ex. 191, p. 7140 -- Previously at that same hearing the trial court had reiterated the threat of fining or incarcerating any attorney who it found to have violated the restrictions of the secrecy orders, so the consequences of falling through the "thin ice" were unambiguous. Ex 191, p. 7139)

Prudently contemplating those warnings, MAS restricted its investigator's assignment to: "...locate, interview and obtain statements of several witnesses who might confirm that the ten plaintiffs associated with the Mejia vs. Dole case did work at the banana plantations in question and to determine if the witnesses knew or saw the plaintiffs perform tasks in connection with the application of DBCP." (Plaintiff's Ex. 4) If MAS could not establish those facts independently of Domiguez and the OLPLB they clearly could not hope to successfully prosecute their clients cases in court, as any communication they had with the Spanish-speaking attorneys they had previously relied on could very well land them in jail. Accordingly, the investigator was not advised of the various fraud claims being made by defendants and the John Doe witnesses, or of the identities of those witnesses. (Plaintiff's Ex. 26)

21. Meanwhile, the fact that an American governmental official has authorized the secret recruitment of Nicaraguan witnesses by a powerful American corporation seeking to overturn a judgment favoring impoverished Nicaraguans is not received well in Central America: "Burro amarrado contra tigre suelto."

It is not clear if the trial court ever contemplated how its orders would be perceived in Nicaragua. That nation is commonly referred to as a "banana republic" because of the historical imposition of regimes favorable to

American business interests - and specifically, banana exporting corporations - by force of American military might. The "banana wars" of the early 20th century included the physical occupation of Nicaragua by American troops from 1912 to 1933. (See footnote 3, ante) After the Somoza regime which ruled Nicaragua from 1933 to 1979 was replaced by the Sandinista government in 1979, American government agents attempted to make Nicaragua more "friendly" to American business interests by secretly funding the ultimately failed Contra insurgency which resulted in economic disruption and significant loss of life in that country. (See section II.B.5, supra)

Stated bluntly, Nicaraguans have sound reasons for being wary about secret operations of an American corporation acting under the authority of an American governmental office to recruit Nicaraguans to undermine other Nicaraguans, as was being done by Dole's operatives under the authority of the trial court's secrecy order. (The fact that it was a banana company was just salt in the wounds.) After the trial court authorized Dole to start taking depositions of the plaintiff's legal counsel, starting with the Nicaraguan lawyer Antonio Hernandez Ordeñana, he responded in a letter sent to Dole's trial counsel:

> The situation you set out is very similar to a saying we have in our Central American countries, "Burro amarrado y Tigre suelto" ["The donkey is chained up whilst the tiger runs free"], and I trust that you will be able to properly analyze this analogy within the context of the aforementioned information.

> Consequently, we will not submit ourselves to the jurisdiction of your court...
> ...we believe that a very serious act of injustice is being carried out when trying to harm Mejia, et. al's clients simply due to the fact that we do not submit ourselves to being a "chained up donkey"." (Ex. 235, p. 8803, 8804)

The saying quoted by Hernandez Ordeñana is common in Central America, and refers to the assistance of government agents to the wealthy and powerful while suppressing the poor and weak. His response was sent on February 14, 2009.

22. February 2009: John Doe 17's multiple false claims about the "chimera conspiracy" and virtually everything else.

In late February 2009 Dole unleashed its "most important witness" - [redacted] John Doe 17. Before his deposition Dole submitted its Memoranda of Interview (MOI) outlining its agent's descriptions of what John Doe 17 had told them to the court and MAS. (Plaintiff's Ex. 3.11, p. 475 - 488) That was the only disclosure of information about the witnesses that the trial court required Dole to make to opposing counsel. But Dole's counsel also met with the trial court ex parte - not even MAS was allowed to be present - and explained to the trial court that [redacted] is probably one of the very most, if not the most important witness that we hope

to depose" (Ex 208, p. 7612[7])

In this ex parte meeting with the trial court Dole's counsel made a series of inflammatory allegations about plaintiff's counsel, both Nicaraguan and American. He advised the court specifically about [redacted] value as a witness to the Montserrat conspiracy meeting:

> "When we met with [redacted], and we had not heard this before, he gave us a very detailed description of this meeting with Judge Toruño that Mr. Dominguez was at, and he had a very specific recollection of what Mr. Dominguez said at that meeting. ... Apparently there had been a discussion about changing the percentages [redacted] to get everybody on board, and there had been some resistance. What we're told Mr. Dominguez said when he made his speech at this meeting was, and this we're told by [redacted] is that initially Mr. Dominguez was opposed to this idea, that he talked about it with Mr. Miller [of MAS], they went over it in some length, Mr. Miller thinks it's a good idea, and therefore we're okay with it. ... He also called him John Miller, and we said, when you say John Miller, are you referring to Duane Miller,and he said, I just remember it was the American lawyer, his name was Miller, that Mr. Dominguez was working with." (Ex. 208, p. 7614)

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Dole filed the "Notice of Ruling" it prepared after this hearing in the same manner as others; as an exhibit to the coram vobis petition, with a transcript of the hearing in question following the Notice and proof of service. But the transcripts filed with the exhibits were not actually served with the notices. The transcript following the proof of service in Ex. 208 is the copy of the transcript which was sent to Dole's counsel, and it includes this portion of the hearing, even though it was held ex parte and sealed. The transcript which was sent to MAS excluded this part of the hearing. See RJN 56-59)

The trial court was not responsive to this feeler about adding MAS to the targets of Dole's fraud claims: "You know, Mr. Edelman, I've known you for -- well, about nine years now, we've had at least two really heavy-duty huge cases together. I've also only known Mr. Miller for about a year and a half, but I did spend four and a half months in trial with him. I couldn't find a straighter arrow or at least somebody that I perceived as a straighter arrow..." (Ex. 208, p. 9614) The trial court indicated an intention to notify MAS of the accusation, but was dissuaded by Dole's counsel, who urged that "even the subject, that information has arisen that might implicate them, I would prefer just to have that come up in deposition." (Ex. 208, p. 7614) In agreeing to that condition the trial court appears to have violated California Code of Judicial Ethics Canon 3 (b) (7) which requires prompt disclosure of information received ex parte to all opposing counsel. *(People v. Williams* (2009) 170 Cal.App.4th 587, 617.)

So the fact that this accusation had been made was kept secret from MAS. And when John Doe 17 was deposed the story Dole's counsel had described to the court changed. John Doe 17 testified that Dominguez discussed the profitability of recruiting fake plaintiffs with *Antonio Hernandez Ordeñana*, and made no mention of his consulting with Duane Miller. (Ex. 62, p. 2489) Accordingly, MAS never learned that they, too had been accused of participating in Dole's lurid fraud scenario, which would have alerted them to

the fact that the witness was telling a story that they could verify from personal knowledge was false.

a. Montserrat meeting. Dole's counsel hadn't oversold [redacted] testimony. At his deposition, he testified not only about the March 2003 Montserrat conspiracy meeting in terms congruent with John Doe 13's description of that event - the location, the agenda, and the mandated 40% azoospermia and 30% oligospermia proportions "for credibility" in connection with case 214 were identical to what John Doe 13 had testified to, and the cast of attendees included all the same Nicaraguans (and more) as well as Benton Musselwhite and Juan Dominquez. (Ex. 62, p. 2496 - 2503) (A comparative chart of the Montserrat attendees listed in the portions of the three "Chimera conspiracy" witnesses' depositions that were made public was filed in the *Osorio* case and appears in Plaintiff's Ex. 1.2, p. 45)

b. Other conspiracy meetings. But he also described an *entire string* of conspiracy meetings [redacted] in his interviews with Dole's investigators and his deposition testimony. [redacted] he reported, he met with [redacted], who encouraged him in the use of manuals to train phony DBCP claimants. (Plaintiff's Ex. 3.11, p.481) [redacted] with Musselwhite and Roberts [redacted], [redacted] Musselwhite supposedly [redacted]

[redacted] (Plaintiff's Ex. 3.11, p. 482)

But the most important [redacted] meeting purportedly took place [redacted] between representatives of all four law firms handling DBCP litigation in Nicaragua - Provost, Dominguez, Lack/Girardi/Gutierrez, and Gomez. (Ex. 62, p. 2485-86) Sparks was there, and both Benton Musselwhite and Juan Dominguez were in attendance and each spoke up at this conspiracy meeting. (Ex. 62, p. 2485-2486) The purpose of the meeting was for the four law firms "to talk about the recruiting of people that never had anything to do with banana farms, and to study the precise mechanism for the -- for the gathering or the recruiting -- same thing -- to join efforts so that the four law firms would speak with the same language." (Ex. 62, p. 2487)

He testified that Mr. Dominguez initially wasn't sure if including fake plaintiffs would be profitable, but that [redacted] (after the above-described consultation with, now, Hernandez Ordeñana instead of Duane Miller) Dominguez expressly agreed to go along with the plan. (Ex. 62, p. 2489-90, 2492) Mr. Musselwhite was even more enthusiastic, offering to finance the effort. (Ex. 62, p. 2491) Of course, under the terms of the secrecy order MAS could not ask either man if the story was true, and with the story changed to delete Duane Miller from the equation there was nothing in their own knowledge base to alert them to the fact that this story was a complete

fabrication.

Nor did MAS, which was not involved in Nicaraguan litigation, have any personal knowledge of what sorts of results were being produced in Nicaraguan fertility labs. It would only be the following year, after *Mejia* was dismissed, that the physical impossibility of Dominguez and Musselwhite participating in multiple meetings in Nicaragua in the first half of 2003 would be revealed, and that the gross disparity between the purportedly dictated percentages of specific findings and the actual findings of the Nicaraguan labs would become public knowledge.

The phony stories about conspiracy meetings just scratches the surface of the wildly enthusiastic prevarication of John Doe 17, who has proved to be a fitting rival to Baron Munchausen. For the sake of brevity the following is a partial list of some of his claims as to which contradictory or inconsistent evidence has come to light despite the court's prohibition against direct investigation of the John Doe witnesses and their testimony:

c. Educational claims. John Doe 17 testified under oath that he graduated from [redacted] high school in [redacted] and earned a bachelor's degree in [redacted] from the [redacted] although he didn't remember the "exact dates" of either. He also claimed to have attended [redacted]. (Ex. 62,

p. 2454 - 2456, 2475) The trial court would later refer to him as "the witness with the extended education" as no other witness claimed to have attended college. (2CV 69)

But... In a resume he prepared two months later [redacted] John Doe 17 wrote that he graduated from [redacted] high school and [redacted] with a degree in [redacted] He did not claim any legal education. (Plaintiff's Ex. 17, p. 3096, Perrino Dec. 6 AA 1104) Note: Appellants remain under the restrictions of the secrecy order, and cannot simply contact the schools for confirmation of his (non)-attendance. All appellants can do is note that it is improbable that a man with a college degree would not remember the year it was awarded, and that a man who claims to heave earned a bachelor's degree from two different colleges with two different majors probably did neither.

d. [redacted] employment: John Doe 17 testified that [redacted] because they wanted him to recruit fake plaintiffs and he refused to do so. (Ex. 64, p. 2721) [redacted] Nicaraguan lawyers [redacted] to force him to come back to work for them. (Ex. 64, 2723-2725, 11CV 1824-1825) (Dole's counsel also made this representation to the trial court in the ex parte conference from which all of plaintiff's lawyers were excluded, as an example

of how the Nicaraguan DBCP lawyers abused the Nicaraguan legal system to threaten honest folks like the John Doe witnesses. (Ex. 208, p. 7612)

But... [redacted] didn't try to [redacted]. As he stated [redacted]" (Ex. 399, p. 14188) And John Doe 17 spoke openly in Nicaragua of [redacted]

e. [redacted] **employment history**. John Doe 17 claimed to have worked [redacted]

But... Workers on the [redacted] he probably never worked on [redacted]. (Ex. 62, p. 2408)

f. [redacted] **"La Concepcion" was a "fraud lab."** John Doe 17 testified that the "La Concepcion" fertility laboratory was the "same place" as the Clinica Salazar and he knew it was a "fraud lab" [redacted] (Ex. 63, p. 2548-2549) This testimony was cited by defendants as proof in the coram vobis hearings that La Concepcion

was a "fraud lab." (8CV 76, 91, 97, 186 Ex. 381 p. 13675)

But... The "La Concepcion" lab was not owned by Francisco Tercero. It was owned and operated by Amira Vanegas Velasquez, who voluntarily appeared for deposition during the trial of this case and was cross-examined about its operations at length. (Plaintiff's Ex. 22, p. 3404-3405, 3445) Claudia Salazar, who operates her own clinic and uses a wheelchair, is a different person with her own lab. (Plaintiff's Ex. 1.3N, p. 278-279)

g. Personal fertility. John Doe 17 stated at his deposition that he had [redacted]. (Ex. 62, p. 2960)

But... On the resume he prepared two months later he claimed [redacted] children. (Plaintiff's Ex. 17, p. 3096) [redacted] he claimed he was rendered *sterile* by DBCP, [redacted] He later bragged of having fathered [redacted] *children.* (Ex. 399, p. 14185.)

h. Never met with Dole's lawyers before his deposition. At his deposition, John Doe 17 testified that he never met with any of Dole's lawyers before the

deposition, that his contacts with Dole's investigators was limited to one or two "conversations" he had had with Luis Madrigal, and that in those conversations there was no discussion of Juan Dominguez. (Ex. 64, p. 2682-2689)

But... In fact, John Doe 17 had met with Dole's [redacted] counsel on multiple occasions in 2006-2007 [redacted] He met with Dole's [redacted] and then [redacted] again in [redacted] 2007, [redacted]

And a few weeks before his deposition he met with Dole's trial counsel Scott Edelman and Andrea Neuman - the latter being the attorney who was representing Dole at his deposition, sitting across the table from him when he claimed never to have met with any of Dole's attorneys. (Ex. 208, p. 7615) The court's secrecy order only required Dole to produce copies of investigator's MOIs, and no MOI was prepared for any of his meetings with Dole's attorneys[8]. Ms. Neuman did not correct the witnesses' false testimony made

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The order appealed from states that the secrecy order required Dole to

in her presence or otherwise notify opposing counsel that the were being lied to about a matter which was within her personal knowledge. Accordingly MAS had no way of knowing that he was lying about not having met with Dole's counsel. The only information MAS had was that John Doe 17 had in fact met with both Luis Madrigal [redacted]

i. Negotiating a deal with Dole [redacted] while testifying as a supposedly disinterested party. After testifying in *Mejia* John Doe 17 repeatedly claimed that he had been in serious negotiations with Dole to finalize an agreement whereby [redacted] would settle with the firm and that Dole's counsel had tendered such an offer to him. (Ex. 396, p. 14693, Ex. 397, p. 14165 Ex. 399 p. 14180-14182, Ex. 407, p. 14437, 12CV 2163-2164`)

But.... for Dole's trial counsel to secretly promise to enter into a lucrative contract with their client's "most important witness" would be unethical and

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provide MAS with "interview notes from Dole's attorneys." (CV dismissal ruling, p. 7, 32) That statement is not accurate. No interview notes were ever produced from Dole's attorneys, including those who had first-hand knowledge that a witness testified falsely, as Ms. Neuman had in this instance.

violate California Rules of Professional conduct 5-220, 5-220, and 5-310.

The testimony regarding the various conspiracy meetings and other claims noted above is just a partial listing of some of the wild tales told by John Doe 17 for which contradictory evidence has become known despite the prohibition on straightforward investigation into a witness and his testimony. Many of his numerous other claims, such as his story of being invited to a meeting [redacted] simply locked behind a wall of secrecy, immune from inspection, no matter how improbable. (Ex. 63, p. 2637 - 2642) He was truly Doles' "most important witness." He provided a wealth of testimony, all of which "proved" Dole's claims of fraud right down the line.

When Jason Glaser, who spent much time in Nicaragua in 2007 - 2009 and spoke with [redacted] on multiple occasions was asked what [redacted] reputation was, this was his testimony:

> The worst. Without a doubt. You ask anybody [redacted] and send an investigator, please, and just tape it surreptitiously, secretly, however you want to do it to get an honest response, and they will be: that guy, [redacted] I mean, I read him in about five minutes as a completely untrustworthy person when we interviewed him.

He exudes slime. (11CV 1917)

Of course, sending an investigator to do what Mr. Glaser suggested would have been a direct violation of the court's secrecy order, punishable by both financial penalties and incarceration, so neither MAS nor the trial court had any way of learning about this witness's almost legendary mendacity. And while every claim John Doe 17 made at his deposition which was later made public and subject to objective verification would eventually prove to be false, that did not and could not happen during the *Mejia* discovery process due to the secrecy order, and his claims, like the claims of the other chimera conspiracy witnesses recruited by Dole, were believed and acted upon throughout the *Mejia* process by the trial court, which assessed his credibility thus:

> "This Court has reviewed the entire deposition transcript of [John Doe 17] and viewed portions of the witness's videotaped testimony. The Court finds [his] testimony to be credible based on his demeanor while testifying, the level of detail in his testimony, his response to cross examination and other evidence corroborating his testimony."
>
> (Ex. 98, p. 4641)

23. John Doe 18 "corroborates" the Montserrat conspiracy meeting story; John Doe 16 describes his attempts to pass himself off as a former banana worker.

[redacted] John Doe 18, also "corroborated" the story of the Montserrat conspiracy meeting, albeit in less detail than the stories told by

John Does 13 and 17. (Ex. 67, p. 3215-3221)

A third witness was deposed in February 2009 - [redacted], John Doe 16. [redacted] he decided to make a DBCP claim against Dole despite never having worked on a Dole banana farm. [redacted]

John Doe 16, who gave his current occupation as [redacted] testified that [redacted] signed up to be a DBCP plaintiff. (Ex. 69, p. 3340, 3351) He agreed to pretend to have worked [redacted] when he went into Chinandega to the OLPLB offices, and to lie about the fact that he had fathered children after DBCP use had ended. (Ex 69, p. 3354, 3366) He bought a pamphlet [redacted] which described the [redacted] farm [redacted] and two more later [redacted]) He bought a film of a man working on a banana farm [redacted] He paid [redacted] to attend a variety of meetings. (Ex. 69, p. 3375) They were not charged to attend a rally at which Juan Dominguez spoke, however, and were given free bus rides to attend. (Ex. 69, p. 3411-3412)

After a while he became angry that the payoff for his bogus claim didn't come through as promptly as promised - they are all "liars and crooks" he said, referring to the *capitans* - so he contacted Dole's local counsel in Nicaragua, who put him in touch with Luis Madrigal. (Ex. 69, p. 3367, 3391 - 3394) He said that he agreed to testify so that the transnationals and Juan Dominguez should "know the trickery that's going on." (Ex. 69, p. 3409)

John Doe 16 testified that most of the leaders of the DBCP litigation in Nicaragua were "Sandinistas" [redacted] He said that he had provided Dole's investigators with copies of the "refresher guides" [redacted] which described the Dole banana farms [redacted] (Ex. 69, p. 3414, 3517)

24. Dole successfully targets Dominguez, convincing the trial court to authorize defendants to depose plaintiffs' counsel with a showing that is based almost exclusively on the testimony of John Doe 13 as "corroborated" by John Doe 17.

Unlike Mr. Hernandez Ordeñana, Mr. Dominguez did not have the option of electing not to submit to a deposition if ordered to do so by the trial court. Dole's showing in support of its motion to depose its opposing counsel was little more than a rehash of John Doe 13's testimony - relying heavily on the bogus Montserrat conspiracy story, of course, but also relying on other

claims made by that witness which Dominguez was not allowed to know about and MAS was forbidden from investigating by the court's secrecy order. (RJN 39-46) The trial court ruled that Dominguez had no right to learn the factual basis for its ruling that he be deposed, and barred him from the hearing held to determine if Dole's prima facie showing in support of its motion was sufficient. (Ex. 203, p. 7456-7457) The trial court eventually signed the requested order after being advised by Dole's counsel that John Doe 17 had "corroborated" John Doe 13's Montserrat meeting testimony. (Ex. 213, p. 7742-7743.)

MAS filed a motion to quash the subpoena on behalf of the *Mejia* plaintiffs, which was continued until April, then dropped by MAS during the hearings held that month. Dominguez also filed a request to have his deposition deferred for medical reasons. (Ex.219, p. 7850, 217, p. 7824) Dominguez' deposition was taken off calendar when the court decided to proceed with a dismissal hearing in April 2009. (Ex. 217, p. 7834)

25. Dole's agents and secret witnesses play the "fear card" again, and again, and again, making lurid claims of threatened violence which never actually happens.

As discussed below in section III.A.3.c, the trial court was highly sensitive to any allegation that a witness might be harmed as a result of testifying in a case before the court. Dole's investigators and agents in

Nicaragua began feeding a steady diet of claims of threats to witnesses to the court through Dole's counsel and, to a lesser extent, in secret depositions.

a. John Doe 17 reportedly claims he was told that Hernandez Ordeñana had directed thugs to beat up Dole investigator Luis Madrigal.

[redacted], Dole's counsel gave the court a declaration from Dole investigator Luis Madrigal in which he stated that he had been informed by [redacted] John Doe 17, that he had been told [redacted] that Antonio Hernandez Ordeñana "was going to order his captains to give instructions to the plaintiffs in this case to whack the investigators like me." (Ex. 208, p. 7621)

The probability that this is another of John Doe 17's fabrications is evident from the July 2010 testimony of **Jorge Madriz' partner**, Jason Glaser. When Glaser was asked on cross-examination by Dole's counsel if he was "aware" that instructions had been given to harm Madrigal Glaser's response was "I'm not.... I also doubt that it's true." (10CV 1745) Glaser also testified that he did not believe that anyone was in any danger from Mr. Ordeñana. (10CV 1687, 11CV 1895) Of course, no direct investigation into this claim has been possible due to the court's secrecy order, but John Doe 17 also told yet a *different* version of this story at his deposition. (see sub-section d., below)

b. John Does 13 and 17 claim [redacted] "the group of eight" - the term used to refer to the Nicaraguans seeking compensation for DBCP claims through the court system, as opposed to The Alliance which had made a deal to accept Dole's administrative settlement. (Ex. 144, p. 6346-47, Ex. 149, p. 6399-6400) Again, the secrecy order prevents any direct investigation of [redacted]" so the probability that [redacted] cannot be objectively tested.

c. John Doe 18 claims to [redacted] **, but no corroboration is produced.** Dole reported that John Doe 18 claimed [redacted] Note: Dole agreed to provide confirmation of this claim [redacted], but never did. Ex. 215, p. 7802.)

d. John Does 16 and 17 testify that Hernandez Ordeñana gave instructions to "beat", "club" or "drag" Luis Madrigal. At his deposition John Doe 17 didn't say anything about being told a story by Jorge Madriz in January. Instead, he testified that [redacted] "Carlota" - an employee of the OLPLB - handing out pictures of Luis Madrigal in the park, with instructions to "grab him" and "beat him up." (Ex 62, p. 2441-2442)

John Doe 16 testified at his deposition that bloodthirsty DBCP claimants "from the boonies" would kill people "like dogs." [redacted]

As discussed in more detail in section III.A.3.c, infra, despite the fact that the identity of Dole's investigators and [redacted] over the course of the ensuing years, none of Dole's agents or witnesses were in fact "dragged", "beaten up," "killed," or mistreated in any way. The only source of information supporting the claimed threats came from the agents and secret witnesses themselves.

26. Nicaraguan lawyer Antonio Hernandez Ordeñana sues Dole's agent for slander and Nicaraguans demonstrate in protest of the tactics being used by Dole to recruit secret witnesses.

While the trial court was blithely accepting that the John Doe witnesses were simply brave whistleblowers telling the truth to expose fraud, driven only by the purest of motivations, the targets of the perjury being committed in secret were less naive. Although the identity of the John Doe witnesses was concealed and the content of their testimony was secret Antonio Hernandez Ordeñana had deduced that Dole's agent were recruiting false witnesses to testify falsely (which was, in fact, exactly what was happening) and doing so in a calculated manner designed to sabotage the legal process by defaming the lawyers opposing Dole in court in order to neutralize any legal opposition and force DBCP claimants to resort to the cheap administrative program Dole had negotiated with The Alliance of capitans. That, too, was in fact confirmed by John Doe 17's own candid statements [redacted] "...their biggest problem is the attorneys. First they went for Dominguez, and now Provost." (Ex 396, p. 14163) and "their first action is to get rid of the law firms, because they don't want lawyers, they want to have direct negotiations with the [capitans]" (Ex. 399, p 14198)

Hernandez Ordeñana filed an action for libel and slander against Jose Francisco Valadez Valadez, one of Dole's agents active in Nicaragua. Unlike the *Mejia* proceedings in our courts, Hernandez Ordeñana's claims were

litigated in open court, with Valadez fully apprised of the claims made against him and given an opportunity for discovery and to present a defense. (Ex. 48, p. 1064-1068, Ex. 157, p. 3457)

At the first hearing in the Ordeñana - Valadez case on March 9, 2009, a demonstration was held denouncing Dole's agents and their secret recruitment of witnesses. The protest was sedate - a march with banners, a man speaking through a loudspeaker, a bit of desultory chanting. (See video - Exhibit A to Exhibit 50, March 9, 2009 "Transnational Protest") Dole's counsel would later describe the varied group of placid Nicaraguans attending the demonstration as a "mob." (Ex. 230, p. 8285) Jason Glaser, who was present and mingled with the crowd at the demonstration testified that he did not hear anyone there express an intent or encouragement that Dole's investigators should be harmed. "...I saw indignation with the fact that People were being manipulated. I did not see angst or the desire to cause harm." (10CV 1689)

There are demonstrations at courthouses in this country when controversial issues are heard as well. One can only imagine what would happen *here* if the tables were turned, and a foreign judge authorized a foreign corporation to recruit secret witnesses in California in an effort to obtain a financial advantage over regular American citizens. Yes - there would be demonstrations. Perhaps this would be the one thing which could bring the

Tea Party and the Occupy movement to protest together.

27. MAS seeks to withdraw as counsel, but with Dominguez successfully neutralized by the secret testimony describing him as an active participant in the conspiracy he is discharged as counsel by the *Mejia* plaintiffs first; the court orders MAS to continue on as counsel in an expensive and time-consuming case they cannot win.

- **The court sets a hearing to dismiss *Mejia*.**

On March 2, 2009 MAS filed a request for leave to withdraw as counsel in *Mejia*, stating:

> Attorney is a law firm in Sacramento, California. Clients are Nicaraguan citizens, living in Nicaragua. Attorney has no Spanish speaking attorneys. Clients do not speak English. All of attorneys' prior contacts with clients have been facilitated by Juan J. Dominguez and Antonio Hernandez Ordeñana. Attorney has no practical means of contacting the clients to obtain a consent to withdraw, other than through Mr. Dominguez and Mr. Ordeñana. Attorney cannot make these contacts through Mr. Dominguez and Mr. Ordeñana at this time due to complicating factors in the relationship between attorney and Mr. Dominguez.
>
> (Ex. 96, p. 4535)

The motion was taken off calendar on March 6, 2009 after papers were filed by the *Mejia* plaintiffs discharging Dominguez as counsel. The court had concerns about MAS' ability to notify its clients since they could not do so through Dominguez or Hernandez Ordeñana. (Ex. 13, pp. 359 et seq., Ex. 217, p. 7828) Although MAS was not allowed to withdraw at that time, they asked to be allowed to "take a breather" from daily involvement in the case. (Ex.

217, p. 7828)

The trial court noted that its findings had become "stronger and stronger" throughout the *Mejia* discovery process and decided to set a hearing to dismiss *Mejia.* (Ex. 217, pp 7831-32) When MAS attorney Mike Axline was asked about filing an "opposition" to the dismissal, he corrected: "A response might be a better descriptor...." Dole's counsel then brought up the subject of "five or six" more witnesses whose depositions had not been taken yet. Mr. Axline suggested that declarations might be preferable. The court noted that that would be "the cheapest way." Axline denied that that was what he was concerned about. (Ex. 217, p. 7833-34)

MAS renewed its motion to withdraw as counsel before the dismissal hearing, and was denied. (Ex. 96, p. 4525) MAS then attempted to dismiss the action. (Ex. 97, p. 4549) The court ruled that, in essence, the fraud of the plaintiffs and their counsel had already been proven and that they could not dismiss the case before the court had an opportunity to hold a hearing "airing the issues and permitting the court to make appropriate factual and legal findings and take all actions required of the Court. These actions may include not only dismissal with prejudice, but may include monetary sanctions against the parties or the attorneys, referral to the State Bar and prosecutorial agencies." (Ex. 225, p. 8038)

28. With MAS' approval, declarations from additional John Doe witnesses are filed without American counsel traveling to Central America to cross-examine them.

Based on the discussion at the March 6 hearing, Dole filed declarations from additional "John Doe" witnesses. Note: in the coram vobis proceedings the following year appellants objected to the admission of all of these declarations into evidence on the grounds that none of the witnesses were subject to cross-examination. That objection was overruled because MAS had the right to ask for permission to depose them in *Mejia* and by failing to do so MAS' generally waived that right not merely for the *Mejia* plaintiffs but for appellants, who were not a party to that proceeding, as well. (5 CV I 25-26)

[redacted] all made a variety of accusations against Walter Gutierrez (a Nicaraguan attorney working on DBCP cases with Lack and Girardi) and Justice Rafael Solis. (Ex 42, p. 997-998, Ex. 43, p 1006-1009, Ex. 44, p 1018-1021, Ex 46, p. 1041-1044, Ex. 49, p. 1077-1080) Note: in the coram vobis proceedings appellants objected to the admission of these declarations into evidence in this case on the grounds that neither Rafael Solis not Walter Gutierrez had anything to do with this case, these litigants, or anything involving litigation in American courts. The objection was overruled on the grounds that Walter Gutierrez was a participant in the Montserrat conspiracy meeting, so evidence about him was relevant. (CV6 p. 55-56)

[redacted] recounted his suspicions about fertility lab reports [redacted]

[redacted] wrote that he had been hired to work in a fertility lab [redacted], he saw [redacted] doing what he thought was falsifying results, including [redacted]. (Ex. 52, p.1135) Note: [redacted] is John Doe 12, who testified that [redacted], but suspected that *others* did. (Ex. 55, p. 1429, 1435, 1535) [redacted], two of the lab technicians who [redacted] believed falsified lab results, were fired [redacted] He described how procedures had been instituted by Juan Dominguez [redacted] which made falsification of results more difficult, and stated that [redacted] adhered to correct lab protocol at all times with the [redacted] samples [redacted] (Ex. 52, p. 1135-1136) Approximately [redacted]% of the samples [redacted] showed some form of fertility issue, although [redacted] questioned the causes. (Ex. 52, p. 1136)

In sum, Dole was able to produce [redacted]

[redacted] - including two whose stories directly contradicted each other. Protocols instituted by Dominguez made any such attempts at falsification more difficult. [redacted] testified that [redacted]% of the [redacted] tests performed [redacted] had negative results for fertility issues. (Dole never presented any statistical evidence showing a pattern of fertility test results from any lab which supported the claims of falsification of reports.)

And at this point, safe from cross-examination, the declaration of Witness X, discussed above in section II.C.11, was filed as well. (Ex. 34)

29. One week before the *Mejia* dismissal hearings MAS is threatened with being held in contempt for failing to act aggressively enough against the interests of their clients.

Leading up to the dismissal hearing MAS was in an unenviable position. They were required to act as counsel for a group of Nicaraguans they could not communicate with, in a case they were not being paid for and obviously could not win at that point, but were required to appear in court repeatedly in a case being heard in a city 400 miles from their Sacramento offices. MAS had no potential benefit from the scheduled future proceedings which were being held overtly for the purpose of displaying evidence that their clients and former co-counsel were a bunch of crooks. But it got even worse for them.

On April 15, 2009, one week before the OSC hearings were scheduled to begin, the trial court "expanded" the proceedings in *Mejia* to place MAS under threat of being held in contempt of court on the grounds that they "allowed this matter to continue after they either actually knew or reasonably should have known of the fraud that appears to have been perpetrated on this court and on the parties." The hearing on the contempt charge was scheduled for May 8, two weeks after the hearing scheduled to dismiss *Mejia* on the basis of defendant's fraud claims. (Ex. 225, p. 8047)

30. April 21-23, 2009: The *Mejia* dismissal hearing: Dole presents selected evidence to dramatize its claims which had already been found true by the court.

- **MAS serving as token adversary offers no opposition.**

The hearing held to dismiss *Mejia* and *Rivera* was held on April 21 - 23, 2009. Although presented in the form of a contested hearing it was actually in substance the equivalent of the "show trials" held in the Soviet Union during the cold war: There was no question of the outcome, and only one side presented evidence in a choreographed production designed to highlight all of Dole's fraud claims. The trial court made clear at the very beginning of the hearing:

> In preparation for today I have read and reviewed all documents, all pleadings, and any supporting evidence presented to me by defense, mainly Dole, and by plaintiffs. Based on that, this court finds that Dole has met its prima facie burden to show that there was a conspiracy afoot to commit a crime or fraud on this

court.

(Ex 228, p. 8106, see also Ex. 230, p. 8266, 8267)

Indeed, in the weeks leading up to the April hearing the trial court had discussed with counsel what evidence should be presented, pointing out that the Montserrat conspiracy meeting was a "linchpin" of Dole's case and discussing how testimony about it might be displayed. (Ex. 219, p. 7861)

In addition to the tale of the Monteserrat conspiracy meeting, Dole presented recordings of various witnesses stating that they were afraid of retaliation if their identities became known. Dole's investigator Luis Madrigal testified that the John Doe witnesses would be beaten and likely killed if the fact that they had testified were to be made public. He was "100% certain" that that would happen. (Ex. 230, p. 8272) (But see section II.A.3.c, below.)

Madrigal also testified that a $20,000 reward had been promised by Antonio Hernandez Ordeñana for a list of the John Doe witnesses. Dole's counsel referred to this a a "bounty" on their "heads." (Ex. 230, p. 8272) But note: In July 2010 Jason Glaser testified that he never heard any report of such a reward offer either personally or from the Nicaraguans working with him who were "in the field constantly" despite the fact that such a story would have been "compelling" for his documentary. (10CV 1690)

Madrigal and his subordinate, Francisco Valadez, both testified that at

that point they were "afraid" to travel openly in Nicaragua because they might be physically attacked. (Ex. 230, p. 8274, 8279, 8285) But note: both continued to do so on a regular basis, and neither was ever attacked. (11CV 1909, Plaintiff's Ex. 12.B, p. 1617)

MAS had no evidence of its own to present. Since none of the John Doe witnesses' testimony or identities could be discussed with anyone outside of their offices in Sacramento, they had no way to investigate or obtain any evidence which might have impeached the witnesses or their stories. Of course, MAS had no hope of changing the court's decisions, and was operating under the dual threat of a sanction motion brought by Dole and the contempt citation threatened by the trial court in any event. Accordingly, MAS did nothing to contest Dole's claims or say anything which might suggest opposition to the court's finding that Dole's fraud case had been proved. Mr. Axline did make sure before and during the hearing to receive confirmation that his firm's request to withdraw would be reconsidered after the hearing. (Ex. 226, p. 8067-8068, Ex. 229, p. 8163-8164) After a 27 page closing argument presented by counsel for Dole, this was the "closing argument" presented on behalf of the *Mejia* plaintiffs by Mr. Axline, in its entirety:

> Your Honor, I can only say that we also appreciate the time that you have spent on this case. We have faith in the fairness of the Court. We understand that it has reviewed all the evidence, and we are prepared to submit the case to your Honor for your decision. (Ex. 230, p. 8303)

The trial court made factual findings that all of Dole's fraud claims had been proven with clear and convincing evidence, and "all the findings that I made I truly believe beyond a reasonable doubt." (Ex. 230, p. 8306.) Dole's opponents in Nicaragua - including lawyers and judges in that country - were described as "organisms" which evolved in a "unique social ecosystem" in Nicaragua to became part of the "monstrous" chimera conspiracy. (Ex. 230, p. 8304, 8305, and see section 3.C, below for a discussion of these findings) The court found the evidence of the conspiracy between Juan Dominguez and the other American and Nicaraguan lawyers, and specifically, the story of the Montserrat conspiracy meeting, to be "highly credible." (Ex. 230, p. 8309.) The court concluded by noting that it would be making referrals for prosecution to the State Bar and various criminal prosecutors. (Ex. 230, p. 8310)

31. After MAS dutifully plays its part in the *Mejia* dismissal hearing the contempt and sanction motions against them are dropped but their permission to withdraw remains in limbo pending the final disposition of the case. MAS agrees to try to help Dole intimidate a documentary film maker into withdrawing his film about DBCP and the *Tellez* trial.

On May 8, 2009, the sanctions motion and contempt charges against MAS were dropped. (Ex 227, p. 8077, 8090) The court expressed a belief that there was a "high likelihood" that Mr. Dominguez would be criminally

prosecuted and decided to delay the hearing of contempt charges against him.[9] (Ex. 227, p. 8089) Dole's counsel had prepared a first draft of the written ruling and presented it to the court and counsel at that hearing for review and possible revision before it was signed (Ex. 227, p. 8099)

Dole's counsel used the hearing to try to enlist the assistance of the court and plaintiff's counsel in preventing the release of a documentary film that had been made by a Swedish film maker about DBCP in Nicaragua, including scenes from the trial in this case. (Ex. 227, p. 8091) Mr. Axline, on behalf of MAS, agreed to send a letter to the film maker to discourage him from releasing the film, prompting the trial court to comment: "that's a very nice offer from Mr. Axline. He's very gentlemanly and I believe his word is as good as gold. Or platinum maybe these days; hmmm?" (Ex. 227, p. 8093) The court promised to rule on MAS' motion to withdraw before the final dismissal order was filed. (Ex. 227, p 8099)

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[9] There is no evidence that Mr. Dominguez has ever been charged or formally accused of any wrongdoing of any sort by any court or agency other than the trial court in these proceedings.

32. June 2009: The written statement of decision in *Mejia* repeats the claims of the John Doe witnesses as facts proven in our courts by clear and convincing evidence, extols the credibility and bravery of the secret John Doe witnesses, and dismisses that action.

- **Dole announces its "vindication" to the world.**

As noted above, the written decision in *Mejia* was drafted by counsel for Dole. (Ex. 227, p. 8084) As finally signed by the court, the *Mejia* findings reiterated the court's firm belief in the truthfulness and bravery of the John Doe witnesses. (Ex. 98, p. 4621)

The chimera conspiracy witnesses, who described in detail events which never actually happened, were each found to be credible, "based on his demeanor while testifying, the level of detail in his testimony, his response to cross examination and other evidence corroborating his testimony." (Ex. 98, p. 4641, 4642)

John Doe 15, who [redacted] routinely lied [redacted] for money, and told a variety of conflicting stories about [redacted], was found to be credible. (Ex. 98, p. 4659) John Doe 9, who testified falsely that [redacted] was the father of [redacted] was found to be credible. (Ex. 98, p. 4650)

The trial court found that every single John Doe witness recruited by Dole was "credible," reciting the same litany of factors each time. (Ex. 98, pp 4621, 4641-44, 4647, 4649, 4650, 4657, 4659) The decision recited the facts of the purported "Montserrat conspiracy meeting" and noted that:

> "All of the evidence on which this Court has made findings of fact has been corroborated by at least two, and usually more, sources. All identities of attorneys and/or other participants in the fraud are supported by at least two sources identifying the person by name or circumstantial corroborating evidence plus at least one clear and confirmed accurate detailed description of the individual." (Ex. 98, p. 4619 - 4620, 4644-4646)

The 130 footnotes citing evidence in support of the decision include **over 90** citations to the testimony of the chimera conspiracy witnesses: John Does 13, 17 and 18. (Ex 98, pp 4620, 4624, 4641-56, 4659, 4661, 4664, 4668) No testimony given by any John Doe witness was cited as being anything but "credible." The court found that defendants' due process rights had been violated and dismissed the *Mejia* and *Rivera* cases under the authority of *Stephen Slesinger, Inc. v. Walt Disney Co.* (2007) 155 Cal.App.4th 736, 765. (Ex. 98, p. 4675-77)

The day after the written decision was filed, Dole announced to the world that it had been "vindicated" by the ruling, and that "In truth, there is simply no science to support the allegation that DBCP caused sterility to Nicaraguan banana workers." (Plaintiff's Ex. 14, p. 1651)

33. After the *Mejia* dismissal hearing was concluded and a decision announced partial transcripts of some of the previously secret testimony upon which the ruling was based are released to the public. Once the secret testimony is exposed to scrutiny proof of its falsehood appears swiftly.

While the trial court had prevented Dominguez or anyone else in a position to effectively investigate and rebut the claims of Dole's secret witnesses from learning exactly what Dominguez and the various Nicaraguans opposed to Dole had supposedly done *before* the *Mejia* dismissal hearing, parts were put on display *at* the hearing and *after* the ruling had been made partial transcripts of those claims were released to the public along with the court's oral and written rulings setting forth the substance of the testimony.

The court which had seen no alternative to keeping the allegations secret during the time when any effective effort to disprove them would have been useful in connection with the fact finding process in *Mejia* now expressed concern that the details should be made public once the final decision was made in order to facilitate criminal, contempt, and State Bar prosecutions of Dominguez and others and to publicize the wrong that had been done. (Ex. 229, 8163-8164) Accordingly, redacted portions of the transcripts of John Doe testimony - including the testimony describing the [redacted] and Montserrat conspiracy meetings described by John Does 13, 17 and 18 - were made public *after* the court announced its rulings.

Dole filed those documents in *Osorio v. Dole* - the Florida federal court case in which the Provost firm was seeking to enforce the Nicaraguan DBCP judgments in this country. (Plaintiff's Ex. 1.1, p. 17-18) That had the effect of disclosing the nature of those claims for the first time to persons who would be in a position to know if they were true or not, and to obtain and present evidence proving that they were false. In June 2009 Provost did just that, filing declarations in the *Osorio* case from Mark Sparks, Benton Musselwhite, Claudia Salazar Maineri and others denying attendance at any such conspiracy meeting and pointing out the disconnect between the purported direction to Nicaraguan labs to produce the specific 40%-30%-30% ratio of infertility findings in order to provide credibility in that very case - *Osorio v. Dole* AKA "Case 214" - and the records of the actual lab reports in that case. (Plaintiff's Ex. 1.2, p. 46-48, 1.3A, p. 62-63, 1.3M, p.248, 1.3N, p. 276) After review of those showings the federal court decided to defer going forward with *Mejia*-type discovery in that case. (Ex. 177, p. 6530)

E. June 2009 - May 2010: Coram vobis OSC is issued by this court in this case based on the evidence and rulings from the *Mejia* case. A return is filed and investigation and discovery ensue.

Defendants filed petitions for writ of coram vobis to vacate the judgment in this case within weeks after the trial court issued its oral rulings at the end of the *Mejia* dismissal hearing, before the written decision was filed.

As MAS was in the process of withdrawing from all Nicaraguan litigation, awaiting only court approval, and Dominguez had been terminated as counsel by the clients once he became a target of the court's criminal/contempt/State Bar prosecution referrals, there was no one adverse to defendants who was authorized to see the sealed versions of the petitions. This court issued an order to the Superior Court directing it to hold hearings on the petitions.

Dole's request that the matter be assigned to the same court which had dismissed *Mejia* was granted and defendant's complete victory, if not actual "vindication," appeared imminent. (7 AA 1360) Unexpectedly, a SLAPP suit filed by Dole against the Swedish documentary film maker mentioned above in section II.D.31 brought this case to the attention of attorneys outside the previous small circle of tort lawyers. New counsel appeared to defend appellants' rights, with the result that bona fide factual opposition to Dole's fraud claims was undertaken for the first time in our courts. (2CV 32-34)

Appellants remained hobbled by the secrecy order which prevented all direct investigation of any John Doe witness or his or her secret testimony, but the *Mejia* dismissal hearing and the redacted transcripts released thereafter exposed some actual specific claims to public scrutiny despite the secrecy order, and additional investigation within the restrictive borders of the secrecy order uncovered evidence of more perjury in the secret testimony. A series of preliminary hearings were held to hear a demurrer, discovery requests by

appellants, and objections to the thousands of pages of evidence submitted by the parties in preparation for the OSC hearings.

34. Defendants file their coram vobis petitions in this court based on the evidence and oral findings in *Mejia*.

On May 19, 2009, Dole filed its petition for writ of coram vobis in this court under seal in action B216182. (2 AA 138-189) Dow filed a "me-too" petition three days later which was assigned case No. B216264. (2 AA 385-391)) No one adverse to Dole received a copy of the unredacted version of its petition other than MAS, who were still awaiting approval of their motion to withdraw from all Nicaraguan DBCP litigation. (2 AA 387-388) MAS gave no indication of willingness to step back into the fray from which it had worked so hard to extricate itself; accordingly no one with any intention of opposing Dole's petition was allowed to see its complete contents. MAS' motions for leave to withdraw from all Nicaraguan DBCP case were granted in the trial court and this court in June 2009 and that firm has not participated in the litigation since.

Dole's petition relied heavily on the testimony of the "chimera conspiracy" witnesses' testimony, including their tale of the conspiracy meetings purportedly held in Nicaragua by *everyone* opposed to Dole in DBCP litigation, containing no less than **42 citations** to the testimony of the chimera conspiracy witnesses - John Does 13, 17 and 18 - as good cause for this court's

issuance of the extraordinary writ. It also gratuitously renamed the "group of 8" the "gang of 8" - a term was never used by any witness - for dramatic impact (2 AA 235)) and repeatedly stated that Juan Dominguez and the plaintiffs in this case had threatened the life and safety of witnesses, a claim for which *absolutely no evidence exists*, as discussed below in section III.A.7.c. With no real opposition there was little reason not to engage in that type of gratuitous distortion, particularly as to the parts which were redacted from the "public" version.

35. After MAS withdraws this court is left to consider defendants' coram vobis petitions with no party adverse to defendants being allowed to know what is in the complete petition; new counsel later appears to defend appellants in the Superior Court and is allowed to see the secret evidence.

True to its word, the trial court allowed MAS to withdraw from all Nicaraguan litigation, including this case, before signing the final order dismissing *Mejia.* MAS was also allowed to withdraw from the appeal from the initial judgment in this case (B207718) at the same time that appeal was stayed on June 12, 2009. Accordingly, at that point appellants had no American counsel. Furthermore, neither appellants nor anyone acting on their behalf were allowed to see the sealed petition which was pending in this court seeking the dismissal of the judgment they had won against Dole in 2007-2008. (2 AA 387-388) That left this court with the task of determining if defendants' coram vobis petitions should be granted on what was in great part

an ex parte showing.

Based on the unopposed filings this court issued an order to show cause directing the plaintiffs to file a return in the Superior Court showing why the relief sought in the petitions should not be granted, to be heard in that court. (RJN 2-3, 2 CV A3) At the last minute, a return to the redacted version of the petition was filed in the Superior Court on behalf of appellants by new counsel with no prior relationship with the case or any of its prior counsel. (2 CV A36-A37, A43)

Dole's request to have the coram vobis hearings presided over by the same court which had heard the *Mejia* case was granted, and a hearing date set for the coram vobis proceedings to commence in the Superior Court. (2 CV 4)

36. Appellants attempt to investigate the claims made by Dole's witnesses but the secrecy order prohibiting direct investigation of the John Doe witnesses and their testimony remains in force.

On August 20, 2009 the court granted appellant's new counsel authorization to see the secret evidence filed in both this case and in *Mejia,* but noted that MAS was not obligated by that order to share any information from *Mejia* in their files. (CV2 RT 50, 51) Dole's counsel indicated a desire to have the testimony of two of the John Doe witnesses who had publicly declared that

they were among the secret witnesses made public. The court stated: "I have no problem with unsealing the names and the information supplied by those people who came forward." (2CV RT 42, 48) However, both Dole and the court reversed course later. (3 AA 405-406) [redacted], and the tale of Witness X's trip to Los Angeles in 2008 has discussed freely both by him and others. (Plaintiff's Ex. 1.3E, p. 144, Plaintiff's Ex. 6.1, p. 1426, Plaintiff's Ex. 6.2, p. 1457-1458, Plaintiff's Ex. 6.3, p. 1474-1475, Plaintiff's Ex. 10, p. 1558-1559, Ex. 253, p. 9220-9221, 11 CV 1827-1830, Ex. 60, p. 2200.) To date appellant's counsel has never been authorized to mention the identity or testimony of any of the John Doe witnesses to anyone other than the court and defendants' counsel in order to investigate their accuracy, bias or credibility.

After reviewing the unredacted petition and the supporting exhibits appellants filed an amended demurrer to the petition, requesting that the court take judicial notice of extensive evidence in the case file which showed that defendants had had possession and knowledge of all of the relevant evidence presented in the coram vobis petition before and during the trial of the case, and that regardless of whatever fraud might have been committed by other people in Nicaragua there was no evidence that it affected the outcome of the trial in this case. (3 AA 407 et seq.) The trial court denied the request for

judicial notice and overruled the demurrer. (2 CVS C 37)

Appellants filed an amended return to the coram vobis petition denying the factual claims contained in the petition and challenged the reliability and constitutionality of admitting the evidence gathered through the *Mejia* discovery process, (3 AA 535 et seq) specifically objecting to the admissibility of deposition testimony taken in that case under the restrictions placed on the only counsel adverse to Dole who were allowed to participate, (3 AA 551) and contesting the sufficiency of the allegations of the petition to satisfy the legal requirements of coram vobis. (3 AA 552.)

The first hearing held after appellants' new counsel had read the secret evidence filed in support of the coram vobis petitions took place on November 19, 2009. Mindful of the fact that the trial court had exerted control over all investigative efforts attempted by plaintiff's prior counsel, and that this case was outside of normal discovery context, appellant's counsel asked the court for permission to contact Thomas Girardi, a prominent Southern California attorney who, along with Walter Lack, had been involved in Nicaraguan DBCP litigation and who had been identified by John Doe 17 as a participant in the Montserrat conspiracy meeting, to simply inquire if Mr. Girardi had any information which would be helpful to appellants, particularly with regard to that meeting. (2CV C62, Ex. 62, p. 2497) That request was denied: "Whatever opinions Mr. Girardi has, he can keep them to himself. He doesn't need to

share them with you." (2CV 76-77)

At that same hearing the trial court pre-emptively notified counsel that "we are not opening up things for more depositions." (2CV C78) Appellants' counsel advised the court that after reading the secret deposition transcripts it became evident that a deposition of [redacted] would be highly probative, and inquired if the court would allow counsel to travel to Nicaragua to undertake that discovery. (2CV C79) [redacted].

Since Witness X claimed to have worked at Candelaria [redacted] should have been able to testify to the truth of that claim. John Doe 17 also claimed to have [redacted] (Ex. 62, p. 2481) Further, [redacted] had told Dole's investigators that he did remember appellant Calero Gonzalez as a worker on that farm. Indeed, [redacted] not only confirmed that Calero Gonzalez worked on the farm to Dole's agents, but confirmed the dates of his employment from 1978 to 1980 (which [redacted] believed disqualified Calero Gonzalez as a legitimate DBCP claimant because [redacted] incorrectly remembered when DBCP application was discontinued at Candelaria. - Ex. 3.7, p. 412)

Witness X claimed that he had worked at Candelaria, and that Calero Gonzalez had not. (Ex. 34, p. 790, 795-796) Accordingly, [redacted] was an obvious witness with regard to the important issues which surrounded the respective claims of each of those men to have worked at Candelaria. However, [redacted], he was never asked about any of them.

The trial court told appellants' counsel: "the answer is no to a deposition in Nicaragua." (2CV C86.)

Appellants filed a motion to require defendants to disclose all evidence relating to the "new facts" upon which the coram vobis petition was brought, specifically including information about which Nicaraguans did and did not work at Dole's banana farms in the 1970s, any evidence relating to the various conspiracy meetings described by Johns Does 13, 17 and 18, and any claims of bribery or requests for bribes by persons related to DBCP litigation. (Motion for Order that petitioners disclose information relating to the "new facts" upon which they base their petition, 3 AA 455 et seq.)

Dole objected on the grounds that the court already knew everything it needed to know, and because the disclosure motion sought information protected by work product privilege. (3 AA 490 et seq) The trial court ruled that Dole should produce any MOIs it had relating to investigator interviews

of witnesses regarding appellants, Witness X, the alleged conspiracy meetings at Montserrat and the [redacted] and any MOI's relating to claims of bribery, but nothing else. (3 CVS C75-76) Dole produced some MOI's relating to appellants but nothing as to any of the other categories, despite evidence that its investigators **had** interviewed witnesses on those subjects. (10 CV 1284.)

Specifically: in May **2008** a Nicaraguan lab operator, Claudia Salinas Maineri, swore out an affidavit describing Dole's agents interviewing her that month about the bogus Montserrat meeting story. (Plaintiff's Ex. 1.3N, p. 276) Dole's investigator Luis Madrigal responded to the Salinas Maineri affidavit in July 2009 with a declaration stating his version of what transpired in his meeting with her 14 month before. (Ex. 243, p. 9096) However, no MOI's were produced regarding that interview, or any other inquiry Dole's investigators might have made into any of the purported conspiracy meetings or Witness X's claim to have worked at Candelaria.(10 CV 1284.)

Accordingly, it appears that either Dole's investigators were careful not to ask anyone in Nicaragua if Witness X had really worked at Candelaria, or any questions about the various conspiracy meetings which were described by John Doe 17 and 13 to them, or else they were careful not to prepare MOI's describing the answers they got to those questions. No evidence regarding those factual issues other than the MOI's of Dole's agents' interviews with

John Doe 13 and 17 was ever disclosed by Dole.

a. Appellants' objections to the use of secret John Doe testimony from Mejia against them in this case are overruled. Appellants objected to the use of the secret deposition testimony and declarations procured by Dole in the *Mejia* case pursuant to the process authorized by the court. (4 AA 675-680) That objection was overruled. (5CV I20)

37. In Nicaragua, [redacted] witnesses are subpoenaed by Nicaraguan DBCP lawyers to answer interrogatories under oath in open court in a procedure called "Pliego de Absolucion de Posiciones;" others execute affidavits and declarations acknowledging that they were paid by Dole's agents.

Although appellants' counsel was restricted by the secrecy order a variety of interested parties in Nicaragua who had been affected by the court's rulings in *Mejia* but prohibited from learning the evidence upon which they were based endeavored to learn what claims had been made by Dole's secret witnesses and - mindful of Witness X's story - what benefits the witnesses might have been anticipating when they testified. Dole has represented to this court that there is no way to compel witnesses to provide sworn testimony in Nicaragua and the trial court made that express finding in *Mejia*. (7AA p. 7, 10, 26, 46, Ex. 98, p. 4674) But that is not actually true.

While Nicaragua is not a signatory to a treaty authorizing reciprocal

discovery under standard American formats, Nicaragua *does* have a process for subpoenaing witnesses into court to answer questions under oath - a process called "Pliego de Absolucion de Posiciones" which is similar to that authorized by California Code of Civil Procedure section 2028. As under section 2028, the witness is sworn in, and then a series of questions are read to him or her, which he or she must answer under oath. In Nicaragua, however, the process is performed in court in front of a judge instead of a notary public. Also, the format of the absoluciones[10] is in the nature of a leading question, demanding that the truth of the matter stated be admitted or denied. The witness has the option of simply answering yes or no or elaborating, or not answering at all, which is deemed to be an admission. There are no follow-up questions and no cross-examination. The judge can omit any question he or she deems inadmissible or improper. (Plaintiff's Ex. 5, p. 1590)

[redacted] were submitted as evidence in this case.

10

Dole's interpreters translate this term as "interrogatory" (e.g. Ex. 363, p. 13215) While that translation is apt, to avoid possible confusion appellants will use the original Spanish term to refer to this testimony.

(Plaintiff's Ex. 6.1-6.4, 7)).

(NOTE: As with the *Mejia* case, the trial court received and reviewed all of the evidence as it was filed throughout the coram vobis process from August 2009 to March 2011. Accordingly, evidence is addressed here as it was submitted and reviewed by the court, rather than as presented at the final hearings.)

[redacted] gave [redacted] testimony [redacted]. He [redacted] the banana growing process at [redacted]. He stated the only people [redacted] whom [redacted] recognized as former banana farm workers were Rodolfo Mejia (from the *Mejia* case) and Julio Enrique Calero Gonzales - one of the appellants herein. [redacted]

[redacted]

[redacted]

[redacted] committed perjury when questioned under oath in Nicaragua.

[redacted]

[redacted]

[redacted], two John Doe witnesses had signed sworn statements in Nicaragua [redacted] who was represented by Provost in his own DBCP case. (Provost was not notified when its opposing counsel [redacted] Dole's agent had paid him [redacted]. – Plaintiff's Ex. 1.3.E p 144-145))

[redacted] gave a detailed statement of how he was recruited by Dole's agents, negotiated for a payment of [redacted] for testifying [redacted] (Plaintiff's

Ex. 10, p. 1557) He was instructed to claim that he wanted his testimony to be secret because he was afraid of Juan Dominguez and other matters and to deny being coached by Dole's agents on how to testify. (Plaintiff's Ex. 10, p. 1558-59) After he testified he said he [redacted] unless he got the promised $[redacted] He was told he would receive [redacted]. (Plaintiff's Ex. 10, p. 1559-1560)

38. Appellants' counsel learns that John Does 17 and 18 are living in luxury in Costa Rica with Dole paying their bills.

- **Dole's explanation: "witness relocation"**

Jason Glaser is a young American documentary film maker who went to Central America in 2007 to make a film about the problems the inhabitants of that region were experiencing as a result of the use of pesticides on sugar, cotton and banana farms operated by multinational corporations. (10 CV 1677-78) After working in Central America for some time he agreed to report back to Provost about his observations in Central America regarding events relevant to Provost's litigation in Nicaragua, Honduras and South America. In exchange, Provost agreed to help fund his foundation and film. (Ex. 407, p. 14434-14435)

The night that the jury's verdict in this case was announced Mr. Glaser was in a remote part of Honduras interviewing a lawyer who was aligned with

the plaintiffs in DBCP litigation in that country. The following morning, as Glaser was riding back to Tegulcigalpa before dawn, a man fired an AK-47 at the truck he was riding in, killing the driver and missing Glaser by inches. Although it might have been a simple robbery attempt, Glaser believed that he had been targeted by those opposed to the efforts of Central American farm workers to obtain compensation for injuries caused by pesticides used by multi-national corporations in Latin American agriculture. Mr. Glaser and his Nicaraguan coworkers experienced various events which they perceived as attempts to intimidate them by those same factions. (Ex. 407, p. 14441-14443, 10CV 1730-36)

Although he was not an authorized recipient of any of the secret information generated in the *Mejia* process, Glaser was in ongoing communication with [redacted] During the second half of 2009 [redacted], John Doe 18, at the luxury hotel they were living in in Costa Rica, the "Apartotel La Sabana" which boasted a sauna, maid service, and a daily breakfast buffet by the pool. (Ex. 407, p. 14435)

Upon learning that new counsel had intervened on behalf of appellants Mr. Glaser made contact and began providing information he believed would

be helpful. (Ex. 407, p. 14440) He later provided photos of John Doe 17 at the Apartotel la Sabana and portions of recordings of him speaking about this role as a witness for Dole. (Ex. 407, p. 14438, 14446) However, he initially refused to return to America to testify unless he was given the same secrecy rights as Dole's [redacted]. (Ex. 407, p. 14444)

Although there had been mention in the *Mejia* case in the Spring of 2009 of providing John Does 17 and 18 with a two week stay in Costa Rica in connection with their secret depositions, and some discussion of "relocating" them, perhaps to "farming housing" on one of Dole's agricultural enterprises in Costa Rica (Ex. 221, p. 7892) appellant's counsel could find no mention or authorization of Dole's hosting John Doe witnesses in resort-like accommodations indefinitely. The secrecy orders issued by the court incorporated the order issued originally when Witness X came to California which required Dole to disclose any financial payments made to any witnesses for any reason. (56RT 9393-9394) There were no disclosures of any compensation having been provided to any John Doe witnesses in the record in this case. (No disclosure had been made of the substantial financial benefits conferred on John Does 17 and 18 in *Mejia* while MAS was still in the case, either, although the witnesses had in fact been paid thousands of dollars in addition to being hosted in resort-style accommodations with all their expenses paid by Dole over a period of four months before MAS withdrew, as discussed below.).

Upon reading an oblique reference to "witness relocation" in a memorandum filed by Dole, appellants demanded disclosure of the financial benefits provided to those witnesses. In March, Dole's counsel forwarded a copy of a motion and order which had been presented to and signed by the court *ex parte* on June 30, 2009 in the *Mejia* case *after* MAS had withdrawn, approving Dole's accounting of almost $16,000 paid for hotel, restaurant and incidentals on behalf of John Does 17 and 18 over a four month period starting in February 2009. (5 AA 769-778) Seeing discrepancies in that report appellant's counsel demanded a full and current accounting. (5 AA 786)

On April 20, 2010 Dole produced a new accounting showing that, except for the period between mid-June and early August 2009 when there were no counsel representing parties adverse to Dole in the California DBCP cases, Dole had hosted John Does 17 and 18 to extended stays in resort quality hotels at an average cost of about $2400 per month, paid them $1500 in cash each month, and picked up thousands of dollars of other expenses for them. (5 AA 769-778, 788-789 (During the "no opposing counsel" period the two John Does were placed in a much less expensive rented apartment, which significantly lowered the annual *average* housing cost for them. - 5 AA788) Dole requested that the court approve the expenses thus belatedly disclosed, mentioning in the penultimate paragraph of the 10 page motion that documents filed with the court in June 2009 had "inadvertently" failed to report that its agents had given thousands of dollars in cash to the John Doe witnesses in

addition to the other benefits which were reported in the ex parte 2009 accounting. (4 AA 762) Note: the per capita income in Nicaragua is "slightly over a thousand dollars per annum" (Ex. 228, p.8110)

39. April - June 2010: Appellants discover that John Doe witnesses had been paid thousands of dollars from Dole's investigator's "administrative account" without any timely disclosure of that fact to the court or opposing counsel and demand production of the records of those accounts; those records are not produced.

Appellants challenged the characterization of the failure to disclose to the court the fact that thousands of dollars in cash had been paid to witnesses as "inadvertent" and immediately sought to depose the John Doe witnesses and the Dole personnel responsible for the decision to pay them. (6 AA 1032, 1043-1044)

Dole explained the nondisclosure of the cash payments - which it described as "de minimis" - as arising from the fact that its investigators filed two separate expense reports, a "client" report and an "administrative" report, and that the cash payments made to the John Doe witnesses were made from an "administrative" account based on entries in the "administrative" expense account reports submitted by the investigators who met with the John Doe witnesses instead of from the "client" report. (6 AA 1090-1091) This explained why the cash payments were not included with the other expenses which were disclosed, because only expenditures from the "client" accounts

were reported to Dole's trial counsel. (6 AA 1093-1094) In fact, for months the payments were given to the John Doe witness in cash, with no receipt given or taken by Dole's agents. It was only after the situation had become semi-permanent that back-dated receipts were created for the "administrative" account payments and they were reported to Dole's trial counsel. (6 AA 1078)

Appellants noted that numerous Nicaraguan witnesses had reported receiving cash payments from Dole's investigators - generally in the range of a few hundred dollars - which Dole's investigators had denied, and that when the investigator who paid John Doe 17 and 18 thousands of dollars in March and April 2009 was asked at the *Mejia* dismissal hearing on April 23, 2009 if he had paid any of the John Doe witnesses he had denied doing so, under oath. Appellants demanded disclosure of the "administrative" expense account reports prepared by Dole's investigators who made cash payments to witnesses, to see if there were records of other payments to Nicaraguan witnesses as well. (7 CV L78-79)

Dole objected to the request for production of documents as "burdensome" and "unwarranted," asserting that everything Dole had represented to the court was true, that its failure to report the thousands of dollars of payments the year before did not constitute "concealment," that its investigator's testimony was true because the money he gave the witnesses wasn't for "information" and that appellants should not be allowed to

investigated the matter any further. (6 AA 1055 et seq.)

At the hearing of the issue Dole then asserted that the issue was moot, because its investigators refused to produce the requested documents and could not be compelled to do so because they *didn't really work for the American investigative company IRI* as they had testified repeatedly under oath. (See section III.A.9.b, below) Dole's counsel asserted that Dole's investigators were actually employed by a "third party" which was outside the court's jurisdiction. According to Dole's counsel representations the "third party" refused to produce the records and, being outside the jurisdiction of the court, could not be compelled to do so in the time left before the final hearing date in July 2010 - which the trial court had emphatically ruled would not be delayed. (9 CV 625, 658-659) No records of the account used by Dole's investigators to record cash payments to witnesses in Nicaragua were ever produced.

40. May 7, 2010: Appellant's request for leave to depose John Does 17 and 18 after appellants discover they had recently become [redacted] is denied based on the trial court's finding that their testimony would be too insignificant to justify the expense of taking their depositions.

In its April motion for retroactive approval of payments to the John Doe witnesses Dole also disclosed that the two John Doe witnesses [redacted] in Costa Rica and relocated to houses Dole had

rented and supplied with all new appliances and furniture. Their pay in their new jobs was $1000 plus $300 to pay the rent on their new homes.

In comparison, the average total compensation for [redacted] in the jobs John Doe 17 and 18 were purportedly hired to perform (including "allowances") was about $750. (Plaintiff's Ex. 19, p. 3160) One of [redacted] earned $200 to $250 per month in Nicaragua working full time. (Plaintiff's Ex. 1.3.E. p. 145, Ex. 395, p. 14143) Prior to being "hired" at double the normal wage [redacted] (Ex 68, p 3308) (Dole also produced the resumes prepared by John Doe 17 and 18 in April 2009 for these jobs - that's where John Doe 17's alternative high school and college diploma was reported by him. John Doe 18 "earned" a college degree at that point as well. (Plaintiff's Ex. 17, p. 3094, 3096))

As soon as appellants discovered that John Does 17 and 18 were employed in Costa Rica [redacted] they moved for leave to take their depositions. (6 AA 1044) Appellants noted that those witnesses, along with their fellow chimera conspiracy witness John Doe 13 were the only John Doe witnesses to have claimed to have attended the purported "conspiracy meetings" in 2003, the only witnesses who testified that Juan Dominguez had knowledge of the shady acts reportedly committed by capitans such as

themselves, and also the new evidence of Dole's previously undisclosed payments to these witnesses. (6 AA 1044-1045) At oral argument appellants counsel cited John Doe 17's central and pivotal role in the *Mejia* case findings. (7CV L80) The trial court had asked Dole to provide an estimate of the cost of taking the depositions, and after reviewing that estimate ((6 AA 1109-1111) denied that motion on May 7, 2010 on the grounds that the expense of taking their depositions was not warranted in light of the court's opinion of the lack of likelihood that their depositions might lead to the discovery of admissible evidence in the case. (7CV L88-90)

F. Coram vobis OSC hearings, May and July 2011.

The coram vobis OSC hearings had been scheduled and rescheduled several times after appellants filed their responsive pleadings. Finally, May 10 and 11 were set for the initiation of the process; in the days leading up to those hearing dates it became clear that additional hearing time would be required. Ultimately, July 7-9 were set aside for the remainder of the hearings. As in the *Mejia* case the formal OSC hearings were not held to present evidence to the court for the first time - the court had reviewed all of the evidence as it was gathered, and had ruled on objections to that evidence on an ongoing basis throughout the months leading up to the hearings.

The formal OSC hearings had two purposes: limited live testimony by

witnesses put on by appellants, and a presentation of what the trial court aptly described at one point as"a combined opening statement, argument, and some evidence thrown in" in an oral presentation augmented by a Powerpoint presentation and brief excerpts from video recordings. Accordingly, the proceedings are described hereafter in the same format; describing the argument made by defendant's counsel, the evidence cited for it - and the evidence against it, although appellants' evidence was not presented until two months later for the most part.

41. Coram vobis OSC hearings, part 1, May 10-11, 2010, defendants' argument/evidence.

The first two days of hearings on the coram vobis OSC were held on May 10 and 11, 2010. Defendants went first, presenting a hybrid opening statement/presentation of evidence displaying the testimony and documents they felt established their case, tracking a series of Powerpoint slides. (8CVI p. 42; Ex. 381) These are the arguments they presented:

a. There are 14,000 Nicaraguan DBCP claims but only 1,000 possible legitimate claimants. After legal argument and citation to the court's findings in *Mejia*, Dole stated its baseline factual assertion supporting its case: the claim that the number of DBCP claims in Nicaragua - which they mistakenly cited as "over 14,000" - was far greater than the number of possible claimants. The support for this claim was the statistical analysis of their

expert, who "found that the number of farm workers on Dole-contracted farms when DBCP was being used is probably less than or fewer than 5,000," and the number of those men who could possibly test positive for azoospermia or oligospermia by 2000 was "less than 1,000." (8 CVI p. 50-53, Ex. 381, p. 13637, 13647-13649, Ex. 323, p. 12284) Hence, not only were there fraudulent claims, but the number of fraudulent claims was "many times" the number of possibly legitimate claims, as the trial court had found in *Mejia*. (Ex. 98. P. 4651)

Dole's expert estimated that the number of "farmworkers" on Dole's banana farms was about1,200, based on his extrapolation from the testimony of three men who had been foremen from Dole's banana farms in the 1970's which he projected to one worker for every five acres of farms. (Ex. 339, p. 12545) Applying a calculation to address employee turnover during that time he estimated that the total number of "farmworkers" (as he defined the term) for the period from 1973 through 1979, was between 4,000 and 5,000. (Ex. 339, p. 12545-12546. He then further analyzed the likelihood of any of those farmworkers testing positive for azoospermia or oligospermia in 2000, and concluded that fewer than 1,000 possible people could meet the criteria thus set. (Ex. 339, p. 12546-12549)

But once this claim was articulated and factual basis upon which it was premised was made available for investigation the fundamental flaw in the

analysis was easily revealed. Dole's expert had been instructed by Dole's counsel to estimate only the number of *male fieldworkers* who claimed to have suffered from the two specific DBCP-related conditions of *azoospermia and oligospermia* between 1973 and *1979*. (Plaintiff's Ex. 24, p. 3560) But Nicaraguan Law 364 authorized claims by *both* men *and* women who had worked at or *lived* on Dole's banana farms *in any capacity* between 1973 and *1980* and who suffered from a wide variety of ailments including cancer, kidney disease, and a half-dozen fertility-related conditions. (Ex. 312, p. 12102, 12116) Dole's expert's estimate *excluded* women, supervisors, mechanics, packers, dependents of workers living on site, etc., as well as the final year of DBCP application, 1980. (Plaintiff's Ex. 24, p. 3567, Plaintiff's trial exhibit 57)

Dole president David DeLorenzo testified both at his deposition and in trial that the the ratio of workers to acreage on Dole's Nicaraguan banana farms was about one worker for every *two* acres, not *five,* and that the total number of people employed on Dole's banana farms at any given time in the 1970's was about *3,500*, not 1200. (Depo. of DeLorenzo, Plaintiff's Ex. 21, p. 3362-3363; 22RT 2564)

Under cross-examination Dole's expert acknowledged that there was "no statistical relationship" between the numbers he calculated and the number of DBCP claims filed in Nicaragua, and that if he utilized the same

assumptions he had used to calculate the subgroups of Dole employees he had been told to refer to as "farmworkers" but applied them to the total number of people Mr. DiLorenzo had testified to having worked on the farms, and the correct time frame of 1973 to 1980, **the total number of people who worked on the banana farms would have been more than three times the number he had calculated** - i.e., 12,000 to 15,000. (Plaintiff's Ex. 24, p. 3560, 3567) And he acknowledged that he had also excluded the substantial number of family members who lived and attended schools on the farms but were not employed there. (Plaintiff's Ex. 24, p. 3554) Dole was comparing the "apple" of total claims of all injuries made by all persons in a position to be exposed to DBCP on Dole's banana farms in Nicaragua between 1973 and 1980 to the "orange" of men employed as laborers in the banana fields and claiming to suffer from azoospermia and oligospermia between 1973 and 1979 – and Dole was touting the difference in those two numbers as "proof of fraud." (8CV p. 56)

This tactic was at least temporarily successful due to the trial court's misapprehension that Law 364 only addressed male sterility and no other conditions (9CV 1239) - a misunderstanding which would briefly become the basis of an oral finding of the court at the end of the hearings in July. (12CV p. 2412)

But most of the DBCP claims in the *Osorio* case were not for either

azoospermia or oligospermia. An example of a Nicaraguan DBCP claim made by a man who did not assert any reproductive damage is Jose Joaquin Flores Velasquez, a plaintiff in the *Osorio* case who prevailed on a claim of renal (kidney) disease and psychological damage. (Ex. 312, p. 12145, 12196) An example of a woman who brought a DBCP claim in *Osorio* is Hilda Antonia Jirón Larios (Ex. 312, p. 12174) An example of a person did not work on a banana farm but brought a claim based on the fact that he lived on one as a child is Félix Pedro Hernández Estrada, (Ex. 312, p. 12139) And as discussed above is section II.D.17, the majority of fertility-related claims brought in *Osorio* were for conditions other than azoospermia and oligospermia. In sum, Dole's expert's analysis simply excluded the majority of people who lived and worked on Dole's banana farms and the majority of claims which were authorized under Nicaraguan law in order to arrive at his conclusions.

This basis for finding fraud in Nicaraguan DBCP claims - "too many Nicaraguan claimants" - was eventually dropped from the trial court's written findings in this case.

Dole also displayed a page from Juan Dominguez' website in which he bragged of being "international plaintiff lead counsel, with a consortium of other plaintiff law firms both in the United States and in Nicaragua, representing over 10,000 farm workers claimants" and asserted that that meant that Dominguez was claiming that he and his Nicaraguan associates at the

OLPLB represented 10,000 claimants *in addition to* those represented by Provost etc, rather than a claim of being "lead counsel" of *all* of the American and Nicaraguan lawyers who cumulatively represented the 10,000+ Nicaraguans who had filed DBCP claims. (8CVI 51, (Ex. 320, p. 12257) (Either claim would be, at the very least, *"puffery"* as he was not technically "lead counsel" in any cases.) In fact, according to defendant's witness, while the total number of such claims filed in Nicaragua was over 13,000, the OLPLB which was affiliated with Dominguez had filed claims on behalf of only 4,127 plaintiffs - fewer than those filed by the firms affiliated with Provost or Lack and Girardi (8CV 55, Ex. 328, p. 12321-12322)

b. Attrition rate of California DBCP plaintiffs. Defendants then pointed out the "attrition rate" of plaintiffs in the California cases - they calculated that about 60% of the individual plaintiffs cases in *Tellez, Mejia* and *Rivera* had been dismissed by plaintiff's counsel during the pretrial period. (Ex. 381, p. 13637) The precise number turned out to be elusive, (8CV 59, 11CV 1839-1842) but it is clear that there was in fact a high "attrition rate" of plaintiffs in the California cases. Some had to be dismissed because no visa could be obtained for them to travel to California, others failed to appear for their depositions, and at least one died before trial. (3 RT G34-36, 37) Of course, this appeal addresses the claims of those who did go to trial and whose claims the jury found to be compensable.

c. Dominguez' conduct at depositions in other cases. Defendants next cited two depositions where Juan Dominguez had represented DBCP plaintiffs in other cases; one where the witness stated he was exposed to DBCP in 1990 or 2003, but after speaking with Dominguez at a break said it was in the 1970's, and later, when asked what conditions he suffered from as a result of exposure to DBCP failed to mention "emotional distress" until after speaking with Dominguez at another break. (8CV 63-68) In addition, a brain damaged plaintiff had testified that he had carefully rehearsed his testimony at a Nicaraguan law office so that he could recite it "like a parrot." (Ex. 99, p. 4705)

d. Diaz Artiaga is a "plaintiff-coach." Dole next showed a portion of a videorecording of the deposition of a plaintiff whose case was later dismissed, Mr. Rostran Ocon, which was attended by one of the appellants in this case, Mr. Diaz Artiaga. (8CV 70-75) Both of the (then) plaintiffs had been flown to the United States at the same time to have their depositions taken and Mr. Diaz Artiaga was in the room when Mr. Rostran Ocon was deposed. Defendants asserted that that proved that Mr. Diaz Artiaga "assisted" in fraud which they asserted was committed by Mr. Rostran Ocon. (8CV 69)

As with the "too many Nicaraguan claimants" argument presented by Dole, this assertion, too, found its way into the oral findings of the court at the end of the hearings in July when the trial court found that Diaz Artiaga was

guilty of acting as "a plaintiff coach." (12CV 2415) But in the process of drafting the final written order appellants pointed out that there was actually *nothing whatsoever* in the record of Ocon's deposition to support such a finding. Diaz Artiaga hadn't even worked at the same banana farm as Rostran Ocon testified about, and other than meeting each other at their common lawyer's offices and being flown to the U.S. together for their depositions, they didn't even know each other very well. While it's not clear from the written transcript, viewing the video recording shows that Rostran Ocon even had to ask Diaz Artiaga what his full name was in order to identify him. (Video recording of Augustin Rostran Ocon at 9:48:45 - 9:48:55)

As with "too many Nicaragua claimants," "Diaz Artiaga as plaintiff-coach" was also dropped from the final written findings issued by the court.

e. Two unsuccessful plaintiffs were not infertile. Dole next turned to the six unsuccessful plaintiffs in this suit. At trial, defendants had shown that one of them who had tested as azoospermic in Nicaragua was reported to have 20MM/ml of sperm by an American lab - a fact which came out at trial.[11] Another had brought up a child with his wife, and unlike [redacted]

[11] 20MM/ml is the threshold of oligospermia. A level below that constitutes presumptive infertility, above it is low-normal. A normal sperm count is 400MM. (33RT 4901) Dole's counsel was apparently unfamiliar with the science on this point; he thought 20MM/ml was a "massive" sperm count (8CV 76)

it turned out that the boy actually was his biological son, born after his exposure to DBCP. (8CV 77-79)

f. Facts about appellants which were known at the time of trial.

Dole then turned to appellants. Dole summed up the evidence against them (8CV 80) as follows:

- "Four of the six of them were recruited" - i.e., initially contacted at one of the remote locations set up by the *capitans* before coming to Chinandega for their intake interviews, which was true.
- "all six produced discovery responses manufactured in the Dominguez law office" - i.e., they responded to discovery with documents prepared by their lawyers, which was true.
- "four of the six produced bogus work certificates" - At least one of the work certificates was indeed "bogus" as discussed above in section II.B.7.a. Others may have been as well.
- "and all six had fraudulent sperm test results from the fraud labs." This statement was simply false, as the trial court noted in July: "the 12 plaintiffs who made it into the courtroom for the trial in [this case] either had oligospermia or azoospermia, tested by U.S. labs, and confirmed by both plaintiffs and defendants." (12CV 2144)

What Dole's counsel was arguing on the last point was that if a DBCP plaintiff ever was tested at a lab at which any witness claimed any lab worker

had ever falsified a result in any case, that meant that their own results were fraudulent and the lab which prepared it was a "fraud lab." Five of the appellants had had their initial testing done at Hospital Espana; after Bayardo Barrios signed an affidavit for defendants in 2003 asserting that some results at that lab had been falsified all six were retested at La Concepcion lab, then later tested again, as noted by the court, by American lab personnel. Whether Hospital Espana was indeed a "fraud lab" is subject to debate, but the sole evidence cited at this hearing for the proposition that La Concepcion was a "fraud lab" was John Doe 17's entirely fabricated claim that it was "owned by Francisco Tercero" [redacted] (Ex. 381, 13675, footnote citations, See discussion supra at II.D.22 regarding the falsity of John Doe 17's testimony)

Dole's counsel also played excerpts from appellants' testimony at deposition and at trial in which their description of events from the 1970's was not clear or precise. (8CV 81-90, 93-96, 98-104, 105-112, 114-120, 122-125) Next Dole showed Diaz Artiaga's testimony in which he stated that the people who applied pesticides to the banana plants told him that it was done manually, with men carrying pumps in backpacks applying the pesticide to individual plants. (As noted above, DBCP was applied through aerial nighttime spraying, not by individuals with backpacks. *Other* pesticides were applied in that manner.) Diaz Artiaga was not on the irrigation or pesticide application crews; he worked during the day as a general laborer. His testimony was limited to

what others had told him about pesticide application, and apparently what they told him was wrong. (8CV 129-132)

As discussed below in section III.B.11.a and III.B.15, other than John Doe 17's patently false claim that La Concepcion was Francisco Tercero's "fraud lab" everything that was presented in this phase of the OSC hearing was evidence which was in Dole's possession during the underlying trial - indeed, some of it was testimony that was given at trial. (e.g. 9CV 122-125, 129-132)

g. The Montserrat conspiracy meeting. Although appellants had previously disclosed the evidence showing that the participants in the Montserrat conspiracy meeting could not have been in the same place at the time it was supposed to have occurred, and that the actual lab results issued by Nicaraguan labs did not show any correspondence with the results they were supposedly ordered to produce by Judge Socorro Toruño, Dole insisted that it actually did take place anyway and tried to paste together a theory of how that could be true. (8CV 135 - 148, Ex. 381, p. 13691-13696)

To deal with the problem of Musselwhite and Dominguez never being in Nicaragua at the same time for the entire period of September 2002 to August 2003 they asserted that the meeting might have taken place in 2004 or 2005. (8CV 16) And in response to the fact that the instructions to fertility labs supposedly dictated at the Montserrat meeting failed to correspond to

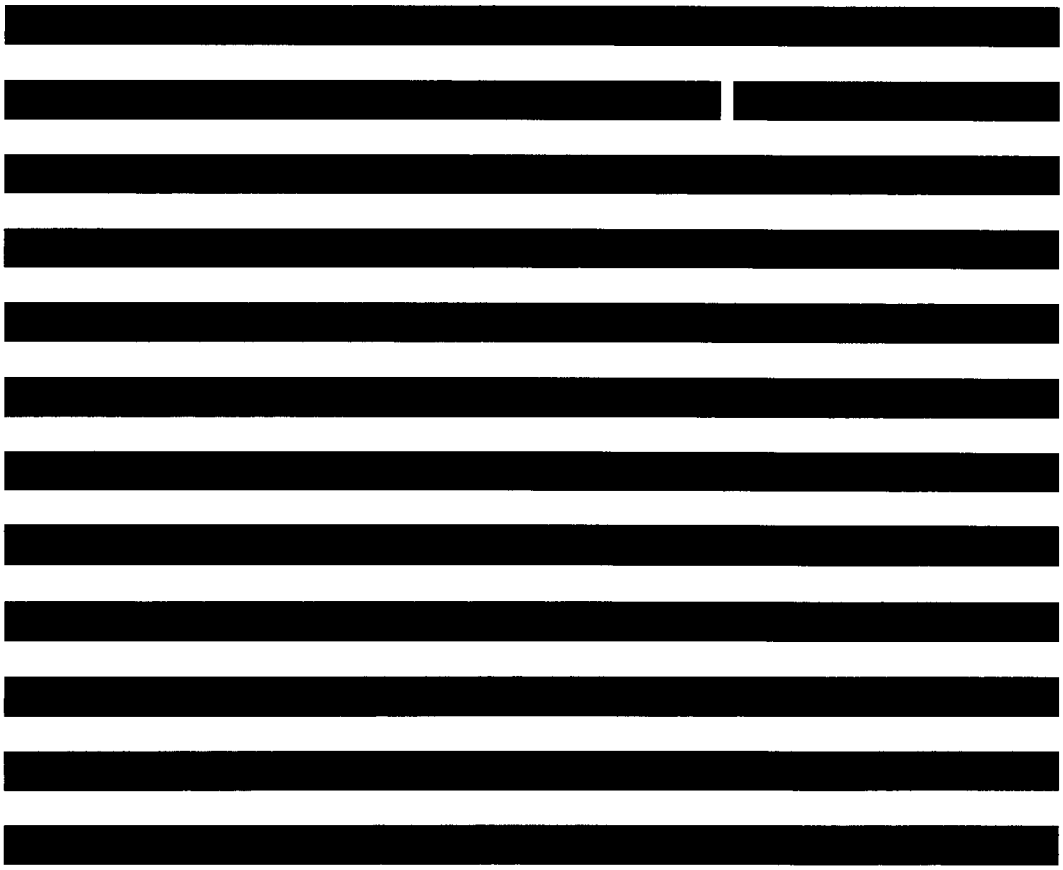
actual instances of those conditions reported by the labs, Dole resorted to, once again, bringing in an orange to compare the apple to, and declared it to be the "proof of the pudding."

Dole presented the purported direction to produce 40% azoospermia and 30% oligospermia as "somewhere in the range of 70 percent total people that would have some form of sterility." (8CV 136-137) Then Dole claimed that that was "corroborated" by the fact that 75% of the plaintiffs in *Osorio v. Dole* -- the "Case 214" for which the dictated results were supposed to provide credibility – had "recovered," and that was "the proof of the pudding." (8CV 139, 141, Ex. 381, p. 13700) After all: 75% and 70% are "virtually identical." (8 CV 142)

The records of the *Osorio* case were indeed "proof" but they proved the exact opposite of what Dole was arguing. While 75% of the plaintiffs in *Osorio* "recovered" - i.e., 25% of the claims were decided in favor of the defendants, and 75% in favor of plaintiffs - **most** of those "recoveries" were based on finding of conditions **other than** azoospermia and oligospermia. (Ex. 312, 314) The actual number of lab reports showing either azoospermia or oligospermia - the results Judge Socorro Toruño supposedly dictated at 40% + 30% - was less than 30%, combined. (Plaintiff's Ex. 1.2, p. 47; Ex. 314, p. 12226) An "apples to apples" comparison shows that the actual events in the real world did not correspond at all to the tale spun by John Does 13, 17 and

18. Only by comparing the "apple" of number of azoospermia + oligospermia reports supposedly dictated with the "orange" of the number of Nicaraguan plaintiffs who recovered due to conditions of all sorts - most of which were neither azoospermia nor oligospermia - could Dole create the "pudding" it wanted the court to buy.

And the meeting couldn't be "moved" to a time when Mussewhite and Dominguez could have attended, either. In addition to the very specific dating of the meeting during the "dry season" in or about March 2003 by both John Does 13 and 17 (Ex. P. 66 3002-3003, Ex. 62, p. 2496-247) all three of the John Doe witnesses who supposedly attended the meeting testified that they



[redacted]. So there was simply no date left on which all of the purported participants actually could have been at the described meeting at the same time.

The Montserrat conspiracy meeting was not cited as a basis for any finding in either the trial court's oral or written rulings - or, indeed, mentioned by name in any way in the final written order, other than a muted reference to "a meeting" which Benton Musslewhite "did not participate in." (7 AA 1371)

h. Nicaraguan Justice Solis is a crook and a Sandinista. Justice Rafael Solis was a member of the Nicaraguan Supreme Court. (Their Supreme Court is not the highest decision-making court, but rather an administrative body. 8CV 494) Dole needed the Montserrat meeting to exist because it was the only excuse Dole had to put on evidence about Judge Socorro Toruño and Justice Solis, who had no connection to this case other than John Doe 17's Munchausen-style claim that [redacted] Judge Socorro Toruño - who has nothing to do with this case either, other than her purported participation in the Montserat conspiracy meeting. After arguing that the Montserrat conspiracy meeting actually did happen Dole's counsel put on a lengthy presentation lambasting Nicaraguan political figures, judiciary, public demonstrations, unrest, etc. in relation to numerous events, none of which had anything to do with appellants,

DBCP or this case, but which nonetheless in Dole's view required that the judgment won in our courts be vacated and Dole declared the victor. The highlight of this presentation was an Al Jazeera videorecording of a political demonstration in Managua, which had absolutely nothing to do with this case, DBCP, or anything else with even marginal relevance to the proceedings - but which looked pretty scary at first glance. (8CV 146 - 167; see powerpoint slides at Ex. 381, p. 13703-13711; Al Jazeera recording was Ex. 327) Appellants objected to the presentation regarding Justice Solis, including the Al Jazeera tape, and the objection was ultimately sustained on July 9, 2010. (11CV 1843-1844, 1847-1848, 1957-1958)

i. The Alliance/Dole letter doesn't really memorialize an agreement, and [redacted].

Dole next moved to a discussion of the group which provided the key testimony directed at Juan Dominguez: John Does 13, 17, and 18 and Witness X. Dole asserted that the June 28, 2007 joint Dole/Alliance letter to the Nicaraguan government actually did not "purport to memorialize an agreement of any kind" and in any event, [redacted] Note: The letter is found at Ex. 266, p. 9460-9461, and, as translated by defendant includes the statement: "We think it is relevant to share with you the points that both parties have agreed upon..." followed by the provisions discussed above in section II.C.10.

Dole followed by showing the extent to which defendants' case was in fact dependent on the testimony of Witness X, John Doe 17, [redacted] John Doe 18, and the other chimera conspiracy witness and long-time John Doe 17 associate, John Doe 13, as the **only** direct evidence implicating Juan Dominguez in the misconduct alleged by Dole and its witnesses. (8CV 177) Of course, appellants submit that the very fact that the three chimera conspiracy witnesses told the identical phony story about the bogus Montserrat conspiracy meeting is itself the best evidence that they were, in fact, working in concert to provide false testimony targeting DBCP plaintiffs' counsel - and not just the plaintiff's counsel in this case.

j. [redacted]

Dole also noted that the testimony of Witness X and John Does 13 and 17 was consistent with the testimony of John Does 11 and 14 with regard to the falsification of work certificates by *capitans* and other matters, and that John Doe 16 had testified in accord with their testimony regarding the use of "refresher guides" by plaintiffs to familiarize themselves with the workings of banana farms. (8CV 186-187)

k. John Does 13, 17 and 18 all claimed to [redacted]. To drive home the credibility of Witness X and John Does 13, 17 and 18, Dole next pointed out that *each one of them* had claimed to have [redacted] as described above in sections II.C.11, II.D.27b and 27c, and discussed below in section III.A.1.g)

l. The sworn testimony given in affidavits and open court in Nicaragua about Dole's agent's payments to witnesses and solicitation of false testimony was "bogus, unsubstantiated, coerced allegations that simply don't stand up to any scrutiny." Next, Dole's counsel urged the trial court to ignore the sworn testimony given by witnesses in Nicaragua in absoluciones, affidavits and declarations, [redacted] (8CV 192-195) John Doe 13's claim that he testified in the secret deposition because his "conscience" bothered him

was singled out as being worthy of particular note as evidence of the credibility of the secret John Doe testimony. (8CV 193)

Dole asserted that the evidence which did not support its case was "bogus, unsubstantiated, coerced allegations that simply don't stand up to any scrutiny" which "further taints this case with fraud." (8CV 309) The evidence presented to prove that the testimony given in open court in Nicaragua was "coerced" was [redacted] John Doe 17 claimed to have [redacted] (8 CV 307) The evidence that the affidavits and absoluciones testimony was "bogus" was [redacted]

However, Dole's characterization of Dole's investigator's statement was not quite accurate. The investigator did deny paying [redacted] swore out an affidavit which the investigator described as a "retraction" which set things straight and told the truth. (Ex. 254, p. 9228-29) The investigator

finished with: [redacted] advised that [redacted] " and [redacted] presumes that [redacted] "know I'm one of the witnesses who testified on behalf of Dole." For that reason, he fears plaintiffs "may hurt me or my family."

But the affidavit which was being attacked by Dole's counsel at the coram vobis hearing [redacted] was the "retraction." [redacted] Furthermore, the witness who Dole's investigator claimed told him in [redacted] that he was afraid that he or his family would be harmed if his identity [redacted] was revealed not only [redacted] describing [redacted], he talked about it with [redacted] (Ex. 382, p. 13787) and also spoke about it [redacted] - in both cases describing how he was paid [redacted] by Dole's agent. (Ex.395, p 14143 - 14155) Nonetheless, Dole's counsel insisted that [redacted] was "bogus, unsubstantiated and coerced" whereas Dole's agents' denials were credible. Of course, Dole's refusal to disclose the records of the administrative account used to make cash payments to witnesses makes

any independent verification outside of the "he said - she said" statements of the two men involved impossible.

Dole's agents also alleged that [redacted] declaration describing how he was being paid by Dole (and promised $[redacted] that he never got) was coerced - he only said that because he was frightened that something might happen to him [redacted] in which he again described [redacted] the payment he received and the much larger payment he was offered but cheated out of – on camera. (11V 1891-1892) To the interviewer, rather than frightened, he appeared "cocky." (11CV1831-322)

42. Closed proceedings May 11, 2010 - appellant's evidence and the court's temporary about face regarding allowing the depositions of John Does 17 and 18 as "insurance" against reversal.

As the courtroom had been closed for defendant's presentation at that point, appellants next presented evidence out of order which was not to be disclosed to the public. Appellant's counsel first brought to the court's

attention the matters stated above which contradicted Dole's claim that the statements made in the affidavits and absoluciones was "coerced" - citing the fact that, according to Dole's investigator's declaration, [redacted] affidavit [redacted] (8CV 325 - 331)

Appellant's counsel next showed that in response to absoluciones in open court in Nicaragua, [redacted] had not "said what he was supposed to say" out of fear, and in fact showed no reluctance to describe [redacted] He stated [redacted] and that he hadn't been offered large sums of money to testify, [redacted]

Appellant's counsel read the remaining absoluciones and affidavits described in section 33, above. After the break, the trial court advised counsel for all parties that it was not necessary to read the evidence into the record, because all of the evidence filed in the case had been read by the court, and was already in the record. (8CV 366)

Appellant's counsel then outlined the known facts about [redacted] (John Doe 17) and [redacted] (Witness X) [redacted] the group led by Victorino Espinales with Dole's Vice-President and Chief General counsel and others leading up to the joint letter setting forth the terms of the agreement reached between Dole and The Alliance of capitans as set forth above in section 10. (8CV 268-282) John Doe 13's [redacted] with John Doe 17 and [redacted], John Doe 18 was then outlined, leading to a discussion of how those three witnesses had each testified to the exact same details of the Montserrat conspiracy meeting story - for which no evidence existed outside of their testimony, and which plaintiffs' would prove to be a hoax. (8CV 382-383) Next counsel cited the contradictions between John Doe 17's biographical claims made at his deposition with what he had presented in his resume and other extraneous evidence then available as described above in section 22, above. (8CV 383-386)

At the close of this presentation, the trial court advised Dole's counsel that based on the showing over those first two days of hearings, it was reconsidering its ruling denying appellants' motion to depose John Doe 17 and 18:

> There has been enough raised, [ ] where I have some concerns and things are not quite as I had thought they were when I made a ruling the other day. So that if I rule against plaintiffs -- and I don't know how the ruling is going to go right now, but if I rule

> against plaintiffs and if it turns out that there are significant issues that are raised, you're likely to end up with a reversal for an abuse of discretion by me for failing to allow the deposition of these individuals. So, we're going to call this insurance for everyone. (8CV 387)

Dole's counsel argued against allowing these witnesses to be deposed, asserting that the discrepancies between their testimony and other evidence "didn't amount to a hill of beans." (8CV 387-393) Appellant's counsel asked for an order directing Dole to disclose the expense reports of the investigators who dealt with the five witnesses who had stated that they had been paid by Dole's agents under oath in absoluciones, declarations and affidavits. The court deferred a final decision on both items until later. (8CV 390, 396)

43. Benton Musslewhite denies every part of the John Doe witnesses' testimony about his purported involvement with a conspiracy in connection with Nicaraguan DBCP cases.

Benton Musslewhite, who had been identified as a key participant in the chimera conspiracy and attendee at the [redacted] and Montserrat conspiracy meetings, flew out from Texas to testify. He testified that in 2000 or 2001 he agreed to take DBCP cases in Nicaragua by referral from local attorneys, and would handle them in a joint venture with the firm of Provost*Umphrey. (8CV 421-422) Two Nicaraguan attorneys they worked with were Martha Cortes and Bernard Zavala in Chinandega, who had about 2,000 clients signed up, including both men and women. (8CV 423-425) They

also worked with a lawyer in Managua, Jacinto Obregon. (8CV 451) The other American law firms backing DBCP cases in Nicaragua were California attorneys Walter Lack and Thomas Girardi, Juan Dominguez, and a Florida attorney, Carlos Gomez. (8CV 425) He noted that Lack's clients, in particular, included many women. (8CV 426)

Musslewhite met Juan Dominguez for the first time in 2004 in a meeting hosted by the Nicaraguan Ministry of Agriculture in Managua, Nicaragua to try to assist in settling the DBCP cases in that country. There were two or three meetings held; in addition to Musslewhite and Dominguez, each of the other American firms representing DBCP claimants participated, as well as Dole. (8CV 427) Musslewhite did not have any personal conversations with Dominguez at the Agriculture Ministry meetings, but when he was in California on a different case he called Walter Lack and set up a meeting at Girardi's office in Los Angeles with Lack, Girardi, Dominguez and MAS's Duane Miller. (8CV 429-430) They discussed various ways of going forward with the Nicaraguan DBCP cases, but came to no agreement. Musslewhite never saw Juan Dominguez again. (8CV 430)

Musslewhite specifically denied participating in anything resembling the Montserrat conspiracy meeting described by John Does 13, 17 and 18 and he did not believe that any such meeting ever took place. (8CV 430, 477-478) As he put it in his own words: "That meeting is just a bunch of bunk." (8 CV

479) He never saw Judge Socorro Toruño outside of the courthouse until 2008, when she was interviewed by his daughter for a film school project. (8CV 432) He never conspired with Judge Toruño to affect the outcome of DBCP cases. (8CV 432-433) He never bribed any Nicaraguan judges. He never conspired with anyone to "fix" the lab results of claimants from Nicaragua. (8CV 433) When Bayardo Barrios' declaration in which he claimed to have falsified lab results in DBCP cases was made public, Provost "bit[] the bullet" and had all of their clients who had been tested in Barrios' lab retested elsewhere, which "cost a lot of money." (8CV 434, 443)

Musslewhite denied participating in anything resembling the [redacted] conspiracy meeting described by John Doe 17, in which he purportedly stood up and offered to finance a campaign to recruit phony plaintiffs and phony lab results, calling it "the biggest concoction I ever heard of." (8CV 434-435)

On cross-examination, Mr. Musslewhite disputed Dole's witness's report that the Nicaraguan attorneys affiliated with him and Provost had filed approximately 4,400 DBCP cases in that country, stating that he believed the number was about 3,600[12]. (8CV 466) Musslewhite testified briefly about

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After returning to Texas he prepared and submitted a declaration stating that the exact number was 3,709. (Plaintiff's Ex. 23, p. 3543, 3545)

the steps he, Provost, and their affiliated Nicaraguan lawyers had taken to weed out false claimants, including requiring corroborating affidavits from supervisors, i.e. the documents referred to in this case as "work certificates." (8CV 467-468, 473-475)

After Mr. Musslewhite left the stand the trial court advised counsel that it would like them to set up a briefing schedule for a later hearing to address appellants' motion to depose John Does 17 and 18. (8CV 501)

44. June 7, 2010: After the court tentatively rules to allow appellants to depose John Does 17 and 18 Dole plays the fear card and the court reverses its ruling.

The parties filed written briefs on the subject of deposing John Does 17 and 18, either in Costa Rica or in California. (6 AA 1113 et seq., 6 AA 1139 et seq.) Three days before the hearing the court notified the parties by e-mail that it had tentatively ruled to allow the depositions to be taken on condition that they be completed before the second set of hearings, which were scheduled for July 7-9, 2010. (RJN 60)

a. Dole files for sanctions and accuses opposing counsel of "collaborating" with evil Nicaraguans to create pressure to deny appellant's discovery efforts. Two hours after the court issued its tentative ruling Dole filed a sanction motion against appellants' counsel similar to the

one they had filed against MAS in December 2008, accusing appellants' counsel of assisting Antonio Hernandez and Juan Dominguez in subjecting the John Doe witnesses to a "dragnet" and "intimidation." It sought financial penalties as well as an order excluding the "absoluciones" testimony from evidence and urged the court to "proceed expeditiously to rule on the Petition either through terminating sanctions or by cutting off Plaintiffs' discovery on side issues that will not affect the outcome of this litigation" – i.e., not let appellants depose the John Doe witness/employees. (9CV 691 - 6 AA 1187) Note: the motion itself is reproduced in the Appellant's Appendix, but the supporting declarations were filed as Exhibits 348 and 350 through 377 and are not recopied in the Appendix.)

Dole's counsel argued ferociously to get the court to reverse the tentative ruling authorizing the depositions of John Does 17 and 18 based on the asserted lack of justification for having the witnesses' depositions taken. (9CV 629-650) That argument was unsuccessful. The trial court then prompted: "But I am interested in witness safety issues; and if Dole has an argument that these individuals' safety would be at issue..." (9CV 649) Dole accordingly turned to playing the fear card.

b. Madrigal was "tracked down" at the Managua airport car rental counter. A few days before the hearing Dole had filed a lengthy declaration from Luis Madrigal, in which he asserted that all of the witnesses

who had testified in absoluciones, affidavits and declarations [redacted], and being paid by them [redacted], were lying, and that that was undoubtedly because they were afraid. (Ex. 348, p. 12846-12847) He acknowledged that [redacted] had committed perjury [redacted] but excused that because he said [redacted] was afraid. (Ex. 348, p. 12847-12848) He said he was afraid as well, and gave as evidence of the basis of his fear a story about being "harassed" at the Managua airport. (Ex. 348, p. 12848-12849) That event was depicted by Dole's counsel at the hearing in this way:

> So you also know what happened with respect to one of our investigators who recently went back to Nicaragua ... [ ] who encountered the spookiest situation, where two people who had somehow learned about his travel plans, when his flight arrived, where he was going to rent a car, showed up at the car rental agency trying to find him and trying to coerce the rental agency attendant with references to the Sandinista party and her need to cooperate to give her the whereabouts of our investigator. (9CV 650)

Pretty scary stuff. Except what really happened, as testified to by Jason Glaser the following month, is that Glaser and his Nicaraguan partner, Jorge Madriz, ran across Madrigal entirely by accident at the airport while returning a rented car and, knowing that Madrigal had claimed to be "afraid" to travel in Nicaragua, simply wanted to document the fact that Madrigal was actually traveling openly and "quite tranquilly" through that country. (11CV 1908-1909) Indeed, Glaser left a note for Madrigal at the car rental counter: "Hi.

My name is Jason, I am the director of the movie bananaland. My producer met with you today, 5/24/10. We want an interview with you for the movie concerning your fear of working in Nicaragua. If you wish to talk about your fear or your perspective, let me know." (Ex. 360, p. 13149, 13155) That was Mr. Madrigals' example of the "harassment" which cause him to have "concerns for [his] safety." (Ex. 348, p. 12849)

c. Antonio Hernandez Ordeñana speaks in a radio interview May 6, 2010. Next Dole produced transcripts of a radio show which had taken place in Nicaragua on May 6 - a month earlier. On that show Antonio Hernandez Odeñana described the false testimony of [redacted] (Witness X) who had claimed in this case to have been employed at the Candelaria but had made a videotape in which he claimed to have worked at a different banana farm, [redacted]. (Ex. 349, p. 12874) He then described the role of the chimera conspiracy witnesses, John Does 13, 17 and 18, [redacted]

(Ex. 349, p. 12875-76)

He spoke of how [redacted] (Witness X) was abandoned by Dole and left to die of kidney disease in Nicaragua without ever getting the $500,000 he had bargained for, and how he had taken [redacted] to the hospital on several occasions during his final illness. (Ex. 349, p. 12876) **(Note:** the fact that Witness X was clinging to a vain hope that Dole would

help him out financially with his medical expenses as he suffered from the kidney disease which would take his life in the fall of 2009 [redacted] - Ex. 34, p. 798.)

He predicted that Dole would abandon John Does 13, 17 and 18 like it had turned its back on Witness X, and urged them to consider how Witness X had died a slow death after being abandoned by Dole (Ex. 349, p. 12876-77) and spoke of the allegations that Dole had "ordered a hit on" others in Central and South America. (Ex. 349, p. 12877)

He then noted that "the meeting of 2003 never occurred, that it is fiction" and reiterated that Dole had "abandoned" the John Doe witnesses. [redacted] He denounced the trial court in this case as "immoral...unethical... devoid of principles." (Ex. 349, p.12878)

He then asserted that "Dole is not interested in approaching any attorney for negotiations." He charged that Dole was offering bribes to witnesses and "In the end, this is what's going to be to the detriment of Dole, if it's true that American Law is fair, but with [the trial court] I don't believe

it since she is aligned with Dole." (Ex. 349, p. 12879)

d. Press conference May 14, 2010. At the press conference Hernandez Ordeñana outlined the history of this case (*Tellez*) including the fact that the infertility of the plaintiffs was established by American labs, not Nicaraguan ones. (Ex. 351, p. 12996- 12998) He then described the negotiations between The Alliance and Dole, and how that led to Witness X and his offer to testify in exchange for $500,000 and his conflicting stories about the banana farms he claimed to have worked at in the 1970's. (Ex. 351, p. 12999-13000)

He then announced that seven Nicaraguans who he said were among Dole's "27" John Doe witnesses were there to tell their stories. First, however, he recounted the false tale of the Montserrat conspiracy meeting as told by John Does 13, 17 and 18, and commented on the "inflammatory" nature of the trial court's oral rulings in April 2009, which referred to Nicaraguans in "crude terms." (Ex. 351, p. 13001) He commented on the secrecy order and the threats under which MAS had been required to work. He introduced Ramon Altamirano, at whose home the Montserrat conspiracy meeting supposedly took place, noting that he was not a former banana worker and had no connection to the DBCP cases whatsoever. (Ex. 351, p. 13002-03) He cited Judge Toruño and another purported participant in the 2003 meeting who had denied its existence, and outlined other evidence which had previously been

presented in this case showing that the story was false. [redacted] He denounced the secret proceedings in this case. (Ex. 351, p. 13005)

He then introduced three of the seven purported John Doe witnesses present at the press conference [redacted] A statement was then made by a politician denouncing the fraud committed by Dole and promising to work towards social and political recognition of the wrong that had been done, and to work together with folks from other banana growing countries to seek justice from Dole. (Ex. 351, p. 13013-17)

Then Hernandez Ordeñana discussed the number of people who worked on the Nicaraguan banana farms, the various diseases linked to DBCP, and the legal proceedings in this case after the jury verdict. (Ex. 351, p. 13017-13018) He accused the trial court of being "partial and in favor of Dole." (Ex. 351, p. 13020-21) A press release was also distributed at the conference which

outlined the same subjects as discussed by the speakers. (Ex. 350, p. 12952-53)

These documents were brought to the June 7 hearing in a disorganized state and shown to the court and appellant's counsel for the first time during the hearing. Dole's counsel noted Hernandez Ordeñana's comment regarding John Doe 17 following the observation that Dole had abandoned previous false witnesses like Witness X once their usefulness was over: "He should be careful, it is dangerous. Dole will not support him all his life, so we are asking them to examine their conscience and recant" and interpreted it as a threat which *really* meant: "We will catch up with you one day" when viewed in conjunction with Luis Madrigal's declaration. He keyed in [redacted] (9CV 689-690) Dole's counsel told the court: [redacted], because of what Mr. Ordeñana and Mr. Dominguez and Mr. Palacios and the rest of them are doing, ever having come forward to tell the truth." (9CV 691)

Note: John Doe 13 was one of the chimera conspiracy witnesses. He described his attendance at the fictitious Montserrat conspiracy meeting in detail in his sworn testimony in his deposition in this case, and also committed perjury [redacted]. He may have had regrets, but it is unlikely that they

had anything to do with "coming forward to tell the truth" as there is no evidence that he ever engaged in that particular activity.

The court continued the hearing to a date less than two weeks before the scheduled July hearings to allow authentication of the belatedly-filed documents but pending such further hearing held that the documents filed by Dole constituted "evidence...of serious witness tampering... which precludes further discovery from taking place" - i.e., appellants would not be allowed to depose John Does 17 and 18 in Costa Rica *or* California. The sanction motion was taken off calendar. (9CV 715-716, 731) The court observed to appellants' counsel in reference to Dole's filing: "You almost had me [ ] until I read these." (9CV 719)

The court noted that "I have grave concerns about witness safety." (9CV 722-723) and also advised counsel that it considered the statements made in the press conference and radio interview to be a attack *on the court*, and that it would be notifying the Judicial Protection Unit for the Court of Appeal of the threat it perceived to have been made to the court *here in the United States.* (9CV 729-730)

45. June 24, 2010: Jason Glaser testifies that he was present at the events the court perceived as "threats" to witnesses and that no one was threatened and all those present - some of whom he interviewed on camera afterwards - were voluntary participants.

- **The Court rules that threats to witnesses are "no longer the issue." Appellants motion to depose John Does 17 and 18 is denied and Dole is not required to produce the records of its investigator's "administrative" account.**

Jason Glaser, who had refused to come to the United States to testify in public previously, relented after his encounter with Luis Madrigal at the Managua airport exposed his identity as a investigator for Provost to Dole. (Ex. 348, p. 12850) He submitted a declaration in which he recounted his entirely chance meeting with Luis Madrigal at the airport and also described the events at the May 14, 2010 press conference which he had attended. (6 AA 1200-1201) He stated that, contrary to Luis Madrigal's assertion that all of those witnesses were acting out of fear, "None of them appeared to be afraid or intimidated and all appeared to be present voluntarily." He had interviewed two of them on camera and volunteered to submit the recordings to the court. (6 AA 1202)

The court ruled that the fact that Dole's evidence of the purported threats to witnesses was weak was "no longer the issue." Rather:

> The issue is whether further discovery can proceed in an atmosphere plaintiff's agents have created. Clearly it cannot. Whatever evidence of bribery exists, no matter how recent --

> and no matter how the recent publicity in Nicaragua is characterized, it cannot be disputed that plaintiff's agents are interfering with witnesses. That interference renders further examination of bribery allegations impossible.
> Plaintiff's request to depose John Doe witnesses 17 and 18 and obtain further documentary evidence are denied. (9CV 928)

The court added that the cost of the depositions, and everything that had happened in *Mejia* and in this case, from the start of trial in 2007, were factors in the ruling as well. (9CV 928-929) The ruling regarding documentary evidence was that if Dole filed a declaration stating that it did not have possession and control of the financial records of the administrative account used to pay the John Doe witnesses (which appellants had continued to seek) then Dole would not have any responsibility to obtain them from their investigators and produce them. (9CV 929) Dole filed the declaration. (6 AA 1208 - 1210) The records have never been disclosed.

46. Final coram vobis OSC hearings, July 2010: Jason Glaser testifies about his investigations in Nicaragua.

The OSC hearings resumed on July 7, 2010. Appellants presented the factual evidence and procedural history set forth above, (9CV 1213 - 1309) and outlined the legal requirements of coram vobis which were not met by defendants showing as discussed below in section III.B. (9CV 1310-1320.) Next Dole presented its argument on the prerequisites of coram vobis. (10CV 1556-1655)

Then documentary film maker/investigator Jason Glaser testified. (10CV 1662) He had gone to Nicaragua in 2007 to make a film about the inefficiencies of the work of charitable organizations (also known as "NGOs") in Central America. (10CV 1666-1669) While there, he went to film a protest related to the use of pesticides on banana farms involving several hundred people camped out in a park in front of the National Assembly in Managua. (10CV 1669-1671) The protest was led by Victorino Espinales, whom Mr. Glaser interviewed on camera several times. (10CV 1671-1672.) Victorino introduced Glaser to his "lieutenants" [redacted]) Victorino "had a problem" with the American attorneys, and felt that the "biggest problem" was Antonio Hernandez Ordeñana. (10CV 1676, 1681, 11CV 1813) Mr. Glaser decided to shift the focus of his documentary from the NGOs to agricultural issues, focusing at first on issues relating to the farming of sugar cane. (10CV 1677-78)

While in Costa Rica Glaser met a man named Bob Izdepski, who was acting as a covert investigator for Provost*Umphrey while working on behalf of sugar cane workers. (10CV 1678-79) Izdepski didn't trust Victorino, and Glaser came to mistrust him as well, as Victorino's efforts in the banana protest seemed to be working in concert with Dole, who was responsible in the first place for the problem that was being protested, while opposing the Nicaraguan government and the attorneys seeking to obtain compensation from Dole. (10CV 1679-81, 11 CV 1813) Izdepski died of a heart attack in

December 2007, and Provost*Umphrey contacted Glaser and asked him to take on Izdepski's role. (10CV 1682)

Glaser continued to shoot his documentary about agricultural work on sugar cane and banana farms in various countries in Central America. (10CV 1684) He collaborated with epidemiologists from UNAN-Leon on a study of kidney disease in agricultural workers and set up a local foundation called "La Isla" to address health issues in Nicaragua, while reporting to Provost*Umphrey on matters he observed in the field. (10CV 1685-1686) Provost, however, had no control over the content of the documentary. (10CV 1691)

a. He saw no cause for "fear" on the part of Nicaraguans who collaborated with Dole due to the Nicaraguan plaintiffs' attorneys. Glaser interviewed Bayardo Barrios, the lab worker referred to by Mr. Musslewhite who had signed an affidavit in 2003 stating that he had falsified fertility test results. Glaser testified that that the fact that Barrios had signed such an affidavit was common knowledge in Nicaragua, and that Barrios had not been harmed in any way. (10CV 1687-88)

Glaser interviewed [redacted] (Witness X) [redacted] shortly before he died of kidney failure. (11CV 1826) [redacted] told him that he went to the United States and was offered cash, a home, a car, and relocation of his

family, but after Dole Vice-President Carter spoke with him and told him he would have to testify "first," before getting verification of his deal with Dole, he refused and returned to Nicaragua. (11CV 1827-28, 1905-6) When [redacted] spoke with Mr. Glaser he did not indicate that he had been afraid to testify. (11CV 1828) [redacted], he was never harmed after returning there from California. (11CV 1830)

Glaser was at the demonstration in March 2009 at the Chinandega courthouse which was discussed in section II.D.26, above. Contrary to the characterization of that event by Dole's investigators, no one at the demonstration expressed an intent to harm Dole's investigators in any way. (10CV 1689) Further, he never heard of the purported $20,000 "reward" for a list of the John Doe witnesses which Dole's agents had claimed was being offered, despite having several Nicaraguans working for him gathering information on the conflict between Dole and the Nicaraguan claimants. (10CV 1690)

Glaser was also at the May 2010 press conference where the "seven John Doe witnesses" spoke. None of them appeared to be frightened or intimidated; [redacted]. (11CV 1830-31) She asked Mr. Glaser for $100 for "bus fare" so he did not interview her. He did

interview [redacted] and he appeared to be "the opposite" of frightened, "a little bit cocky." (11CV 1832)

[redacted] In Glaser's video-recorded interview he spoke of being paid 4,000 "pesos" or about $200 [redacted]" (Ex. 28, 11CV 1866-68, 1873) [redacted] usually only earned 5,000 "pesos" per *month*.(11CV 1872) In the interview Mr. Glaser commented that 4,000 pesos seemed like "a bribe" and [redacted] agreed. (11CV 1880) But if they had given him $500, that would have been "even better for me." (11CV 1873) [redacted] stated that he was never intimidated by Antonio Hernandez Ordeñana, [redacted]" (11CV 1889-90)

When Mr. Glaser interviewed [redacted] the same story [redacted], negotiated over a huge payoff but was only given $300 before being put on a bus back to Nicaragua. [redacted] also did not exhibit any fear of anyone while being interviewed. (11CV 1893)

Mr. Glaser expressed the opinion that no one in Nicaragua was in any

danger from Antonio Hernandez Ordeñana or from Dole itself. But he believed that there were many people in Nicaragua who falsely claimed to have worked on banana farms in the 1970's, particularly in Victorino's camp (10CV 1711), and some people were worried about individuals such as Victorino's followers who might be "outed" as phony plaintiffs. (11CV 1895) He testified that he would be personally concerned if Victorino's interests were to be threatened by something he did. (11CV 1896) He testified that Victorino was a "thug" and that all of his Nicaraguan staff were "terrified of him." (10CV 1738)

Glaser had circulated a photograph of Dole's agent Luis Madrigal after hearing numerous stories of Madrigal offering people money to provide statements favorable to Dole. Those photos had turned up on posters and fliers, but he did not think that Madrigal was in any physical danger: "Nobody's been hurt down there. Nobody." (10CV 1742)

On cross-examination he testified that while some areas of Central America are dangerous, Nicaragua is the safest country in that area, with a highly respected police force. Nonetheless, he testified that he was concerned about Victorino Espinales. (10CV 1744) Dole's counsel pressed him about the photo of Luis Madrigal and represented to Glaser that when it was passed around instructions were given to harm Madrigal. Glaser responded that he had not heard that and he doubted that it was true. (10CV 1745)

b. Recorded conversations with John Doe 17. In September, 2007, before he was introduced to Provost, Glaser [redacted] (John Doe 17) [redacted] meet with Dole's in-house director of litigation, Rudy Perrino. Plaintiff's Ex. 6.4, p, 1501, Ex. 64, p. 2698-2705) Glaser's suspicions were aroused by [redacted]. "I read him in about five minutes as a completely untrustworthy person when we interviewed him." (11CV 1917) "[H]e refused to do an honest interview." (11CV 1817) Thinking that "something was up" Glaser followed a "hunch" and began recording [redacted]' conversations with him and with his Nicaraguan partner Jorge Madriz. (11CV 1817) He continued to do so after he began working covertly for Provost a few months later.

Glaser had a collection of recordings of conversations with [redacted] from 2007 to December 2009. Selections were introduced into evidence by both sides. (Ex. 396-399) On multiple occasions [redacted] represented that he had been negotiating with Dole [redacted]. He told Jorge Madriz that Dole was supposed to bring him back to the United States in May 2009 - i.e., shortly after the *Mejia* dismissal hearings - to "continue the conversations" but that when "a lawyer

was [] hired" Dole decided to continue litigating instead. (Ex. 397, p. 14165) He also told Mr. Madriz in the summer of 2009 that he had a "commitment [from Dole] for an out of court settlement" that he "more or less" had nailed down. (Ex. 396, p. 14163, Ex. 407, p. 14437)

When [redacted] and [redacted] John Doe 18 were living in Costa Rica in the summer of 2009 courtesy of Dole [redacted] contacted Madriz and he and Glaser visited the two John Does at the stylish "Apartotel La Sabana." (CV11, p. 1819, Ex. 407, p. 14435) In December 2009 Glaser arranged for [redacted] to meet with Mark Sparks, an American attorney with the Provost firm (11CV p. 1822) and recorded the conversations between them. [redacted] admitted to Sparks that he had met with Dole's lawyers - Scott Edelman, Rudy Perrino and Michael Carter, (Ex. 399, p. 14180-81) and claimed that they had made him a settlement offer [redacted]

By the time of this meeting the partial transcripts of John Doe 13, 17 and 18 describing the fictitious Montserrat conspiracy meeting had been made public in the *Mejia* case. Sparks, of course, knew that no such meeting had ever occurred. (Plaintiff's Ex. 1.3.A, p. 62-63) He had also deduced that [redacted] was one of the chimera conspiracy witnesses, as had numerous others, but [redacted] apparently did not realize that, and denied having ever

testified for Dole. (Ex. 399, p.14179) Sparks asked [redacted] about the Montserrat meeting. [redacted] initially feigned ignorance of the story, then asserted that "Dole" must have made it up. (Ex. 399, p. 14191) (In a private conversation with Madriz he told an altered version of the Montserrat story: "Socorro Torufio met with most of the laboratories that were handling the case Nemagon and she told them 'you are going to give me 40% sterile and 30% ... and 60% of all the other illnesses.'" (Ex. 397, p. 14166) The date of that conversation, however, is not known. And of course, the numbers in that version still didn't match what the labs actually reported in Judge Toruño's case.)

[redacted] acknowledged to Sparks that he had fathered [redacted] children, and that [redacted] with Provost he had lied about it. (Ex. 399, p. 14186) [redacted] complained to Sparks that when he went to work for [redacted] capitan he had been promised [redacted] Cordobas per plaintiff signed up, but he was never actually paid that; he only got a flat fee of $[redacted] (Ex. 399, p. 14172-73)

47. July 15, 2010, the trial court's oral coram vobis decision:

• The number of Nicaraguan claims exceeds the number of legitimate claimants, thereby proving fraud

• Given the scope of the fraud, multiple attorneys and conspiracy meetings must have been involved (but no mention of the "group of eight".)

• Dominguez and Ordeñana are guilty of conspiracy

• Musslewhite and Sparks are exonerated

• two of the six appellants lied about working on Dole banana farms

• one appellant, Diaz Artiaga, is guilty of being a "plaintiff-coach"

• lab results in cases *other than this case* were falsified

• the "questionable and possibly corrupt" conduct of some John Doe witnesses doesn't mean they aren't telling the truth.

• "Much" of the testimony of the John Doe witnesses was "reliable and trustworthy."

• Dole's lavish compensation of secret witnesses was simply "naive generosity" by Dole's employees who "clearly do not have an understanding of the value of money in Nicaragua and Costa Rica."

After argument by counsel, the court delivered an oral ruling from the bench on July 15, 2010. The decision was later engrossed in a 50 page written ruling discussed in the next section. (7 AA 1348 et seq.) Much of the oral ruling addressed the DBCP claims made in Nicaragua under Nicaraguan law, including a denunciation of Nicaraguan courts, judges, lawyers and Law 364. (12CV 2409-2410) The court concluded that:

> There were 4- to 5,000 maximum banana plantation fieldworkers between 1970 and 1980 per the declaration of Dr. Weisberg, or about 3,500 according to Mr. DeLorenzo at trial[13].

13

This was not actually DeLorenzo's estimate of total workers over an eight

About 14,000 claimants have participated in lawsuits against Dole and potentially thousands more exist according to Juan Dominguez's website...

Not every person allegedly exposed to DBCP becomes sterile.
...
Logically, therefore, not every person who worked on Dole-related plantations could be sterile, even assuming exposure.
...
It not reasonable to conclude that 14,000 claimants in the several lawsuits were made sterile by DBCP. Some or all of the plaintiffs had brought fraudulent claims. (12CV 2412-13)

Given the number of claimants, around 14,000, multiple Nicaraguan attorneys were complicit in perpetrating the fraud. At least one American attorney actively assisted in bringing the sham plaintiffs into the courts: Juan Dominguez. Mr. Dominguez partnered with and appears to continue to be partnered with Antonio Hernandez Ordenana, a Nicaraguan attorney based in Chinandega.
Considering the fraud across the board in the various cases, I believe, and so find, that some planning meetings occurred to coordinate efforts to perpetuate this fraudulent scheme.
After listening to Benton Musslewhite and viewing his passport, I believe that Mr. Musslewhite did not participate in the meeting[14] with Juan Dominguez to actively plan the fraud.

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year period, but rather the number of workers on Dole's banana farms in Nicaragua at any given time. (22 RT 2564, Plaintiff's Ex. 21, p. 3363-3364)

14

Musslewhite and Sparks had actually been accused of attending *numerous*

> Given the concern about the veracity of some of the John Doe witnesses, I can no longer say that Mark Sparks actively participated in the fraud against the defendants.
>
> (12CV 2411)

The trial court next discussed the testimony of two *Mejia* plaintiffs and one of the unsuccessful plaintiffs. The court cited the "attrition rate" of California plaintiffs, commented on Dominguez' conduct in a couple of depositions and found that the plaintiff's inability to remember details from the 1970's was because they were lying about their past. The court found that appellant Diaz Artiaga had acted as a "plaintiff-coach" assisting another plaintiff to commit perjury and cited John Doe testimony as evidence that fraudulent claims had been deliberately brought and assisted by Nicaraguan lawyers. (12CV 2413- 2415) As to the allegations about falsified fertility lab reports, the court found that "Laboratory results in cases *other than* [this case] were falsified." (12CV 2416, emphasis added.)

The court next lauded Jason Glaser's objectivity and credibility regarding his observations in Nicaragua, and spoke of the poverty and various health issues in that nation. (12CV 2416-2417) The court then made this observation:

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conspiracy meetings, included at least two which Dominguez purportedly participated in as well. See section II.D.22.b, above. The court made no express findings as to the other claims made against Musslewhite and Sparks.

> Mr. Glaser indicated that rumors were abundant that Dole engaged in bribery of John Dole witnesses. Mr. Glaser discussed the 4,000 cordobas -- which is about $200 American -- payment to one witness made after the testimony and Witness X's apparent demand for money and a U.S. visa before testifying. Even Mr. Glaser did not credit as truthful Witness X's tale. After reviewing mounds of evidence, I am unable to detect, however, instances of actual intentional bribery of potential witnesses by Dole. Dole's employees clearly do not have an understanding of the value of money in Nicaragua and Costa Rica. Though Dole may have been naive in its generous outlay of expense money to the John Doe witnesses, I do not believe that its expenditure of cash to these witnesses was motivated by the desire to suborn perjury. (12CV 2417-18)

Note: the court's comment regarding Witness X is confusing. The fact that Witness X demanded money and other consideration before testifying was disclosed by Dole's *own counsel* in 2008, albeit belatedly. (Plaintiff's Ex. 3.24, p. 905) And Glaser never discounted Witness X's demand for money, only his claim that he did not testify when in Los Angeles. (11CV 1906, 1914-1945) Also, Dole operates a large-scale agricultural operation in Costa Rica and never claimed that its employees were "naive" or lacked an understanding of the value of money in Central America. The agents who handed the witnesses money were themselves from Central America. John Does 17 and 18 were [redacted] who only earned about half of what the John Doe witnesses were paid in that job. (Plaintiff's Ex. 19, p. 3160)

In its written order, the court found that: "at most, Dole's investigators did not understand the value of money in Nicaragua and Costa Rica." (7 AA 1388) Dole's head investigator, Luis Madrigal, the man who personally handed John Does 17 and 18 $1500 in cash each month, is himself Costa Rican. (Ex 245, p. 9141) It is not clear from the court's order why it felt that a Costa Rican would not understand the value of money in his own country.

Beyond the one brief mention, the court never directly addressed [redacted] matter of fact description of how he was paid [redacted] despite appellants request for a ruling on the issue.

Based on the testimony of the John Doe witnesses, the court found that Antonio Hernandez Ordeñana and Juan Dominguez had "stirred up and manipulated the frantic and forlorn populace. This has created an atmosphere of intimidation and fear in anyone attempting to assist Dole's effort to investigate... In conclusion, the *Tellez* and *Mejia* plaintiffs were assisted by Dominguez and Ordenana, their attorneys, to put forth fraudulent claims. " (12CV 2419)

Turning to the proof of perjury by John Doe witnesses, the court noted that:

Plaintiffs' counsel makes much of the questionable and possibly

> corrupt conduct of some of the John Doe witnesses. This conduct was, and has been, a factor in the *Mejia* findings, and continues to be a factor in determining their credibility in this OSC in *Tellez vs.Dole.* However, simply because a person has been dishonest in the past does not mean that person is incapable of ever speaking the truth or is mendacious in his or her testimony here. (12CV 2419-2420)

After a discussion of the CACI instructions given to juries to assess witness credibility, [redacted] the absolucion procedure, finding it to be "suspect." In contrast, the court found that: "Based not only on the words spoken but also on the nonverbal clues, such as tone of voice, rapidity of response, body posture and facial expression, this court finds that much of the *Mejia* testimony was reliable and trustworthy." (12CV 2421-22)

The court next characterized what it believed some of appellant's arguments to have been and discounted them. The court then made the following findings:

> • These plaintiffs never actually were employed on a Dole-related banana plantation between 1970 and 1980: Rojas Laguna and Claudio Gonzalez.
> • This plaintiff probably was employed on a Dole-related banana plantation between 1970 and 1980, but actively assisted another plaintiff with a fraudulent case brought into this court:

Diaz Artiaga.

- The evidence regarding these plaintiffs is equivocal: Mendoza Gutierrez, Calero Gonzalez, and Lopez Mercado.

> Defendants were unable to bring this fraud to the court's attention at an earlier stage in the process. The defendants acted with all due diligence and did not have admissible evidence to present to this court before April 2009, after the trial in *Tellez.* Defendants were denied their right to conduct reasonable discovery in *Tellez vs. Dole* due to the actions of plaintiffs and their agents. There has been a massive fraud perpetrated on this court in the cases of *Tellez vs. Dole, Mejia vs. Dole*, and *Rivera vs. Dole*. (12CV 2428)

48. The written dismissal order is prepared and signed; more findings previously deemed established by clear and convincing proof are dropped.

The trial Court ordered Dole to prepare a first draft of a written dismissal order. (12CV 2430) Dole did so, and the parties exchanged comments on the proposed document. The compilation of the original order, appellants' comments, and Dole's additional revisions was submitted to the trial court in November 2010. (6 AA 1211 et seq.) The court significantly revised the document and issued its final ruling in March 2011. (7 AA 1348 et seq.) As a result of this process, a number of findings made orally in July 2010 were dropped from the final order.

a. In belated recognition of the fact that the court had misunderstood both the number of Nicaraguans living and working on Dole's banana farms and the nature of the claims authorized by Law 364 the finding that there was an excessive number of Nicaraguan DBCP claimants and thus widespread fraud *must have* occurred is finally abandoned. While Dole's proposed set of findings reproduced the court's (erroneous) oral findings about the number of DBCP claims in Nicaragua exceeding the number of claims which could be legitimately brought under Law 364, appellant's comments to the draft reiterated the evidence demonstrating how those numbers erroneously compared a small subset of possible DBCP claims with the total number of claims authorized by that law. (7 AA 1244-1250) The written findings contain no assertion that the number of claims filed in Nicaragua exceed the number of potential legitimate claimants or that the number filed in that country is proof of fraud.

b. No findings of conspiracy meetings or corrupt Nicaraguan judges. Although the court had expressly found that conspiracy meetings must have been held in Nicaragua in order to coordinated the large number of fraudulent claims it perceived to exist at the time of its oral rulings, this finding, too, was deleted from the written order. Other than setting forth an edited version of its findings in *Mejia* in the course of relating the historical events in the case (7 AA1358-1359) the only finding as to what had previously been described as a nationwide "chimera" of an anti-Dole conspiracy in the

written order was this:

> Although in Mejia this court found that in March 2003 Benton Musslewhite and Mark Sparks, both attorneys from Texas who are affiliated with Provost Umphrey, participated in a meeting to coordinate efforts to perpetrate a fraudulent scheme upon this and other courts, after hearing the testimony of Mr. Musslewhite and viewing his passport, the court believes he did not participate such a meeting. Further, the court can no longer conclude that Mark Sparks actively participated in the plaintiffs' fraud in this case. (Decision, 7 AA 1371)

Of course, Musslewhite and Sparks had not been simply accused of attending "a meeting" - they had each been accused of actively participating in a widespread conspiracy in which they attended multiple meetings at which they had enthusiastically agreed to conspire to recruit phony plaintiffs and fabricate false evidence in conjunction with other American lawyers and numerous Nicaraguan lawyers and judges. (Ex. 98, p.4619) The written decision is silent with regard to those allegations and previous findings.

The trial court also evidently did not feel that there was any need to comment on the *other people* it had previously tarred with the labels of conspiracy and corruption based on the same witnesses whose testimony it had relied upon to make its original findings against Sparks and Musslewhite - including its findings as to the Nicaraguan judges whom the court had labeled as "corrupt" and found had taken bribes - but whose identity was redacted in the public version of its ruling - and Judge Toruño, who was publicly

identified by name and supposedly presided over the fictitious Montserrat conspiracy meeting. (Ex. 98, p. 4645, Ex. 12, p. 351-352)

Despite urging from appellants no further comment at all was made by the court in its written ruling in this case with regard to the extensive accusations which had been made by the John Doe witnesses about the "chimera conspiracy" or the incendiary findings the court made based on those stories in 2009 in *Mejia.* (7 AA 1241, 1253-1256)

c. No finding that Diaz Artiaga was a "plaintiff-coach." This oral finding was incorporated into Dole's draft but deleted from the written findings after appellants pointed out that here was literally *no evidence* to support it. (7 AA 1272-1273)

d. The gratuitous exaggeration of appellants' claims is deleted. In its oral findings, the trial court stated that appellant's current counsel had made the melodramatic claim that: "Each time DBCP was used, each of the plaintiffs had DBCP rain down upon them from high-powered water cannons as they slept in farmworker housing." (12CV 2425) Dole incorporated that finding into their draft, and appellant's counsel objected, having made no such claim at any time. (7 AA 1245) The trial court then assigned Dole's counsel the task of finding a representation which corresponded to its characterization of plaintiff's claims somewhere in the record; perhaps from plaintiffs' counsel at

trial in opening statement or closing argument. (13CV 3002-3003) No support for this characterization of the claims purportedly made by any of appellants' counsel was found, and the finding was dropped.

There was, however, one previous instance of this distortion of the plaintiff's claims in the record: the trial court had given a similarly exaggerated description of the plaintiff's claims in its oral findings in *Mejia:* "They claim that they toiled away as farm laborers and irrigators while being rained upon by DBCP or swimming in it." (Ex 12, p. 335, 336) No such claims were actually ever made by appellants or their counsel at any time.[15]

As to the factual findings which remained, that is discussed below in section III.B, below.

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15 [redacted] Daniel Torres, the Candelaria mechanic, was "drenched" in DBCP, but the Torres was not a California DBCP plaintiff and [redacted] was not introduced by plaintiffs. (Ex 136, p. 6016-6017)

III. ARGUMENT

A. The process authorized by the trial court in *Mejia* and this case was an abuse of judicial discretion which destroyed the reliability of the fact finding function of the court and violated appellants' right to due process of law.

For all of the dramatic accusations and invidious characterizations of routine events contained in the petition which was presented to this court by defendants in 2009, this appeal deals primarily with questions of procedure. Specifically, can a judgment won after a jury verdict which followed a four month trial be vacated based on evidence and rulings which flowed from the process overseen and directed by the trial court in this case and *Mejia.*

In their amended return to the coram vobis petitions, appellants challenged the propriety, reliability and constitutionality of the process which was used to obtain the evidence upon which the coram vobis petitions and the court's decision in *Mejia* were based. (3 AA 535 et seq.) The trial court rejected that challenge, holding that the court's orders imposing secrecy on all of the John Doe witnesses' identities and testimony, limiting which counsel opposed to defendants could learn about them and expressly limiting what steps could be taken to investigate them (coupled with repeated threats of fines and incarceration) did not "inhibit" plaintiff's investigations and that all of the constitutional requirements of due process were met. (See paragraphs 84-92 of Decision, 7 AA 1381-1383)

Appellants submit that not only was the process of gathering evidence in *Mejia* an abuse of discretion which violated fundamental principles of procedural due process of law, but that the framework of the legal process directed by the court including the further orders of the court which continued to restrict appellants' ability to gather and present evidence in their favor in the coram vobis proceeding were also an abuse of discretion and violated their rights to due process when taken as a whole.

a. Standard of review. The question of whether the procedure followed by the lower court violated the appellant's right to due process is subject to independent review by this court. *(Duran v. U.S. Bank National Assn.* (2012) 203 Cal.App.4th 212, 248, *Hypertouch, Inc. v. Superior Court* (2005) 128 Cal.App.4th 1527, 1537) The standard of review as to individual evidentiary rulings in isolation is abuse of discretion. (*Buell -Wilson v. Ford Motor Co* . (2006) 141 Cal.App.4th 525, 542)

The Fourteenth Amendment to the United States Constitution and Article I, section 7, subdivision (a) of the California Constitution ensure that an individual may not be deprived of life, liberty or property without due process of law. "An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing *appropriate to the nature of the case*.'" *(Malek v. Koshak* (2011) 200 Cal.App.4th 1540, 1547, emphasis added, citing *Mullane v. Central Hanover*

Bank & Trust Co. (1950) 339 U.S. 306, 313)

> What is "appropriate to the case" depends on three factors:
>
> "[F]irst, consideration of the private interest that will be affected by the [procedure]; second, an examination of the risk of erroneous deprivation through the procedures under attack and the probable value of additional or alternative safeguards; and third, ... principal attention to the interest of the party seeking the [procedure], with, nonetheless, due regard for any ancillary interest the government may have in providing the procedure or forgoing the added burden of providing greater protections."
>
> *Connecticut v. Doehr* (1991) 501 U.S. 1, 10

In judicial proceedings with a substantial interest at stake, the basic procedural requirements are well established. In our courts, we ensure that parties who are accused of civil or criminal wrongdoing are provided with notice of the claims that are made against them, either by an accusatory pleading such as a complaint of information or a notice of motion or order to show cause with supporting documents providing allegations,[16] an opportunity to investigate the claims being made against them and the evidence upon

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E.g.: "...allegations of fraud involve a serious attack on character, and fairness to the defendant demands that he should receive the fullest possible details of the charge in order to prepare his defense. Accordingly the rule is everywhere followed that fraud must be specifically pleaded. The effect of this rule is twofold: (a) General pleading of the legal conclusion of 'fraud' is insufficient; the facts constituting the fraud must be alleged. (2) Every element of the cause of action for fraud must be alleged in the proper manner (i.e., factually and specifically)..." (*Hills Trans. Co. v. Southwest Forest Industries Inc.* (1968) 266 Cal.App.2d 702, 707)

which it is based,[17] an opportunity to marshal and present evidence against those claims,[18] a fair hearing before an impartial judge,[19] and a record of those proceedings which is sufficient to allow appellate review.[20]

"As the rubric itself implies, 'procedural due process' is simply 'a guarantee of fair procedure.' [Citations.] Hence, we review cases involving adversarial hearings to determine whether, under the specific facts and circumstances of a given situation, the affected individual has had a fundamentally fair chance to present his or her side of the story." (*In re Nineteen Appeals* (1st Cir. 1992) 982 F.2d 603, 611.) The remedy for denial of due process is *per se* reversal. (*Malek v. Koshak* supra, 200 Cal.App.4th at p. 1550)

In the course of finding that the dictates of due process had been met the court ignored the clear evidence of the massive amount of misinformation and false claims which the process allowed to be ushered through the doors of an American courtroom and how the court's orders facilitated that process and

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Smith v. Illinois (1968) 390 U.S. 129, 131

18

Code of Civil Procedure section 2017.010, *In re Marriage of Carlsson* (2008) 163 Cal.App.4th 281, 292

19 *In re Marriage of Carlsson* supra, 163 Cal.App.4th at p. 291

20

Ballard v. Uribe (1986) 41 Cal.3d 564, 574-575, *In re Christina P.* (1985) 175 Cal.App.3d 115, 137

prevented the exposure of the perjury of Dole's witnesses. "Failure to observe the fundamental requirements of due process has resulted in instances, which might have been avoided, of unfairness to individuals and inadequate or inaccurate findings of fact and unfortunate prescriptions of remedy." (*In re Gault* (1967) 387 U.S. 1, 20)

There are three steps to the discussion of how the trial court's rulings vitiated the reliability of the fact-finding process in violation of appellants' right to due process which follow. First, appellants will present the "proof of the pudding" - the numerous *false* material claims which defendants were able to convince the court were not merely *true* but proven true by *clear and convincing* evidence – and which the court came to sincerely believe had been proved true "*beyond a reasonable doubt*." No fact-finding process which possessed even minimal safeguards against the successful foisting of clumsy and obvious hoaxes on the fact finder would have allowed the whoppers which were contained in the trial court's official findings in *Mejia* to emerge unchallenged. The fact that the trial court believed and repeated gross canards in an official judicial ruling published under the imprimatur of an American court is not merely an international embarrassment to our judicial system, but concrete evidence of the failure of the process used in that court to be able to separate fact from fiction.

Next, we examine how unproven - *and erroneous* -assumptions held by

the trial court led the court to make the series of rulings which resulted in the evasion of the safeguards against fraud which have evolved within our traditional legal procedures, as the imposition of secrecy which was initially driven by claims that it was needed for "witness safety" quickly became self-justifying, with restrictions imposed on every means appellants could have used to resist defendants' accusations without any valid justification whatsoever. And finally we will address specific rulings made by the trial court and the legal precedent and authority which governs determination of what minimum level of fair legal process a litigant in a significant civil lawsuit is due.

1. The "proof of the pudding" demonstrating the inability of the process authorized by the court to separate fact from fiction - the material "facts" the trial court officially found to be proven as true by clear and convincing evidence during the *Mejia* and coram vobis proceedings *which were actually false* and ultimately *deleted* from the written findings in this case:

The trial court made many factual findings in its oral rulings and written decisions in *Mejia* and this case justifying the dismissal of the plaintiffs' cases. Most of the findings had to do with the legal claims prosecuted in Nicaragua, under Nicaraguan law, rather than the few cases directly before the court here. The trial court's *misperception* of the nature of the DBCP claims filed in Nicaragua under Nicaraguan law overtly drove the court's decision making process, both as to the rulings made by the court governing the procedures

used to reach its decisions and the substance of its rulings. The undeniable falsehood of some of the "facts" found true in *Mejia* was proved to the court during the coram vobis discovery and hearing process and they were quietly abandoned in the later rulings in this case, but not until procedural and substantive error had irretrievably poisoned the process.

a. "The total number of plaintiffs claiming to have been injured while working on a Nicaraguan banana farm formerly associated with Dole is many times the total number of people who worked on the farms" (*Mejia* dismissal order, Ex. 98, p. 4651) As discussed below in section III.A.2.a, it is not clear what the basis was for this central factual finding in *Mejia* - no citation to evidence accompanies the holding. The trial court retreated somewhat to a more measured but still erroneous oral finding in July 2010 which displayed the court's reasoning: "It [is] not reasonable to conclude that 14,000 claimants in the several lawsuits were made sterile by DBCP. Some or all of the plaintiffs had brought fraudulent claims." (12CV 2413-2414) Of course, even that holding was based on a fundamental factual misunderstanding, and when that was pointed out by appellants during the process of drafting the written ruling (7 AA 1244-1250) **all** mention of the number of claims filed in Nicaragua was deleted from that document.

b. Therefore there must have been a broad conspiracy headed up by numerous lawyers and judges to bring the flood of fraudulent claims

in Nicaragua - the "chimera". This finding, first articulated in the tral court's oral findings in *Mejia* as the "chimera" monster (Ex. 12, p. 335-337) was delineated in its written findings in that case as:

> The Court was presented with detailed, undisputed testimony, which it finds credible, that Mr.Dominguez and the *Mejia* and *Rivera* plaintiffs' Nicaraguan counsel, including Mr. Hernandez Ordeñana and Mr. Barnard Zavala, a Nicaraguan attorney working for the Chinandega office of the law firm Provost Umphrey, conspired and colluded with (1) other DBCP plaintiffs' lawyers, including Mark Sparks and possibly other US lawyers from the offices of Provost Umphrey, Robert Roberts, and Walter Gutierrez, a nonlawyer from the Nicaraguan law firm of Ojeda Gutierrez & Espinoza, (2) Nicaraguan laboratories, and (3) corrupt Nicaraguan judges ....
>
> (Ex. 98, p. 4618-4619)

The widespread conspiracy was cited in defendants' coram vobis petitions as a basis for seeking this court's writ in paragraphs 56, 57, 58 and section D ("heinous and repulsive" was the phrase the trial court used to describe the "chimera" conspiracy. - 12 CV 335) (2 AA 231-232, 243)

That finding was watered down in the oral findings in this case to "multiple Nicaraguan law firms" and "At least one American attorney ... Juan Dominguez... partnered with Antonio Hernandez Ordenana, a Nicaraguan attorney based in Chinandega." (12 CV 2411)

In the written decision the monstrous nationwide "chimera" conspiracy had shrunk to just two men: Dominguez and Hernandez Ordeñana. (AA 1371)

c. There were multiple meetings held to further the conspiracy. You can't have a conspiracy without conspiracy meetings, and the trial Court in *Mejia* found that such "meetings to manufacture evidence" had occurred. (Ex. 98, p. 4635) The conspiracy meetings were cited in defendants' coram vobis petitions as a basis for seeking this court's writ in paragraph 58 and 59. (2 AA 232-234)

In the coram vobis oral ruling that finding was watered down to a non-specific finding that, of necessity given the courts finding that most or all of the thousands of Nicaraguan DBCP claims were fraudulent, "some planning meetings" must have been held to orchestrate them. (12CV 2411.) After recognizing that the number of Nicaraguan DBCP claims was in fact not at all disproportionate to the number of people potentially exposed to the chemical, all references to meetings in furtherance of an anti-Dole conspiracy were deleted from the written ruling.

d. One such meeting, proven by particularly reliable evidence, was the "Montserrat" conspiracy meeting. The trial court felt particularly confident about the specific description of the "Montserrat conspiracy meeting" provided by John Does 13, 17 and 18; it singled out that testimony

as having "[met] the burden, clearly, of clear and convincing evidence, and probably much higher." (Ex. 12, p. 352, also, Ex. 98, p. 4646) The Montserrat conspiracy meeting was cited and described in detail in defendants' coram vobis petitions as a basis for seeking this court's writ in paragraphs 59 and 81. (2 AA 232-234, 245-246)

Other than making an oblique reference to "a meeting" which two American attorneys were found *not* to have attended, there is no mention of the "Montserrat conspiracy meeting" in the trial court's oral or written orders in this case. (12CV 2411, CV Dismissal Order, 7 AA 1371)

e. American lawyers affiliated with the firm of Provost*Umphrey were members of the conspiracy. While acknowledging that the accused individuals had been given no notice or opportunity to defend themselves, the court nonetheless felt that the evidence of the guilt of Mark Sparks and Provost*Umphrey was reliable enough to warrant their public denunciation and included this finding in both its oral and written findings in *Mejia* - identifying specific American lawyers by name in the latter, since: "All of the evidence on which this Court has made findings of fact has been corroborated by at least two, and usually more, sources. All identities of attorneys and/or other participants in the fraud are supported by at least two sources identifying the person by name or circumstantial corroborating evidence plus at least one clear and confirmed accurate detailed description of the individual.... Each

person referred to in this Order was seen actively participating in the fraud based on personal observation by a witness testifying under oath. Therefore, the evidence against these individuals is not based on unsupported third party statements or representations." (Ex. 98, p.4620) Apparently the trial court never considered the possibility that the witnesses who testified in secret might have an incentive to testify falsely, and that no protection against such false evidence existed under the terms of its secrecy order.

The participation of Provost lawyers in fraudulent activities was cited in defendants' coram vobis petitions as a basis for seeking this court's writ in paragraphs 57, 58 and 59. (2 AA 232-234 - and see Ex. 12, p. 351, Ex. 98, p. 4620, 4626) This finding was *expressly* withdrawn by the trial court in both its oral and written findings in this case. (12CV 2411, CV Dismissal Order 7 AA 1371.)

f. "There are groups of corrupt Nicaraguan judges devouring bribes" (*Mejia* oral ruling, Ex. 12, p. 336) That oral finding in *Mejia* was reiterated in the written findings in that case (Ex. 98, p. 4645) with multiple Nicaraguan judges identified by name in footnote 36 of the sealed portion of the ruling which cited secret testimony describing allegations of corruption by those judges (none of whom have any connection with this case) which the trial court deemed "credible." The corruption of Nicaraguan judges was cited in defendants' coram vobis petitions as a basis for seeking this court's writ in

paragraph 59. (2 AA 232-234)

These incendiary findings were downgraded in the current ruling to the observation that "According to U.S. State Department reports for the last ten years, the legal system in Nicaragua is at best fragile in its ability to present consistent rule of law and outcomes" (7 AA 1375) and a reference to the (subsequently disapproved) finding of Florida District Court Judge Huck in the *Osorio* case that the Nicaraguan judicial system "lacks impartial tribunals."[21] (7 AA 1376) The current written order makes no reference to Nicaraguan judges taking bribes.

g. The "enforcement arm" of the Nicaraguan chimera conspiracy was the "Group of Eight." (Oral findings in *Mejia,* ex. 230, p. 8305.) The "group of eight" is a name which is used in Nicaragua to refer to those who were seeking a judicial remedy for DBCP claims, as opposed to the administrative process the Alliance and Dole had agreed to implement. But the chimera conspiracy witnesses, specifically, John Does 17 and 13, presented the "group of eight" as eight specific individuals, who were, as the court found in *Mejia*, the "enforcers" of the chimera conspiracy. [redacted]

[redacted]

21

While Judge Huck's overall decision was affirmed, the United States Court of Appeals expressly declined to adopt that part of Judge Huck's ruling. *Osorio v. Dow Chemical Company* (11th Cir. 2011) 635 F.3d 1277, 1279)

[redacted] (Ex. 144, p. 6347, Ex. 149, p. 6400) No evidence and no witness other than that presented by the two chimera conspiracy witnesses offered any support or corroboration of any part of that claim, the details of which have continued to be shrouded in secrecy. [redacted]

The [redacted] "group of eight" (redubbed the "Gang of Eight" by Dole) were cited in defendants' coram vobis petitions as a basis for seeking this court's writ in paragraph 61 and in its memorandum at p. 61-62, 69 and 78. (2 AA 235 - 236, 258-259, 266, 275)

The court's oral and written rulings in this case contain no reference to the "group of eight."

Each of the facts described above was considered by the trial court to have been proved by clear and convincing evidence in *Mejia,* and the trial court truly believed that they were proved "beyond a reasonable doubt." (Ex. 12, p. 341) But all had to be abandoned by the end of this case because none of them were actually true.

The evidence upon which the trial court relied - and which it believed in beyond a reasonable doubt - was not reliable or trustworthy, but was in most

instances the product of a campaign of calculated perjury designed to deceive the court, and which the procedures authorized by the court were impotent to prevent. How that campaign succeeded is the interesting part of this case.

2. "Proof of the pudding part 2": Multiple secret witnesses committed perjury which went undetected because it could not be investigated, leaving the court to deem their false testimony to be "credible."

John Doe 17 committed perjury, and he recruited [redacted] John Doe 18, and [redacted] John Doe 13, to commit perjury to "corroborate" his story. In its oral ruling in this case the trial court found that "based not only on the words spoken but also on the nonverbal clues, such as tone of voice, rapidity of response, body posture and facial expression, this court finds that *much of* the *Mejia* testimony was reliable and trustworthy." (12CV 2422, emphasis added.) Nonetheless, the court did acknowledge "questionable and possibly corrupt conduct of some of the John Doe witnesses"(12CV 2419) and expressed "concern about the veracity of some of" them. (12 CV 2411)

But even that degree of candor disappeared from the written ruling. Appellants challenged the proposed finding drafted by Dole's counsel (which did not include the latter two findings) and asked the court to specify *which* John Doe witnesses' testimony was credible and which was not, and to clarify

how the court was now able to discern the difference based solely on the same type of observational criteria under which it had found them *all* to be credible in 2009. (7 AA 1283-1285)

The trial court declined this request, and the written ruling simply holds that "the court finds the John Doe witnesses credible" - with no caveats, exceptions, or specifics noted. (7 AA 1377-1378) The blanket finding that all of the John Doe witnesses are credible, when at least four of them clearly committed perjury in their testimony, casts a bright light on the lack of reliability of a fact-finding process in which a litigant recruits secret witnesses to testify and the opposing party is forbidden from investigating either the witnesses or their testimony.

a. John Doe 17 was not a "credible" witness. He lied so prolifically that even with the restrictions on appellant's right to investigate the evidence of his prevarication is voluminous and undeniable. It should not be necessary to revisit the entire panoply of falsehoods John Doe 17 successfully sold to the court in his John Doe testimony, some highlights of which are outlined in section II.D.22, above. Nor does one need to rely on the opinion of Jason Glaser, who spoke with him in person on multiple occasions and testified that: "I read him in about five minutes as a completely untrustworthy person when we interviewed him. He exudes slime." (11CV 1917) There is straightforward, objective evidence that not only did John Doe

17 testify falsely under oath about material matters in the *Mejia* case, he did it with knowledge of the falsehood of his statements and with the intent to affect the decision making process of the court through perjury.

John Doe 17 testified, in detail, about two separate meetings which he described taking place in Nicaragua [redacted]: the [redacted] meeting and the Montserrat conspiracy meeting. He placed Benton Musslewhite and Juan Dominguez at both. He described each of those two men making specific dramatic statements, which he recounted under oath, at the [redacted] meeting. (Ex. 62, p. 2489-2491) The trial court saw Musslewhite testify in person under cross-examination by opposing counsel (who had an opportunity to investigate him and depose him before he testified - 8CV 408-409) and found that Musslewhite was telling the truth about not participating in any such meetings. But this isn't merely a contest of credibility between Musslewhite and John Doe 17 based on demeanor or body language. The events described by John Doe 17 simply could not possibly have happened because they required the simultaneous presence of two Americans who were never in Nicaragua on the same day during the time the events had to have happened if they had happened. (Plaintiff's Ex. 16, p. 3036)

It is true that just because a person's testimony is false, that does not mean he is necessarily committing perjury. A person might innocently misremember events, or have been innocently mistaken about the facts in the

first place. But those possibilities do not apply to a detailed description of an event which actually never happened at all. The stories John Doe 17 told about the purported [redacted] and Montserrat meetings were *inventions*, crafted for maximum effect of undermining the credibility of the plaintiff's attorneys handling DBCP cases in Nicaragua and utility in sabotaging the ability of Nicaraguans to obtain court judgments on DBCP claims.

John Doe 17's stories were tailored to further the narrative being spun by Dole of a conspiracy of plaintiff's attorneys and judges in Nicaragua conspiring to cheat the system. The [redacted] meeting supposedly had representatives of all four of the American and affiliated Nicaraguan legal groups handing DBCP cases in Nicaragua agreeing to work together to recruit phony plaintiffs and fabricate phony evidence. The Montserrat meeting had a judge who was in Dole's crosshairs for handing down a Nicaraguan DBCP judgment which went against Dole standing up at a public meeting attended by, once again, representatives of all of the American and Nicaraguan law firms who were representing DBCP plaintiffs - plus lab personnel, capitans, and a host of others - and directing a conspiracy to fabricate evidence.

The stories were *perfect* for sabotaging the credibility (and enforceability) of every DBCP lawsuit Dole had lost in Nicaragua and America, at least in the eyes of anyone gullible enough to believe them. But, a little too perfect. Dates had to be chosen for the fictitious events, and the

only dates that actually "worked" in terms of the narrative turned out to fall in a span where the key participants could be proven to have not been there. The Montserrat story required additional factual detail that ended up spoiling the story: the actual composition of the fertility test results produced by the Nicaraguan labs. Whether John Doe 17 fell in love with Dole's exaggerated claims about Nicaraguan labs producing 100% azoospermia results, or (more likely) simply misunderstood what the grounds were for the findings in *Osorio* as to the various plaintiffs in that case and "reverse-engineered" a story to match what he thought had happened in that case, the fact remains: he made up numbers that do not match reality.

But regardless of how John Doe 17 came up with the story, it was an invention. And it's not possible to innocently misremember an event you fabricated, or to misperceive an event which exists only in your imagination. John Doe 17's testimony with regard to those two meetings was perjury. There's no rational alternative explanation for it.

The trial court expressly found that John Doe 17 was "credible" based on his demeanor, etc. in its findings in *Mejia*. (Ex. 98, p. 4641) It made no express finding as to the credibility of John Doe 17 in its written decision in this case, but did cite his testimony and out of court statements as evidence supporting its holdings 16 times. (CV Dismissal fn. 56, 57, 58, 62, 64, 65, 67, 75, 91, 131, 132, 133, 136, 138, 185, 186) While the trial court carefully

eliminated any reference to the Montserrat meeting from its written decision in this case, in citing evidence to support its finding that Nicaraguan labs had falsified results in Nicaraguan cases it repeatedly cited an out of court conversation in which John Doe 17 pitched a modified version of that same story [redacted] in private conversation as confirmation of the finding. (Ex. 397, p. 14166 at 5:55; see footnotes 64, 65, 66, 133, 136) And shortly before issuing its final written order in this case the court stated that it was "unaware of any perjurious statement" made by John Doe 17. (13CV 3370)

While a fact finder may rely on a witness's "demeanor" and "body language" in assessing credibility, the fact that his testimony is proven to be false and can only have been willfully false should trump how slick he is with his patter. (Evidence Code section 780 (i))

b. John Does 13 and 18 committed perjury as well. Of course, John Doe 17 was not alone in telling the story of the Montserrat conspiracy meeting. John Doe 13 told the exact same story, with the same cast of characters (including Musslewhite and Dominguez) and the same unreal 40%-30%-30% lab result instructions from Judge Toruño. The trial court took this as "corroboration" rather than "collaboration" and interpreted it as strong evidence of truth.

The trial court was wrong. The fact that three men told the same phony

story was not "corroboration" of a true story; it was evidence of a conspiracy to commit perjury. John Doe 18's version of the meeting was the weakest, but he still spun a "corroborating" story. In describing fictitious events, John Does 13 and 18 had to be committing perjury as well. (Of course, it is undisputed that [redacted] committed perjury [redacted] The trial court found both John Doe 13 and John Doe 18 to be credible in *Mejia.* (Ex. 98, p. 4691, 4692) It made no express finding as to their credibility in this case, but it did cite testimony from those two witnesses 20 times in its written order. (7 AA 1362 et seq. see footnotes 43, 51, 56, 57, 62, 68, 70, 91,96, 97, 102, 105, 130, 131, 132, 133, 162)

c. John Doe 9 also committed perjury. John Doe 9, [redacted] was far less central to the issues in the case but [redacted] equally illustrative of lack of reliability of secret testimony. [redacted] that [redacted] had fathered [redacted] after DBCP use was discontinued, [redacted] But because objective evidence to verify [redacted] was authorized (at the court's urging) we know that [redacted] is *not* [redacted] father. (Ex. 81, p. 4049, RJN 6-7) It's possible that [redacted] was not perjury. [redacted]

[redacted] simply mistaken about that. But [redacted]

John Doe 9 was also expressly found to be credible by the court in its findings in *Mejia* [redacted] cited three times as evidence in support of the court's findings in this case (Fn 48, 52, 70) No mention has ever been made by the court [redacted] testified falsely about [redacted]

The fact that Dole was able to cause the court to have "grave concerns" that [redacted] based on the *exact same type of evidence* which the court has relied on to support the findings it used to vacate appellant's judgment - clumsy testimony of a plaintiff pitted against secret testimony accusing him of lying given by a witness whom the court deems "credible" based on "demeanor" and "body language," etc. - illustrates the lack of fact-finding reliability of that type of evidence. If external investigation into John Doe 9's testimony had not been allowed (and, ironically, it was allowed precisely because it was expected to confirm Dole's claims, not refute them) the probability that the court would have gotten that factual finding wrong as well is high.

3. The false assumptions made by the court which underlay a series of erroneous rulings.

Before going through the individual rulings made by the court which vitiated the adversarial fact-finding process in *Mejia* and this case, it is worth reviewing the perspective from which the trial court assessed the requests being made by Dole and the factual bases for those motions. A court's rulings are not made in a vacuum, and the rulings made by the trial court in this case clearly had their genesis in unstated, unproven, and tragically erroneous assumptions made by the trial court at the outset which were never corrected until it was too late to salvage the reliability of the fact finding process.

a. The primary false assumption made by the trial court in deciding what procedures to authorize was the assumption that the number of plaintiffs claiming to have been injured while working on Dole's Nicaraguan banana farms was "many times" the total number of people who worked on the farms. As noted above, the trial court made a factual finding in the written *Mejia* decision that the number of DBCP claims filed in Nicaragua was "many times" the number of people who actually ever worked on those farms. Although there are 132 footnote citations to supporting evidence in that document, there is no citation to support this finding of fact. (*Mejia* dismissal order, Ex. 98, p. 4651) And indeed, no evidence was ever presented on the record in *Mejia* to support this claim, and its fundamental

falsehood was not recognized by the trial court until *after* it had made its final decision in this case. Because the *Mejia* dismissal was not litigated pursuant to any specific set of factual claims or allegations, this fundamental statistical data point never had to be expressly alleged and put up for critical review or adversarial testing in that case - a hallmark of most of the evidence relied upon to support the court's extraordinary rulings.

That finding was dead wrong. The number of DBCP claims filed in Nicaragua is actually *less than* the number of people who lived and worked on the farms during the DBCP era of 1973 to 1980 and therefore are legitimately qualified to file a claim under Nicaraguan Law 364 for whatever damage they believed was due to exposure to that chemical.

Of course, the fact that the number of Nicaraguan DBCP claims filed here and in Nicaragua is less than the number of people potentially exposed to the chemical does not mean that every Nicaraguan DBCP claimant was legitimate. Mass tort events invariably breed false claimants. As appellants noted in the Memorandum of Points and Authorities in support of their Amended Return, the United States Department of Justice formed an entire task force to combat fraudulent claims arising from Hurricane Katrina; the number of criminal prosecutions listed in the 2007 report was 768 (4 AA 625)

The most recent published report (2010) cites over 1300 such prosecutions.[22] (RJN 64) And that's right here in the United States. There would be no reason to assume that there would be no false claims in Nicaragua arising from events which happened in the 1970's and involved thousands of people. And of course we know with certainty that at least two John Doe witnesses filed false claims - [redacted]

So a certain number of false claims simply "comes with the territory" in Nicaragua as it does in the United States. And as noted above in section II.B.7.a, the attorneys representing plaintiffs in Nicaraguan DBCP cases consciously put procedures in place to try to weed out false claimants as well as seeking in vain to get whatever information Dole had. But there's a huge difference between accepting that a certain number of false claimants is inevitable and believing that in this instance there are "many times" as many false claims as valid ones. A certain number of false claimant's "beating the system" by successfully circumventing the plaintiff's lawyers admittedly low-tech screening system wouldn't prove anything of any significance. But if **over 90%** of the claims were bogus - the lawyers *had* to be "in on it."

If the court's assumption had been true, the various stories Dole's

[22]http://www.justice.gov/criminal/katrina/docs/09-13-10katrinaprogress-report.pdf

witnesses were able to successfully peddle would make sense. Indeed, one would hardly need to hear a story about a conspiracy to recruit false plaintiffs to conclude, as the court articulated in its oral findings in this case on July 15, 2010, it would *require* a conspiracy *and* conspiracy planning meetings in order for the (perceived) massive number of necessarily false claimants to exist. (12CV 2411) Furthermore, if over 90% of all Nicaraguan DBCP claimants were fraudulent, as Dole argued, then if would stand to reason that that fact would be common knowledge in Nicaragua, and in order to cover it up, something would have to explain how the massive fraud was being concealed. Neither of those conclusions flow from the fact that the number of claims in Nicaragua is 70% to 90% of the total number of people who lived and worked on Dole's banana farms in the 1970's, but both *are* necessary if the number of fraudulent claims was as massive as the court assumed it was.

If the trial court's assumption about the number of fraudulent DBCP cases in Nicaragua was correct, every procedural and factual ruling it made makes sense, even though they are of dubious procedural (and Constitutional) propriety.

But the assumption was wrong. Which invites two questions:

• Where did the trial court get the idea that the number of claims filed in Nicaragua was "many times" the number of former workers on Dole's banana

farms, a fact that, if true, would necessarily imply the existence of a massive conspiracy?

• And why wasn't the erroneous assumption corrected before the trial court had made its rulings in both *Mejia* and this case?

The first question cannot be answered for two reasons: first, the trial court did not cite the source of its finding in *Mejia* and there is no evidence which supports it in the record. Second, as discussed below in section III.A.10, the sheer volume of out-of-court and ex parte communications between Dole's counsel and the court leaves much of the persuasive communication upon which the court relied unreviewable. Appellant twice sought to have the many, many e-mails sent to the trial court by defendants' counsel printed out and included in the record, but both motions were denied. (3CV 5; 13CV 3336-3337) Accordingly, just where and when the trial court came to hold this false belief is not ascertainable from the record.

The second question is easier to answer: the false assumption was never debunked in *Mejia* because it was never articulated as an accusation that plaintiffs could fight in that case. Dole first produced its expert's testimony which was supposed to prove its claims about the excessive number of DBCP claimants in Nicaragua a few days before the coram vobis hearings commenced in May 2010. Having the claim and the assumptions upon which it was based openly articulated and subject to critical inspection, albeit at that

belated date, allowed appellants to expose the false premises which underlay the trial court's misperceptions which Dole's counsel had instructed Dole's expert to "bake into" his analysis (Plaintiff's Ex. 3554, 3566, 3567) But without any express pleading or any other requirement of an articulation of the fundamental factual underpinnings of Dole's fraud accusations the truth about this key factual misunderstanding was never brought to light before that time. It was simply a belief that was somehow planted in the trial court's mind which had a huge impact on the proceedings without ever being subject to adversarial testing.

b. The second false assumption which had to be believed in order to validate the primary assumption: all Nicaraguans are united and willing to lie to cover up "the fraud" that many must have known about. Once one adopts the belief that there are many times as many false claims in Nicaragua as potentially legitimate ones, an explanation needs to be found to explain the lack of widespread evidence of the massive fraud. The secondary assumption was laid out by the trial court at the first hearing on Dole's requested secrecy order in October 2008:

> "the community of Chinandega has been portrayed to me as being a very close-knit community where one member of the community supports another member of the community absolutely." (Ex. 1, p. 54)

And the court held true to that vision of the citizens of Nicaragua right

through to the final hearing at which the coram vobis decision was announced 22 months later:

> "A consequence of the lawsuits and the hope of compensation which would bring wealth into these communities is that members of their community rallied behind the claimants. A threat to one was perceived as a threat to all." (12CV 2410)

Defendants labored mightily to instill and preserve that simplistic view of the attitudes and beliefs of a nation's people in the trial court. But there was never any actual evidence to support it, and the evidence which was presented, by Jason Glaser, who actually lived and worked in Nicaragua for years, was that communities in Nicaragua, like most (all?) other communities in the world, are riven by jealousies, rivalries, suspicion and infighting. As Mr. Glaser put it:

> ... there are all these different divisions in Nicaragua, and everybody has their different groups of workers, ...
>
> The Court: and when you say divisions, you mean factions? Is that how you mean that?
>
> The Witness: I mean, it's just ridiculous. I mean, you know, like [redacted] had a problem [redacted], but they were together and they had a split, and then [redacted], and then, you know, we don't know [redacted]; and then, yeah, there's several separate divisions, there's absolutely no unity in these cases, it's just a – I want to say a bad word. It's a cluster[ ] you-know-what.[23]

23

The "bad word" Mr. Glaser was referring to is used to describe a state of chaos and disorganization, usually due to an excess of people working at

But again, there is no need to rely on the word of a man who lived in Nicaragua, spoke personally with many of the key actors in this drama, and understood the mood of the nation first hand. There is documentary evidence of the lack of unity between major factions of people seeking to lead the DBCP compensation effort in Nicaragua: the competition between the attorneys who were seeking compensation through the court system, and The Alliance, which had cut a deal with Dole to lead a cheap administrative compensation program which could not succeed unless successful litigation could be prevented from coming to fruition.

They did not "support each other unconditionally." They did not see "a threat to one as a threat to all." Victorino, the leader of The Alliance, had had disputes with all of the Nicaraguan lawyers, and had vowed to "bring down" the OLPLB run by Antonio Hernandez Ordeñana, one of the lawyers seeking compensation through the courts, so he could "take over" his clients. (Ex. 57, p. 1772, Ex 58, p. 1924) Just days before the trial in this case was to start in 2007 he held a press conference to encourage former banana workers to fire their lawyers, announcing that this lawsuit would *fail.* (10 Trial RT 131-132; article is at Plaintiff's Ex. 15.33, p. 2947) Nicaraguan society clearly has as

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cross-purposes. See definition in the Urban Dictionary: http://www.urbandictionary.com/define.php?term=Cluster%20Fuck

many rifts, divisions and rivalries as any other.

• Note: the group of people appellants refer to as "The Alliance" did exist and that members of that group [redacted]" At this point appellants must address a finding in the CV dismissal order stated as section heading C.2.b.: "There is no Alliance." Of course there is an "Alliance." The fact that a group of Nicaraguans headed by Victorino Espinales negotiated with Dole for years, and reached an agreement in 2007 which they set forth in a joint letter to the Nicaraguan government is not in dispute. Dole's Vice-President, C. Michael Carter, confirmed the meetings and the letter describing the agreement. (Ex. 266, p. 9452-9453, 9460-9461) As appellants put it in their return:

> The capitans who were identified as the principles on their side of the deal list their affiliations as being with three organizations - Espinales' ASOTRAEXDAN, a smaller group called AOBON, and, as to the majority of the capitan signatories, "Alianza Nacional" or "National Alliance." No specific title appears to have been given to the combined group. For purposes of this document [appellants] will refer to the individuals who joined in this enterprise - Espinales and his ASOTRAEXDAN members, the AOBON leadership and members, and all the others who elected to work with them in competition with the law firms simply and collectively as members of "the Alliance."
>
> (Amended Return, 3 AA 562

As the group of people thus described clearly does exist, the trial court's finding that "there is no Alliance" is a head-scratcher.

The specific factual findings in that section of the CV dismissal order are no help:

"Plaintiffs contend Dole and some of the John Doe witnesses and others formed an "Alliance..." (7 AA 1389) The order cites to appellants' amended return (see above) which makes no such contention. Dole did not did not "form an Alliance" with anyone. As stated in the amended return, Dole *entered into a agreement with* the group appellants dubbed "The Alliance" and the terms of that agreement are described in the Dole/Alliance letter to the Nicaraguan government. (3 AA 562, Ex. 266, p. 9461)

And: "That persons met with Mr. Carter to discuss the Nicaraguan Worker Program does not mean that they were part of an improper 'Alliance.'" (7 AA 1390) Appellants never asserted that the "Alliance" was "improper" - merely that it existed, and that it was in competition with the plaintiff's lawyers seeking judicial remedies for DBCP claims. The facts that appellants actually *did* highlight in their amended return are not even disputed.

And: "...plaintiffs assert that the union leaders, motivated by the opportunity to obtain direct settlements with Dole, have been the primary architects of false John Doe witness testimony. This assertion is speculation." (7 AA 1390) While there were no "unions" or "union leaders" involved (see Ex. 266, p. 9452-9453) it is undisputed that (1) Witness X [redacted]

[redacted] (2) that Dole's "most important witness [redacted] John Doe 17:

a) was the primary architect of the bogus Montserrat conspiracy meeting testimony for which he got false "corroboration" from [redacted] John Doe 18 and also John Doe 13 -- and was also the architect of *lots* of other false John Doe witness testimony, such as the [redacted] story, the "La Concepcion is a fraud lab owned by Francisco Tercero" false testimony, the "group of eight as *enforcers*" false testimony, the "I never met with Dole's attorneys" false testimony, etc. (See section II.D.22, above)

b) was [redacted]) and,

c) spoke often of his negotiations with Dole's lawyers and agents to obtain a direct settlement with Dole for "his" claimants. (Ex. 396, p. 14693, Ex. 399 p. 14180-14182, Ex. 407, p. 14437, 12CV 2163-2165; CV Court's Exhibit 13 and 14, July 9, 2010)

None of those things are "speculation" - they are *facts*, which are not even disputed by defendants.

And finally: "Plaintiff's allegation of the existence of an "Alliance" does not support their bribery allegations." (7 AA 1390) Appellants never said it did. Appellants' amended return contains no allegation that Dole engaged in "bribery." What appellants asserted is that the Dole/Alliance contract demonstrates that all Nicaraguans did not "support each other unconditionally"

or view "a threat to one as a threat to all" but that there were in fact deep rifts among Nicaraguans with regard to the DBCP controversy, and in fact, this one specific group of Nicaraguans actually had a clear financial incentive to see efforts to recover compensation for DBCP claims through legal actions *fail*, not succeed. And key John Doe witnesses in fact came from that group.

It is not "bribery" to enter into a contract with a group of people which gives those people a financial incentive which would be advanced if they committed perjury, unless the contract is coupled with an understanding that they will provide false testimony as a *quid pro quo*. (California Penal Code section 138, *People v. Pic'l* (1982) 31 Cal.3d 731, 738) Appellants have never claimed the Alliance John Doe witnesses who testified falsely did so at Dole's direct behest. But the fact that the Dole/Alliance agreement gave the members of the Alliance a financial interest in seeing their competition for DBCP clients fail is undeniable. Their competition was the plaintiff's lawyers, and one way to see them fail was to sabotage the judgments they obtained. The perjury of John Doe 17, 18 and 13 and Witness X was directly aimed at the achievement of that goal. The simple fact is that persons with a financial interest in seeing the judgment in this case be vacated provided the key testimony upon which the order vacating the judgment was based. Appellants have never claimed that Dole directed that testimony or offered a direct *quid pro quo* for the perjury from which it has benefitted, and it is immaterial whether Dole did or did not do so.

The fact that the trial court had fixed its attention on a straw man argument instead of the facts pointed out by appellants perhaps explains the cavalier dismissal of the significance of the contract between Dole and the Alliance by the court during the proceedings. ("Are you going to talk about the Alliance again? Please don't bother." -9 CV 643)

c. The next false assumption which flowed from the primary assumption, as colored by the trial court's prior experiences with Colombian litigation: that witnesses were unwilling to step forward to expose the massive fraud the court assumed must exist due to a well-founded fear of being killed. The trial court had experienced a tragic event: a witness in a case involving a dispute in Colombia was killed at some point after testifying in a case under the trial court's supervision. The Court spoke of this on several occasions (2CV A 16-17, 4CV F 75, 7CV L18-19, 9CV 612-613, 13CV 3032) commenting that that experience made the court "more sensitive than the average judge might be." (9CV 612-613) However, the trial court advised counsel, "you take the judge as you get them." (7CV L19, also 4CV F 75, 9CV 613)

- **Dole's claim: It is "100% certain" that if the identity of the witnesses who testified for Dole should become known they would be attacked and even killed.** The testimony of Dole's head investigator in Nicaragua, Luis Madrigal, at the April 2009 *Mejia* dismissal hearing was

unambiguous:

> Q. What types of concerns for their safety did [the witnesses] express to you?
> A. Well, first, for their own lives; second, for their families. The fear was to being attacked, beaten or even killed.
> Q. Based on your experience investigating these DBCP matters in Nicaragua, do you think the John Doe witnesses' concerns that they would be beaten, attacked or killed if it was known that they came forward are legitimate?
> A. Yes.
> Q. Why do you believe that?
> A. I've spent five years in Nicaragua, and especially in rural areas when people are manipulated individually or in a group, they tend to be violent. It's a matter of somebody giving an order to beat somebody up and it happens.

....

> Q. Do you believe it's possible that a John Doe witness could be killed if it was found out that they testified in the Mejia matter?
> A. Yes.
> ...
> THE COURT: How likely do you believe this violence that the individuals may suffer if their names are revealed?
> THE WITNESS: One hundred percent.
>
> Ex. 230, p. 8272

Pretty scary stuff. A witness specifically found to be credible by the trial court (7 CV 1391) testifying that Nicaragua is a country full of violent individuals who would beat up and kill any of the secret witnesses whose

identity became known. Ordinarily, "proving the negative" - i.e. that it was not "100% certain" that the witnesses would become victims of violence if their identities became known would be difficult if not impossible. But once again, as with the Montserrat meeting story, we do have evidence from the real world, as opposed to a story spun by witnesses employed by Dole.

- **The reality:** [redacted] in Nicaragua since Mr. Madrigal testified. [redacted].

The first two witnesses who provided testimony to support Dole's lurid fraud claims were Bayardo Barrios, the lab technician, and Witness X. Barrios' identity has been known in Nicaragua since 2003, when he signed a declaration prepared for him by Dole's counsel which included the statement: "I am conscious of the fact that by giving this statement I am putting my life and my family's life in danger, if I remain in Nicaragua." (Ex. 384, p. 13831) Although he traveled with his family to the United States to meet with defendants' counsel, things apparently didn't work out there, as he did not remain but returned to Nicaragua (Ex. 385, p. 13847) where the fact that

Barrios had signed such an affidavit was common knowledge. Yet Barrios has not been harmed in any way. (10CV 1687-88)

Witness X himself spoke of his trip to Los Angeles to testify after he returned home, and the debate over whether he had asked for "too much" to testify appears to have been a topic of conversation in Nicaragua generally. (Ex. 60, p. 2200) Witness X was not harmed either. (11CV 1830) In fact, Antonio Hernandez Ordeñana (identified as a member of John Doe 17's "enforcement arm of the chimera conspiracy" version of the "group of eight") made a point of how Witness X was cared for in his final illness by the Nicaraguan plaintiff's lawyers, not Dole, in the radio broadcast and press conference in May 2010 which the trial court interpreted as "witness tampering" discussed in section II.F.44. b & c, above.

[redacted] (Ex. 271, p. 10151-10153, Ex. 355, p. 13062-13065) Jason Glaser saw them and spoke with them [redacted] and none of them seemed at all intimidated. (11 CV 1830-1832) [redacted]; another was described by Glaser as being "cocky." Two sat for videorecorded interviews with him. (11CV 1831 - 1832, Plaintiff's Ex. 28, Ex. 395)

[redacted]

[redacted]

[redacted]

Ex. 253, p. 9219

And that's it. [redacted]

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The Spanish term was "declaracion" Ex. 253, p. 9215, line 17. Permutations of the Spanish verb "declarar" were translated in this case as signifying both live and written statements, and not always accurately. In this case it was a written declaration, not a transcribed deposition.

[redacted]

There are only 26 witnesses whose testimony in support of Dole's "fraud" claims" appear in the record, including Witness X and the various "John Does." [redacted] After Bayardo Barrios and Witness X, there were 17 John Doe witnesses who testified in person and seven more who filed declarations.

Of course, at the time the trial court instituted the secrecy procedure in *Mejia*, [redacted] or that Nicaragua is not Colombia, and is actually, by Latin American standards, a relatively safe country. (10CV 1744)

d. The final false assumption: There is no way to compel a witness in Nicaragua to testify under oath. While it is true, as the court noted, that there's no reciprocal treaty between the United States and Nicaragua by which an American litigant can obtain a local court order in Nicaragua to perform American-style discovery, the assertion that there is "no compulsory discovery" process in Nicaragua is false. As noted above in section II.E.37,

a witness in Nicaragua can be subpoenaed to appear in court and respond under oath to questions in the form of written interrogatories which are read to the witness by a judge, and the testimony is recorded - the procedure called "Pliego de Absolucion de Posiciones". (Plaintiff's Ex. 5, p. 1390) The trial court was unaware of this process when it authorized the secret depositions in *Mejia*.

When evidence of the absolucion procedure surfaced, defendants initially insisted that the answers given under oath by witnesses were inadmissible. (Ex. 267) Defendants' fallback position, adopted by the trial court in its decision, was that testimony given by witnesses testifying under oath in open court in Nicaragua is inherently less reliable than testimony given in secret by witnesses recruited by a litigant with the promise that nothing they say will ever be seen by anyone adverse to the litigant who would be in a position to prove it's a lie. (7 AA 1381, and see section III.C.17.b, below) Indeed, the court's decision includes the finding that the very act of Nicaraguan plaintiffs' attorneys subpoenaing witnesses to testify under oath in open court in Nicaragua is itself evidence of "the fraud." (7 AA 1372, 1399)

4. The trial court's intentions in authorizing the secret deposition procedure, in its own words: "the court had sensed the strong possibility of fraud in the background of these cases"...[25] the court has a "strong interest to... root out any fraud subverting the legal process"[26]... "and my goal [ ] was to have as many people who Dole and/or Dow were claiming knew or alleged fraud to come forward and be comfortable to come forward in saying whatever they needed to."[27]

While the stated reasoning of the trial court is seductive, it betrays a fundamental misunderstanding of the proper role of a trial court judge when allegations of "fraud" are made by a litigant. It is not the court's job to "root out" claimed fraud which is actually based on false accusations; it is not the court's duty to ensure that any witnesses who might support those claims be "comfortable to come forward and say whatever they needed to." It is the trial court's duty to ensure that those allegations are subjected to a fair and therefore reliable fact-finding process so that if true they can be upheld, but if those accusations are exaggerated, distorted, or fabricated that falsehood will be exposed and those claims will be debunked. That includes ensuring that witnesses will be "uncomfortable" about testifying if their testimony is going to be willfully distorted or false.

It also includes the duty to allow a vigorous adversarial testing of all

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[25]CV decision, p. 6

[26]CV decision, p. 7, 12 CV 21, p. 2407

[27]2CV A 20-21

claims through investigation of the witnesses and the substance of their testimony. The exclusive means the trial court afforded plaintiffs in *Mejia* to contest the testimony of the John Doe witnesses was the opportunity for a handful of attorneys selected by defendants and the court who spoke no Spanish and had no familiarity with Nicaraguan society (or Nicaraguan DBCP litigation) to review redacted versions of the MOI's Dole produced as to the witnesses its agents had recruited, and to cross-examine them once with no other information than that and no follow-up and no investigation of the witnesses or their stories.

That the trial court was motivated by a perceived responsibility to "root out fraud" cannot be denied. But that's not the court's job. "A court is a passive forum for adjusting disputes." (*Sale v. Railroad Commission* (1940) 15 Cal.2d 612, 617) The zeal with which the court exercised its power to "root out" fraud which the court has concluded must exist based on a set of unpleaded and fundamentally inaccurate assumptions about events taking place in another country left no neutral overseer to ensure that the process would be fair and reliable.

5. The only type of "verification" which was authorized by the court for the John Doe witnesses' testimony was the trial court's own personal assessment of whether or not they were telling the truth, based on viewing video recordings of their testimony through interpreters.

President Reagan was famous for his sensible approach to negotiations with the Soviet Union: "Trust, but verify[28]." It is a principle which is worth remembering in many circumstances, but particularly by a court hearing dramatic accusations of fraud. The sole "verification" of the John Doe's testimony which the court allowed in *Mejia* was the trial court's own assessment of whether it believed that they were telling the truth or not, based on how plausible the trial court found their testimony as augmented by the trial court's assessment of their "demeanor" (Ex. 98, pp 4621, 4641-44, 4647, 4649, 4650, 4657, 4659) and "nonverbal clues, such as tone of voice, rapidity of response, body posture and facial expression." (12CV 2421-22) External investigation of their claims - such as by investigating to see if the witness had a motivation to lie, investigating the factual claims to see if they can be verified by reliable external evidence - or indeed, are even physically possible - was strictly prohibited by the secrecy order.

a. The specific rulings which restricted the investigation of Dole's claims were individually abuses of discretion as well as constituting a violation of due process as a whole. Appellant's due process challenge addresses the entire process, taken as a whole. Discussion of the specific rulings which appellants submit were an abuse of discretion appear in various

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sections of this brief, but are listed here for reference:

In Mejia:

1. The initial October 8, 2008 order authorizing secret depositions of John Doe witnesses while denying anyone opposed to defendants except for MAS to participate and denying MAS any effective means of investigating the witnesses or their testimony. (Ex. 2)

2. The October 24, 2008 order reasserting the secrecy order based on the court's finding of a "strong likelihood of fraud" at that point and restricting the conduct of any investigator hired by MAS (Ex. 191 p. 7140)

3. The October 31, 2008 order prohibiting MAS' employment of a new investigator pending further order of the court. (Ex. 192, p. 7225)

4. The December 8, 2008 order denying Juan Dominguez access to the identities of the John Doe deponents and the content of their testimony based on the secret evidence secured through the October 6 order. (Ex. 199, p. 7347-48)

5. The January 9, 2009 order denying MAS' request for access to Dole's MOI's of witnesses Dole elected not to have testify in secret depositions and denying MAS the right to even limited disclosure of the substance of the John Doe witness' claims to *its own clients* for purposes of investigating whether they were true or not. (Ex. 201, p.7391

6. Agreeing in an ex parte meeting with Dole's counsel on January 30, 2009 to withhold from MAS the information given to the court that John Doe

17 had told Dole's counsel that Duane Miller had encouraged Juan Dominguez to participate in fraudulent practices. (Ex. 208, p. 7614)

In the coram vobis proceedings in this case:

8. Overruling appellant's objections to the use of the secret depositions and declarations from *Mejia* in this case due to the restrictions on opposing counsel' right to investigate the witnesses and their stories before or after they testified. (5CV I20)

9. Overruling appellant's objection to the declarations filed in *Mejia* after MAS had attempted to withdraw from that case - and specifically the declaration of Witness X - on the grounds that those witnesses were never made available for cross-examination by counsel with "an interest and motive similar to that which the party against whom the testimony is offered" as required by Evidence Code section 1292 (a)(3). (5CV I-19)

10. Ruling *sua sponte* that even the identities of persons who had publicly identified themselves as John Doe witnesses could not be disclosed by appellant's counsel to anyone. (3 AA 405-406)

11. Denying appellant's motion for disclosure of all evidence in defendant's possession relevant to their claims of "new facts" justifying vacating the judgment, and limiting defendants' duty of disclosure. (3 AA 455 et seq., 2CV C 17-22)

12. Denying appellant's request to interview Thomas Girardi (2CV CS 76-77)

13. Denying appellant's request to depose [redacted]. (2CVS C86)

14. Denying appellant's repeated motion to depose John Does 17 and 18. (6 AA 1044, 1113 et seq., 1188 et seq., 1192 et seq.)

15. Denying appellant's motion to require Dole to obtain and produce copies of the records of the "administrative" account used by its agents to pay its witnesses. (9 CV 198, and see section II.A.9.b, infra)

16. Denying appellant's repeated motions to have the e-mail communications between counsel and the court in the *Mejia* case disclosed to appellants. (3CV D5, 13CV 3336-3337)

MAS' objections to being forced to participate in a process that was outside their area of expertise, prohibited from utilizing the resources they needed to interpret and understand what was being claimed about events in Nicaragua, and hobbled by an inability to undertake any effective investigation of the stories they were hearing fell on deaf ears. (Ex. 7, p. 218-220, Ex. 1, p. 17) While MAS was allowed to hire an investigator the restrictions placed on who the investigator could be, where he could come from, who he could and could not talk to and what he could and could not say to anyone while operating on "thin ice" eliminated any opportunity to perform any meaningful investigation into the substance of Dole's fraud claims and the witnesses and their stories being pushed to sell those claims. (Ex. 191, p. 7122, 7140)

Appellant's current counsel's requests for leave to perform investigations into the claims of Dole's witnesses were similarly repeatedly rebuffed. (See sections II.E.36, 39, 40 and II.F 44 and 45, above, III.A.9 and III.A.10, below) Even when strong evidence was presented that the testimony of the witnesses the court had relied upon and considered especially credible - the chimera conspiracy witnesses who provided testimony describing the "linchpin" Montserrat conspiracy meeting - was itself a calculated, coordinated fraud on the court, the trial court denied appellants motion to depose those witnesses.

So the only form of "verification" of the secret witnesses' stories was the trial court's own assessment of their credibility. The trial court expressed a high degree of confidence in its ability to distinguish witnesses who were not telling the truth. (E.g., Ex. 213, p. 7750: "I've seen it all and I've done it all and I've heard it all. So, I think I'm good at spotting a lie.") But however advanced the court's skills were in that regard, our judicial system doesn't rely exclusively on the finder of fact assessing the veracity of witnesses' testimony in a vacuum; our system is designed to have claims tested by an adverse party with an opportunity to perform external verification of claimed facts. And in this case the trial court did not actually have much success in "spotting a lie," as noted in section III.A.1 and III.A.2 above.

- **The court has cited appellant's failure to submit evidence which**

could not be secured without violating its express orders as proof of appellant's guilt. Perhaps the clearest example of the "Catch-22" the court put appellants in is exemplified by the court's citation of the appellants' failure to "testif[y] or submit[ ] a declaration stating they had actually worked on a banana farm or refuting defendant's evidence of fraud" in the coram vobis proceeding as evidence that their judgment was "a Product of the Fraud." (7 AA 1369)

As to "stating they had actually worked on a banana farm," all of the appellants (other than Calero Gonzalez) gave that testimony both at pretrial depositions and at trial, in front of the jury and subject to cross-examination by counsel who had reviewed hundreds of investigator's reports about them. That is what trial is for. Furthermore, contrary to the court's assertion, two of the appellants did submit post-trial declarations attesting to the truth of their testimony in 2009, albeit without any apparent significant influence on the trial court's decision. (Plaintiff's Ex. 3.24 p. 801, 805.)

With regard to "refuting defendants' evidence of fraud," in *Mejia* the trial court specifically instructed plaintiff's counsel as to what they could and could not say to their own clients: "it is permissible to ask plaintiffs open-ended questions about their circumstances [ ] It is not, however, permissible to ask specific questions to plaintiffs that would reveal information protected under this Court's protective order, including if they used any forged

documents, faking lab results, or asking about individuals identified by the John Doe witnesses." (Ex. 201, p. 7391)

It would not be *possible* for counsel to prepare a declaration for any of the appellants which would "refute defendants' evidence of fraud" without violating that specific order. Yet the failure to do so was cited by the court as proof of appellant's guilt. Furthermore, to the extent that the things which defendants cite as "evidence of fraud" actually might have happened they would not have taken place in appellants' presence. That is the position the court's secrecy rulings have put appellants in: they are presumed guilty if they don't deny accusations they aren't even allowed to hear about events they would not have witnessed even if they had taken place.

6. A series of steps based on faulty assumptions created a malignant feedback loop facilitating false claims advanced by Dole's secret witness, with secrecy facilitating perjury and the resultant perjury designed to justify redoubled secrecy, until all semblance of a reliable adversarial system of fact finding was destroyed.

Understanding the court's assumptions, that there were "many times" more false claimants than legitimate ones, that everyone in Nicaragua must be lying about it, and that anyone who was willing to step forward as a whistleblower would be killed, makes its initial rulings predictable. When Dole brought in a set of declarations containing claims about fraud in

Nicaragua, each coupled with the representation that the witnesses might not show up to testify unless promised secrecy, the court agreed to impose the requested secrecy, even though they were just "allegations." (Ex. 1, p 6:1-4, 5:11-17, 8:14-20) After all, the ruling would be "revisited" later.

What the trial court failed to anticipate was that by affording Dole the freedom to recruit witnesses with a promise of secrecy all safeguards against perjury went out the window and could not be recovered. John Doe 17 is the living embodiment of this principle: After years of living in a state of luxury far beyond anything he had enjoyed before with an income far above anything he had ever earned from honest work, and being protected from [redacted] prior misdeeds by his corporate sponsor with American court approval, he has yet to suffer the slightest inconvenience despite the fact that his many fabrications have been exposed as blatant perjury. There were no safeguards against that.

But the initial and most significant abuse of the fact-finding process that the secrecy order facilitated was John Doe 13's tale of the Montserrat conspiracy meeting. We all know now that that story is a hoax. But MAS and the trial court had no way of knowing that at the time. That one specific exercise in perjury not only pushed the "fraud" story well down the tracks, it was self-insulating. Until the trial court read that testimony it was about to allow Juan Dominguez - the only member of the plaintiff's legal team with

familiarity with Nicaraguan society and the ability to speak Spanish - to participate in the defense of Dole's claims.

But the Montserrat story, unexposed and unrebutted because the secrecy order prevented its investigation, changed that. The secrecy which had fathered the Montserrat perjury then became redoubled by the very perjury it had facilitated - which prevented the lie which was used to justify the increased secrecy from being exposed. Once that happened, there was nothing to keep Dole's agents and witnesses from providing "proof" of just about anything they wanted the court to believe, safe in the knowledge that it couldn't be investigated by plaintiffs without violating the secrecy order.

Next, the same witnesses who had perpetrated the Montserrat hoax ramped things up - claiming to have been "threatened" and claiming to have witnessed threats to Dole's investigators. (See section II.D.25, supra) There was no outside corroboration of any of these claims - certainly none of Dole's agents or witnesses were ever actually assaulted by the alleged evil chimera "enforcers" or anyone else. None of those stories could be investigated by plaintiffs by asking people in Nicaragua if they had heard the same story without violating the secrecy order. Even the mention of the chimera conspiracy witnesses' *claims* [redacted] in open court - let alone disclosure of the specifics of those claims - was deemed a violation of the secrecy order. (9CV 1294-1295) The drumbeat of unchallengeable claims

of threats was successful in encouraging the trial court to totally clamp down on any attempt to defend against Dole's claims. The trial court believed them *all*, despite a complete lack of any verification other than, like the Montserrat story, the same witnesses "corroborating" each other.

Thus, each of the later rulings made by the trial court was itself based on an accretion of evidence obtained through a process which no one - not even defendants - asserted was "fair" or designed to allow adequate vetting of the witnesses in the beginning. Each step away from the straight and narrow became a precedent for the next step even further off center. If the court's initial stated intention had been followed through - if Dole's opponents had been allowed to investigate the John Doe witnesses and their stories before the court made up its mind that they were all telling the truth - the error could have been cured. But it never was. The process which allowed undetected perjury allowed that perjury to be used to justify the prevention of its detection.

7. Once the court granted itself and Dole the privilege of acting in secret the use of secrecy was exploited to prevent investigation of Dole's witnesses' false testimony without even a pretense of being justified by the need for "protection."

Defendants will no doubt protest the use of the term "secrecy order" in this brief instead of the label affixed to that order: "protective." But while the extent to which the order ever actually protected anyone against anything other

than the exposure of their perjury is debatable, the fact that it was used to impose secrecy under many circumstances in which there was not even a pretense of justification for "protection" is undeniable. One of the truisms of the seductive allure of secrecy is that once an agency grants itself the authority to act in secret that authority is almost invariably abused. The following are examples of various ways secrecy was imposed in this case in circumstances in which no pretense of a justification of "witness safety" was even suggested, each of which inhibited appellants ability to defend against Dole's accusations - and to even know what accusations were being made:

a. Concealing the fact that Thomas Girardi was identified by John Doe 17 as a participant in the Montserrat conspiracy meeting and denying appellant's counsel's request for leave to interview him about that accusation. The "chimera conspiracy" witnesses' testimony about the fictitious Montserrat conspiracy meeting was coordinated in its general outline. Certain key features were consistent: that the meeting was held at a house in the Montserrat neighborhood and was headed by Judge Socorro Toruño, the "40%-30%-30% order" given to the laboratories, that attendees included Benton Musslewhite, Juan Dominguez, Mark Sparks, Bob Roberts, Bernard Zavala, Claudia Salazar (the lab operator who worked in a wheelchair), etc., and, of course, the three of them. But John Doe 17, as befits his more grandiose style of prevarication, added a number of participants whom the other two had not listed, including Thomas Girardi (Ex. 62, p. 2497) among

others. (See chart, Plaintiff'S Ex. 1.2, p. 45)

When the court released redacted copies of John Doe 17's deposition testimony after the *Mejia* decision had been announced, Thomas Girardi's name was redacted. (A number of other names were as well.) Redacting the name of Thomas Girardi had nothing to do with "witness safety." Whether he was or was not at the meeting (even if it were not entirely fictitious to begin with) had no bearing on whether the witnesses whose testimony describing the meeting had been made public would be more or less safe.

What Mr. Girardi did offer, however, was a California-based lawyer who had been involved in Nicaraguan DBCP litigation who would have been knowledgeable about at least some of the claims being advanced by Dole's secret witnesses and available to speak (in English) to appellant's counsel about them. When appellant's current counsel was first allowed to review the secret testimony in 2009 it was evident that Mr. Girardi was obviously a witness who had the potential to shed light on the case. Uncertain of the exact parameters of the "ground rules" the court had imposed, counsel sought the court's permission to contact Mr. Girardi, disclose to him that he had been identified as a participant in the Montserrat meeting, and simply interview him about it. (2CVS C 62, 65) That request was denied: "[W]hatever opinions Mr. Girardi has, he can keep them to himself. He doesn't need to share them with you." (2CVS 76-77)

b. Concealing the fact that John Doe 17 had accused Duane Miller of agreeing to participate in the recruitment of phony plaintiffs. As noted above in section II.D.22, Dole's counsel Scott Edelman met with the trial court ex parte and gave a detailed description of what John Doe 17 had told him and Andrea Neuman: that Juan Dominguez, while initially opposed to the idea of recruiting phony plaintiffs, had consulted with MAS' Duane Miller about the idea "at length" and Miller had agreed that recruiting phony plaintiffs was a good idea "and therefore we're okay with it." When the trial court indicated skepticism of that claim - after all, the court had seen Miller first hand for months of trial and had external means of verifying the improbability of Duane Miller having said any such thing from personal observation - Dole's counsel prevailed upon the court not to disclose that communication to MAS. (Ex. 208, p. 7614) And then, when John Doe 17 was deposed, *his story changed,* without explanation or follow-up by Ms. Neuman, who was taking the deposition for Dole. The purported communication with Miller was never mentioned and Miller and MAS had no knowledge of it when John Doe 17's deposition was taken in February 2009.

Concealing this claim from MAS did nothing for "witness safety." Ms. Neuman, who participated in John Doe 17's deposition and listened to him tell a significantly different story under oath than the one she and Mr. Edelman had heard from the witness a few weeks before, said nothing, just as she remained mute in the face of John Doe 17's false statement that he had never met with

any of Dole's attorneys. MAS did not know, and had no way of knowing that Mr. Miller had also been the target of the accusations of Dole's secret witness when the witness was deposed - a fact which would have graphically alerted them to the fact that the witnesses were not telling the truth, because of all of the stories that were being peddled by Dole's secret witnesses, this was one that they actually knew the truth about.

c. Concealing the fact that Dole's counsel has repeatedly and falsely represented to this court that Juan Dominguez threatened witnesses with violence and specifically threatened Witness X's life. Dole represented to *this* court *seven times* that Juan Dominguez individually or in concert with others threatened violence to witnesses, and specifically, that Juan Dominguez threatened Witness X's life. (Dole's CV Petition (Sealed) 2 AA 246, 247, 258, 266, 267, 271 and 280-281) That accusation is absolutely false. There is not a shred of evidence to support it. The boldest accusation appears at pp 83-84 of the petition: "Dominguez also knew that it was not because Dole refused to pay [Witness X] that he refused to testify – it was because Dominguez threatened his life." (2 AA 280-281) The only evidence cited anywhere in the petition which is even peripherally relevant to this accusation is to paragraphs 30 and 31 of Ex. 34 - the declaration of Witness X. But Witness X does not claim that Dominguez threatened him in that declaration, and he never did so at any other time. No one else ever claimed that Juan Dominguez ever threatened anyone, either. There is simply no evidence in the

record which suggests - and no reason to believe - that California attorney Juan J. Dominguez has ever threatened anyone with violence anywhere, at any time.

An accusation that an attorney threatened the life of a witness is about as serious a claim of professional misconduct as can be made. Such an act would be a serious crime – if it was true. But Dole's claim that Juan Dominguez threatened witnesses with violence is not only serious and completely untrue: it is cowardly and deceitful. Because every instance of Dole's accusal of Dominguez threatening witnesses is *blacked out* in the redacted version of its Petition - the only version Dole had any reason to believe Dominguez would ever see. (Compare pages 2 AA 246, 247, 258, 266, 267, 271 and 280-281 in the sealed version of the petition with pages 2 AA 345, 346, 357, 365, 366, 370 and 379-380 in the redacted version.)

Dole never attempted to prove this outrageous calumny at any point during the coram vobis OSC hearings, or even claimed that it was true. It is a false accusation, and if Dole and its counsel were not protected from any consequence of its actions by the litigation privilege, it would be actionable defamation of the highest order.

Concealing from everyone in the world (except MAS and this court) the fact that Dole was claiming that Juan Dominguez had threatened the life of a

witness and generally threatened others with violence had the advantage of ensuring that Dominguez would not have a motivation to find someone to take this case on after he and MAS had been chased out of it. Had Dole not filed a SLAPP suit against a Swedish documentary film maker[29] with the unanticipated consequence of bringing this case to the attention of counsel who were previously unaware of it it is highly unlikely that anyone outside of this court other than MAS ever would have seen the sealed petition - and MAS was certainly not going to wade back into this financially ruinous case on behalf of Dominguez. But concealing this accusation from the world has no justification in terms of "witness safety."

d. Preventing anyone from "tampering" with Dole's witnesses once it became clear that key witnesses had testified falsely and further investigation threatened to expose the full extent of false testimony the secret process had facilitated, even when there was no threat to witnesses' safety. As set forth above in sections II.E.39 and 40 and II.F.42 and 44, although appellants' counsel had been advised in unambiguous terms at the beginning of his appearances in this case that no depositions would be allowed in Central America, once Dole disclosed that two of the key "chimera conspiracy" witnesses had been lavishly compensated by Dole after testifying and were [redacted] in Costa Rica appellants

[29]2CV A31-33

immediately moved for leave to depose them. [redacted] The court initially denied the motion on the basis that whatever testimony those witnesses might have to offer was not reasonably likely to lead to the discovery of admissible evidence. (7CV L88-90) After the coram vobis hearings commenced the trial court indicated an intention to reverse that ruling as "insurance" against appellate reversal pending briefing and a hearing, and to allow the depositions to go forward either in Costa Rica, [redacted], or in the United States.

As noted above in section II.F.44, when that hearing was held Dole brought unbound sheaves of documents comprising translations of a radio broadcast and a press conference held weeks earlier and asserted that that evidence justified curtailment of appellants' right to depose witnesses. (The logic behind that argument was and remains obscure.) But appellants were given the opportunity to respond to those documents at a hearing set just two weeks before the final OSC hearings were scheduled. Before that hearing appellants filed a declaration from Jason Glaser in which he stated that he had been present at the press conference and that he had: "observed the demeanor of the seven people who were present and asserting that they had been witnesses for Dole at the press conference. None of them appeared to be afraid or intimidated and all appeared to be present voluntarily. Nothing that was said

at that press conference came across as a threat, express or implied, against anyone." (6 AA 1201)

However, while inaccurately characterizing appellants' reasons for wanting to depose the witnesses as relating to "bribery"[30] the court ruled that whether or not witnesses had been threatened was "no longer the issue[ ]." It then made the following ruling:

> The issue is whether further discovery can proceed in an atmosphere plaintiff's agents have created.
>
> Clearly it cannot. Whatever evidence of bribery exists, no matter how recent -- and no matter how the recent publicity in Nicaragua is characterized, it cannot be disputed that plaintiff's agents are interfering with witnesses. That interference renders further examination of bribery allegations impossible. Plaintiff's request to depose John Doe's witnesses 17 and 18 and obtain further documentary evidence are denied.
>
> --9CV 928

Having dispensed with any pretense that the reason for secrecy was threats to witnesses safety the trial court plainly stated the reason for denying appellants counsel the right to perform discovery: to prevent any opportunity for anyone to "interfere" with any John Doe witnesses who had already

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Appellants had actually outlined the reasons for believing that John Doe 17 and 18 had testified falsely and the significance of the key testimony given by these witnesses as the primary reason for wanting to depose them; the financial rewards they had received from Dole were only secondary. (See Supplemental MISO depose JD17 6-7 and section III.A.9.b, below)

testified so as to expose the fact that they had testified falsely. No witnesses were imperiled by allowing appellants counsel to depose key John Doe witnesses who had perjured themselves in key testimony; witnesses whose testimony had been cited as "proof" of various of Dole's claims dozens of times by the court in *Mejia,* and whose testimony would be cited dozens of times in the ruling under appeal. (See section III.A.9.b, below) The order denying appellants any opportunity to depose key witnesses (and to expose the duplicity of Dole's agents who had denied ever paying any witnesses a penny at any time) was a straightforward abuse of judicial power taken to prevent the investigation of key witnesses upon whose testimony the court was basing its decision.

• **When a witness has testified falsely it is the right of the targets of his false testimony to "tamper" with that witness by urging him to come forward and testify truthfully and by seeking the opportunity to cross-examine him, and it is the court's duty to facilitate that sort of "tampering," not to prevent it.** This ruling by the court perhaps illustrates in starkest contrast the approach the court took to fact finding in this case. Driven by the assumption that there were "many times" more false claimants than valid claims, and that there must be a conspiracy to allow that fact to be true, the court facilitated any evidence which was consistent with that view, and simply forbade the pursuit of any evidence which was inconsistent with it. But Dole's witnesses - and without question, John Does 17 and 18 -

should have been *"tampered with."* They had committed perjury. Evidence of that perjury had, despite all efforts to keep it secret, leaked out.

A court which is trying to "root out fraud" should afford all persons who have presented credible evidence that multiple witnesses had committed coordinated perjury the opportunity to verify that fact. But even with substantial evidence that John Does 13, 17 and 18 had conspired together to testify falsely about a fabricated event, the court not only did not assist appellants in that search for evidence, it expressly forbade it.

8. Lack of specific notice: Dole's claims of "fraud" were an ever-shifting set of accusations.

There was never any express accusatory document in *Mejia* setting forth Dole's claims. The initial motion for leave to take secret depositions merely asserted that "Dole was recently able to obtain signed declarations from several witnesses attesting to facts indicating that plaintiffs' counsel and certain of the *Mejia* plaintiffs are engaged in a fraud upon the court." (Ex. 4, p. 117) No specification of the nature of the "fraud" was provided outside of the claims of some witnesses that some *Mejia* plaintiffs had not worked on the farms they had identified. The "Montserrat" conspiracy meeting - the MOI's describing which had been in Dole's counsel's files for over a year - was not alleged. The theory that there were many times more DBCP claims than there were people who had worked on Dole's farms - a key and significant data

point - was never articulated. The myriad factual allegations which the trial court relied on in *Mejia* just accrued under the cloak of secrecy, for the most part after the total clampdown on investigation or disclosure of the claims was complete.

This appeal deals with the coram vobis proceeding in *Tellez*, of course, and here we do have a set of specific factual allegations. But even with an accusatory pleading the exact nature of what appellants were accused of and why their judgment should be vacated was far from clear. Appellants filed a special demurrer to the petition. (3 AA 408) It was overruled. (2CV 15-16)

As appellant's counsel advised the court several months before the coram vobis hearings commenced, "I need to know what I'm defending against, your Honor. I've gotten an O.S.C. I've read the petition. It's not nearly as specific as I think it might be in terms of saying what it is exactly that my clients did or what is the basis for seeking to throw out a judgment that the jury -- jury's verdict entitled them to. And that's what I'm trying to find out..."(3CVS D 60)

Dole's petition states factual allegations about the "chimera conspiracy" of fraudulent activity on behalf of Nicaraguan DBCP plaintiffs (2 AA 225-237) and the petition asserts that it addresses "an attorney-orchestrated scheme to train thousands of Nicaraguan men [ ] to pretend to be former banana

workers..." (2 AA 201) The logical first step in such an inquiry is to find out (a) how many people were in a position to be exposed to DBCP on Dole's banana farms and (b) how many claims have been filed by plaintiffs claiming to have been one of those people. But that simple exercise doesn't help Dole. The number of people who lived and worked on the farms was more than the number who have filed claims.

So there never has been a specific allegation in any accusatory pleading of document filed by defendants that the number of DBCP claims in Nicaragua was actually disproportionate to the number of people potentially exposed. That claim arose in this proceeding, like most of the factual claims in *Mejia*, by means of a declaration filed at the last minute and presented to the trial court with fanfare by defendant's counsel.

But in this case the hearings didn't conclude at the first set of hearings. They were continued and the second portion set long enough after the first days of hearing to afford appellants' counsel notice of the claim, an opportunity to investigate it, and therefore the ability to debunk it. And that made all the difference with regard to that claim - then. But by the time the claim was articulated and could be defended against, the court had made myriad rulings in apparent reliance on its false assumption to the contrary.

The problem with notice in this case is that defendants were allowed to

grandiosely refer to "the Fraud" without being held to specific factual allegations. "The Fraud" could refer to anything from the indisputable fact that a finite number of false DBCP claimants exist in Nicaragua just as they would under similar circumstances in America - call that "Fraud 1" - to the full-fledged "chimera conspiracy" of judges, lawyers, capitans and laboratory operators with the murderous "group of eight" enforcers, planning meetings where laboratory operators were instructed as to how their results should come out, etc., as found to exist by the trial court in *Mejia* and set forth in the above-cited allegations in the coram vobis petition filed in this court -call that Fraud X10. Or maybe it's something in between, as the trial court found in its oral ruling in this case (Fraud X4?) and its written decision (Fraud X3?) The lurid claims contained in the coram vobis petition are a far cry from the two-man "conspiracy" the trial court eventually settled on as its justification for its almost-unprecedented order. One thing remains constant, however: defendants' claims and the court's findings are based on secret testimony which still can't be investigated, which the trial court continued to rely on after the claims which *have* been made public were proved to be lies.

9. The restrictions on plaintiffs' right to investigate the claims being made by Dole's secret witnesses were a clear violation of due process of law.

The basic parameters of the trial court's orders restricting the *Mejia* plaintiffs and appellants from investigating the claims made by Dole's secret

witnesses have been set forth above. The prohibition of disclosing the identity of any of the 25 secret witnesses to anyone at any time effectively prevented any investigation into their potential motivations for distortion or fabrication of evidence, and the prohibition against telling anyone what they had testified about prevented any effective attempt to verify the substance of their testimony.

a. The trial court's ruling that "blind" cross-examination of the John Doe witnesses satisfied the dictates of due process is contradicted by precedent, reason, and experience in this case. The evidence from secret witnesses in *Mejia* was admitted in this case over appellants' objections. (4 AA 676-680, 5CV I 20) The authority for taking secret depositions in *Mejia* was the discretionary authority of the court to limit pre-trial discovery to prevent "unwarranted annoyance, embarrassment, or oppression, or undue burden and expense" for witnesses. (Ex. 4, p. 119, Code of Civil Procedure section 2025.420 (b)) Plaintiff's counsel in *Mejia* protested the ruling when it was made, pointing out that cross-examination without investigation was inherently "crippled." (Ex. 1, p. 22-23) MAS' petition for a writ preventing the implementation of the secrecy order was summarily denied. (Ex. 71, 77)

MAS' protests that the restrictions on their ability to prepare for the depositions would render them unable to perform cross-examination adequate for use in an ultimate evidentiary context was put off with the repeated

promise that that matter would be addressed "later." (Defendants' Ex 1, p 53:1 - 54:8) The initial motion promised: "...any prejudice to plaintiffs can be remedied - if plaintiffs desire - by conducting a follow-up deposition, which Dole will cooperate in scheduling." (Ex. 4, p.119) Dole's counsel, Mr. Edelman, candidly articulated the premise at the hearing on October 24, 2008: "Once the depositions are done, we can come back to your Honor and we can figure out together *what needs to be done to make it fair* to the plaintiffs so that they have an opportunity to assess memory, credibility, or anything else." (Defendants' exhibit 191, p 7157:116:21-25, emphasis added.)

But "later" never came. The witnesses were never subjected to cross-examination by anyone adverse to defendants who had had any opportunity to investigate their stories or their credibility. Instead, the Court reviewed each deposition as it was made available, growing increasingly convinced of their truth as defendants exploited the opportunity to select the witnesses who served their purposes to presented a choreographed, virtually unopposed narrative which their opponents were prevented by express court order from testing or disproving. And each bit of untested evidence built upon the previous ones, and prepared the way for those to follow, with no bona fide adversarial process to test them - including the secret claims of "threats" which were used to prevent any further examination of any of the secret claims. The process was never made "fair to the plaintiffs" at a later date; instead, the admittedly unfair process was continuously utilized to allow a one-sided

presentation of evidence presented by essentially anonymous witnesses selected exclusively by Dole's agents in Nicaragua, and never subjected to investigation or testing by any adverse party.

• **The right to cross-examine includes the right to perform out-of-court investigation of the witness and his testimony.** The legal authority for allowing the *Mejia* deposition testimony into evidence in this case was Evidence Code section 1292:

> (a) Evidence of former testimony is not made inadmissible by the hearsay rule if:
>
> (1) The declarant is unavailable as a witness;
>
> (2) The former testimony is offered in a civil action; and
>
> (3) The issue is such that the party to the action or proceeding in which the former testimony was given had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which the party against whom the testimony is offered has at the hearing.

Appellants objected to the admission of the *Mejia* John Doe deposition testimony in this case on the grounds that MAS never had a bona fide "opportunity to cross-examine" the *Mejia* John Doe witnesses. (4 AA 677, 5CV 12-13) The objection was overruled. (5CV 24-25)

What constitutes the exercise of the right of "cross-examination" is not specifically defined anywhere in California statutory law. However, it is clear that more than just an opportunity to question an adverse witness must exist for

the right of cross examination to be satisfied, and that excessive restrictions can reduce the efficacy of the process to the point that no bona fide exercise of that right has been allowed.

> Bare existence of an opportunity for cross-examination in a prior proceeding supplies only a limited indicator of the opportunity's adequacy. ... Qualitative factors play a role. The nature of the proceeding; the character of the witness and his connection with the events; the extent and subject of his direct testimony; the time and preparatory opportunities available to the accused and his attorney--these are some of the influential factors."
>
> --*People v. Gibbs* (1967) 255 Cal.App.2d 739, 743

> "[W]hen the credibility of a witness is in issue, the very starting point in 'exposing falsehood and bringing out the truth' through cross-examination must necessarily be to ask the witness who he is and where he lives. The witness'[s] name and address open countless avenues of in-court examination and out-of-court investigation. *To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination* itself." *(Smith v. Illinois* (1968) 390 U.S. 129, 131, italics added, fn. omitted, quoted in *Alvarado v. Superior Court* (2000) 23 Cal.4th 1121, 1125-1126.)

In *People v. Brock* (1985) 38 Cal.3d 180 a magistrate was appointed to oversee the examination of a sick, elderly witness. Defense counsel was given an opportunity to cross- examine her, but because of her condition the defense counsel's opportunity to ask her questions probing her testimony was restricted. Her testimony was received at trial under Evidence Code section

1291. The Supreme Court reversed, holding that the restrictions on defense counsel's right to question the witness rendered the examination which did occur insufficient to constitute a "meaningful" opportunity for cross-examination and thus failed the statutory requirement of Evidence Code section 1291. (Section 1291 has the same "previous cross examination" requirement as section 1292, differing only in that section 1291 deals with prior proceedings involving the same parties, instead of simply parties with allied positions.)

In opposition to this objection, Dole cited three cases in which pretrial testimony (from preliminary hearings and conditional examination) was admitted into evidence in criminal trials when the witness was unavailable to testify at trial: *People v. Jurado* (2006) 38 Cal.4th 72, 108-111, 115-116; *People v. Valencia* (2008) 43 Cal.4th 268, 293-294; and *People v. Mayfield* (1997) 14 Cal.4th 668, 741-743. (4 AA 696-697) In none of those cases was there any restriction on the defendant's right to investigate the witnesses or their stories. Indeed, in two of them the defendant uncovered evidence which tended to impeach the prior testimony of the witnesses. (*People v. Jurado, supra* 38 Cal4th at p.89, 115-116; *People v. Valencia, supra* 43 Cal.45th at p. 293). Further, the evidence was peripheral in the case of *Valencia,* supra 43 Cal4th at 293 (the witness was in regard to just one of numerous priors at penalty phase) and *Mayfield, supra*, 14 Cal.4th at p. 743 (witness was only one of numerous percipient witnesses to the events) and the defendants were

present at the events testified to by the unavailable witness in each case and allowed to discuss the anticipated testimony with their counsel before and after the witnesses testified.

Here, the only people adverse to Dole who were allowed to cross-examine the John Doe witnesses or learn their identities was MAS. They weren't present for any of the things described by the John Doe witnesses, and weren't allowed to discuss the allegations with anyone who was, or who might know anything about it, or investigate the witnesses in any way, before or after they testified.

There is no precedent in California law for the type of restrictions placed on plaintiff's counsel in this case. The closest analog in pretrial discovery restrictions is found in *Planned Parenthood Golden Gate v. Superior Court* (2000) 83 Cal.App.4th 347. In that case, a pro-life protester (Foti) sued Planned Parenthood for allegedly interfering with his right to picket the Planned Parenthood office; Planned Parenthood cross-complained for harassment of its staff and patients by Foti. (Id at 351) The contested factual issues dealt with events that Foti personally participated in. Foti sought to obtain personal information regarding all staff and patients who used the facility, ostensibly to locate witnesses in preparation for trial. (Id at 352) The Court of Appeal noted that "Planned Parenthood's staff and volunteers could well face unique and very real threats not just to their privacy, but to their

safety and well-being if personal information about them is disclosed" citing a Congressional investigation had concluded that as of 1994 "there was '[a] nationwide campaign of anti-abortion blockades' and violence [and] that abortion opponents had committed a least 36 bombings, 81 arsons, 131 death threats, 84 assaults, 2 kidnappings, 327 clinic invasions, 71 chemical attacks, and [one] murder"[31] (Id at 361-362) The Court also noted that California Civil Code section 3427.3 provides an express authorization to issue protective orders on specific types of health care facility "blockade" cases. But even with all that evidence of *actual* violent acts which have *actually* been committed repeatedly, the order approved in *Planned Parenthood* required the clinic to provide the names of every person it *might* call as a witness to events which had taken place in Foti's presence.

The only information Planned Parenthood was allowed to withhold was the phone number and address of the witnesses at the pre-trial discovery phase. (Id at 370) Foti was free to depose any of those witnesses; in the event of trial he would be free to cross-examine them after having deposed them and performed whatever investigation in the interim that might be necessary as to whatever limited information they might have to testify about. Any testimony they might give about whatever factual event they were called upon to testify about could be investigated to a fare-thee-well before trial.

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[31] The toll has, of course, grown significantly since that time.

In contrast, in this case, with no showing that anyone in Nicaragua had ever been subjected to any harm whatsoever due to assisting Dole with its defense against DBCP claims, the court authorized what was in effect a complete denial of information about witnesses who testified about matters as to which plaintiffs were not participants in, had no notice of before they testified, and as to which they could perform no investigation whatsoever.

> "[H]owever praiseworthy was the prosecution's motive in protecting the [witness] from the threat of reprisal[,] [s]uch motives and purposes cannot prevail when, as here, they inevitably result, intentionally or unintentionally, in depriving the defendant of a fair trial." (*People v. Kiihoa* (1960) 53 Cal.2d 748, 754
>
> (Quoted in *Alvarado v. Superior Court* (2000) 23 Cal.4th 1121, 1151)

The express premise of Dole's motion was that a later process would occur which would supply the missing elements of investigation and confrontation which were absent in that process. (Ex. 4, p. 119) But that later, corrective process never took place. The "preliminary" evidence became the only evidence the trial court would ever see. As a result, no real "cross-examination" of the John Doe witnesses has ever been allowed by the court. The witnesses were never confronted by counsel with any significant knowledge of their identities, biases, affiliations, or past history or any opportunity to investigate them or their stories. Accordingly, the testimony given in those depositions was never subjected to adequate cross examination

sufficient to satisfy the requirements of Evidence Code section 1292 and was inadmissible in this case under Evidence Code sections 1200, 1290, and 1292.

• **The trial court's justification for the John Doe secret deposition process was based on the assumption that their stories were true; as to testimony that is false the court's rationale makes no sense.** The trial court insisted that MAS had had ample opportunity to investigate the stories of the John Doe witnesses because: "The same plaintiffs' counsel had represented both the *Mejia* and *Tellez* plaintiffs for at least four years and had been witness to the unprecedented attrition rate in these cases. This attrition rate alone should have alerted plaintiffs' counsel to the possibility of widespread fraud." (5CV 124) Similarly, in the order appealed from the Court held that the secrecy order did not even "inhibit" MAS' investigations, because: "...the *Mejia* protective order was not issued until October 6, 2008, although the fraudulent scheme has been in place since at least 2004. Plaintiffs' counsel had ample opportunity to investigate the fraud during the pendency of this litigation without the restrictions of the protective order." (7 AA 1381)

Really? How was MAS supposed to "investigate the fraud" of the 2003 [redacted] and Montserrat conspiracy meetings prior to October 8, 2008? *Those stories were a complete fabrication*, which hadn't been told in public until John Doe 13's deposition in November of that year. To "investigate" that "fraud" before the secrecy order was imposed MAS would

have had to have been psychic. The gravest danger of the trial court's secrecy order was that it allowed witnesses to make up stories about "events" which never even happened, and have those stories pass for the truth - something which happened with regularity during the *Mejia* discovery process. MAS could only "investigate the fraud" if the testimony about "the fraud" was *actually true*. If whatever was being pitched as evidence of "the fraud" was a phony story it couldn't be investigated until the lie was told.

The trial court's blithe assumption that MAS could have "investigated the fraud" before even hearing the testimony of the John Doe witnesses is an example of the logical fallacy of *petitio principii* (assuming the premise, or "begging the question") If one assumes that the secret testimony is true, there would then be evidence of it which could be discovered by investigation before the depositions were taken. Therefore, no significant restriction on investigation occurred, because MAS could have "investigated the fraud" before the secrecy order was imposed. But if one *doesn't* start from the assumed premise that the deposition testimony was true, it is clear that the conclusion that adequate opportunity for investigation existed is false, because MAS could not have know what lies to investigate before the lies were told.

By the logic of the court there is never any need for notice or any opportunity for investigation and discovery in any case in which a party is accused of wrongdoing, civil or criminal. He should already know what he

did, and what evidence proves his guilt or liability. Why should he need access to the accusations and evidence arrayed against him? He can investigate his own "fraud" (or whatever he is accused of having done) based on his own knowledge of his guilt.

The trial court repeatedly asserted that the restrictions placed on plaintiff's and appellants' counsel were justified by the court's belief that Dole's accusations were true. During a pretrial hearing in the coram vobis process on February 19, 2010, the court responded to appellants' argument about the impact of the restrictions placed on MAS and their investigator by asserting: "I believe, as I sit here right now, that I did the right thing. I believe that there is a conspiracy." (4 CV3 F-85) The trial court's belief in the answer to the ultimate question drove its decision-making about what means could be utilized to test that question. That made the outcome inevitable.

When John Doe 13 told the story of the Montserrat conspiracy meeting for the first time in November 2009, it directly led to a total lockdown on the John Doe depositions from that point on. (See section II.D.17, above) It was not merely the court's ultimate substantive order that was affected by the secrecy order, the court's ongoing procedural supervision of the case became increasingly oriented towards preventing exposure of any falsehoods uttered by the secret witnesses. The trial court's initial implicit assumption that all of the John Doe witness testimony was truthful not only led inexorably to its

ultimate explicit finding that all of the John Doe testimony was truthful, it blocked any corrective action which could have alerted the court to the fact that it was proceeding on a false assumption.

b. The trial court's continued restrictions on appellants' new counsel's efforts to investigate and marshal evidence of the falsity of Dole's accusations, the deceit of its witnesses, and the rewards given to those witnesses also were an abuse of discretion which violated appellant's right to due process of law. The restrictions on counsel opposing Dole's claims did not end with *Mejia.* Initially appellant's new counsel felt out the scope of the court's restrictions on investigation by Dole's opponents as set forth in sections II.E.36 and III.A.7.a above, in response to which the trial court denied appellants the right to depose a [redacted] Nicaraguan witness about specific evidence directly relevant to the contested claims of the parties, and ordered counsel not to even talk to an American attorney with relevant knowledge.

• Refusing to authorize the cross-examination of John Does 17 and 18. Perhaps the most glaring abuse of discretion by the trial court in restricting appellants' ability to defend themselves was the trial court's repeated denials of appellant's motion for leave to depose John Doe 17 and [redacted] John Doe 18 after they had been disclosed [redacted]

[redacted]. The testimony of those two witnesses was cited more than 60 times in the written decision in Osorio[32] and two dozen times in Dole's coram vobis petition[33] as proof of various claims made by Dole. One thing that all parties' counsel agreed on was the importance of the testimony of these witnesses. Dole's counsel stressed the importance of these witnesses and how their evidence was central to Dole's case; they were the sole or primary source of evidence for most of Dole's most inflammatory claims. (8CV 177-178) Appellant's counsel repeatedly pointed out the fact that the "chimera conspiracy" witnesses - John Does 13, 17 and 18 - were the exclusive source of many of the key aspect of Dole's "fraud" claims.[34] The only witnesses to have claimed that the Montserrat conspiracy meeting occurred were John Does 13, 17 and 18. The only witnesses who claimed to have personal knowledge that Juan Dominguez knew about and promoted the recruitment of phony plaintiff's by the capitans were John Does 13 and 17. The only witnesses who claimed [redacted] the "group of eight" were John Does 13 and 17. John Doe 18 had claimed to have been

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Ex. 98, fns 1, 2, 29-31, 33, 34, 36-38, 40, 42, 49-51, 62, 65-67, 69, 71-76, 79-83, 95, 114, 128, 132

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These transcripts are not identified by number in the petition as they have been since that time; John Doe 17's deposition transcripts sre identified as Exhibits JJJ, KKK and LLL in the petition; John Doe 18's are listed as Exhibits OOO and PPP

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E.g. 2 CVS C36, 44, 52; 3CVS D 16, 60

[redacted]

Appellant's motion stressed the fact that John Doe 17's "story of a conspiracy between plaintiffs' lawyers - including Juan Dominguez - and Nicaraguan judge Socorro Toruño lacks any external confirmation, conflicts with objective evidence, and is corroborated solely by [redacted], John Doe 13" and that that "story was the central pillar upon which the vast conspiracy theory was built. Convincing the Court that a Nicaraguan judge was actively conspiring with American lawyers to defraud our courts was a watershed event in the *Mejia* proceeding - a bell which could not be un-rung, after which MAS realized that they could not win their case under any circumstances and started working out how to cut their losses and get out." (6 AA 1045) John Doe 17 "is the key to the ring of perjurers who spun lurid tales of conspiracies designed to disgrace and marginalize every single American plaintiffs' attorney who had been handling DBCP cases against Dole in Nicaragua. I seek leave of Court to investigate the matter so as to expose the truth to the light of day." (6 AA 1050)

Ideally, appellants would have had the opportunity to redepose all of the John Doe witnesses, but the trial court had issued a blanket prohibition on any

more depositions in Nicaragua at the outset of the coram vobis process. (2CV C78, C86) With the news that John Does 17 and 18 were [redacted] living in Costa Rica the grant of authorization to depose them should have been automatic. But it wasn't. As noted abve in section II.E.40, after all of the extraordinary rulings the court had made to ensure that Dole could secure evidence from witnesses recruited by its agents in Nicaragua, at this point the court deemed the "possibility" that these key witnesses might produce even so much as testimony leading to admissible evidence was too slight to justify the financial cost of taking their depositions. (Cost was never raised as an issue before, except for the court's observation when MAS offered to allow witnesses to submit testimony by declaration instead of flying down to Central America to cross-examine them that that would be "cheaper.")

This ruling is significant in the manner in which it reveals the trial court's approach to the question of what evidence which parties should be allowed to pursue. But as a simple matter of procedural due process, denying appellants the right to have the key witnesses against them cross-examined by counsel who actually had some clue who they were and the things they had testified about which were demonstrably false was an abuse of discretion. And not only did the court deny appellants that right, it subsequently relied extensively on the testimony and out-of-court statements of those very witnesses as proof of its findings in its ultimate order. (CV Dismissal fn. 56, 57, 58, 62, 64, 65, 67, 70, 75, 91, 131, 132, 133, 136, 138, 163, 185, 186)

Note: The order appealed from states: "While the court initially denied that request, it reconsidered the ruling after the first part of the OSC proceding and ordered those depositions to proceed." (CV dismissal order, p. 33) That statement is not accurate. While the portion of the transcript which is cited appears to support that statement, in fact the trial court never actually authorized appellants' current counsel to cross-examine the witnesses. It merely set the matter for a hearing a month later at which the motion was denied, as discussed in sections II.F.44 and 45, above. (8CV 501)

• **Relying on the testimony of Dole's agents while refusing to require them to produce the records which would confirm or refute it and accepting Dole's representation that they actually did not work for the company they had repeatedly testified under oath was their employer so as to excuse the non-production of financial records.** As noted above in sections. II.E.38 and 39, appellants learned in April 2010 that Dole's investigative agency, IRI, used what it called an "administrative account" to pay cash to John Doe 17 and 18 without reporting it to the court. Appellants immediately moved the court to require Dole's investigators to disclose the records of the "administrative accounts" used to pay John Doe 17 and 18, and the "Administrative accounts" of the investigators who had been identified as having paid cash to Nicaraguan witnesses. In terms of the credibility of Dole's investigators and the relative reliability of the absoluciones and other

statements of witnesses the financial data was the only external, objective evidence that could be used to resolve the "he said-she said" claims.

The investigators identified their employer as Investigative Research, Incorporated or IRI numerous times under oath, including specifically identifying the president of that company as their direct supervisor and that IRI was "an American company" located in Brownsville, Texas (E.g. Ex.137, Ex. 138, p. 6038, 6054, Ex. 244, p. 9132, Ex. 245, p. 9141, Ex. 246, p. 9152.)

Dole's counsel, in a last-ditch effort to avoid disclosure of the records, represented to the court that Dole's investigators did not, after all, really work for IRI, but for a separate company in a foreign jurisdiction and therefore were immune from the court's ability to force disclosure of those records. (9CV 658-660) The trial court elected to relieve Dole of any responsibility to obtain the documents - and then made findings based on the testimony of the IRI witnesses who had refused to produce those records. Specifically, the court found that the testimony of IRI witnesses who denied paying John Doe witnesses - a matter those witnesses could have proved with the financial records in their possession - was credible, and to be believed over the word of witnesses like [redacted]

Ironically, the investigator identified [redacted] as having paid him specifically identified his employment by "a professional investigative company based in the United States, IRI [with] a strict policy against compensating witnesses or possible witnesses" as a basis for supporting his credibility when he denied paying [redacted] Yet when called upon to produce objective evidence to support that claim, IRI (according to Dole) refused to do so, and also denied that that investigator was actually employed by "a [ ] company based in the United States."

It was an abuse of discretion for the court to blandly accept Dole's representation that the employer of its witnesses was not who they had repeatedly testified so as to excuse the litigant from the responsibility to produce concrete evidence, and to then rely on the testimony of those witnesses as to whether or not they had paid witnesses after they refused to disclose the financial records of the account they had admitted using to pay cash to witnesses. (Fns 70, 75, 76, 102, 175, 176, 184, 197)

10. "Trial by BlackBerry:" the court's denial of appellants' repeated motions to have the voluminous out-of-court communications between defendants' counsel and the court produced as evidence and filed in the court's record was an abuse of discretion and denial of due process.

Appellant's counsel twice moved the court for an order that the e-mail communications between counsel and the court in *Mejia* be produced by Dole's counsel (1) so appellants' counsel in this case could revue everything

that the court read and relied upon during that process in preparation for the *Mejia* hearing and (2) so the record of all such communications be available for review in this appeal. Both motions were denied. (3CV D 5; 13CV 3336-3337) The court's reasoning the first time the motion was made in January 2010 was that the *Mejia* case was over, and the judgment final, and hence "jurisdictional." Next, the court held that all parties to *Mejia* had been sent copies of the e-mails, there weren't that many of them, and the content was reflected in the "Notice of Ruling" prepared by Dole after each hearing in which they were discussed. Finally, the court held that the e-mail communications between court and counsel in *Mejia* were "not relevant" and would be "a distraction." (3CV D6)

None of those explanations for denying the motion hold water. The status of the *Mejia* case - from whence most of the evidence cited in the coram vobis petitions came - had nothing to do with allowing appellants counsel access to the e-mail communications between court and counsel during that case. The court had "jurisdiction" over itself and the senders of the e-mails, who were the moving parties in the coram vobis proceeding.

As to whether or not all counsel in *Mejia* received all of the e-mails, that's both unconfirmed, since the e-mails themselves haven't been produced, and also factually questionable:

THE COURT: I have a real problem getting people's

> names up on e-mails and putting e-mail groups together for this case. It's been a nightmare. So if anybody gets an e-mail from me and it hasn't been forwarded yet, you're responsible for forwarding. (Ex. 209, p. 7664)
>
> I've had problems with typing in Mr. Axline's name; sometimes it lets me come up with it and sometimes it won't. So, my goal is to send it out to the world, because I'm not looking for ex-parte communications, but if there seems to be a problem or if one of you doesn't seem to be getting it, if another one of you learns about it, if you could forward my e-mails I'd appreciate it. (Ex. 210, p.7695)

More importantly, whether or not the e-mails were circulated to all counsel in *Mejia* is irrelevant; appellants were not parties to *Mejia* and their counsel was not a participant in that case either.

As to whether the "Notices of Ruling" prepared by Dole are a sufficient substitute for the actual documents, there are three problems: first, there's no confirmation that all e-mails were discussed at a hearing which gave rise to such a "Notice"; second, most of the "Notices" from the relevant time period were never served on MAS; they were filed after MAS withdrew on June 12, 2009, so they've never been seen by opposing counsel who were present. (E.g. Ex. 211, 213, 216, 222, 223, etc.) And finally, the "best evidence" of what was in the e-mails is the e-mails themselves. Absent any valid reason for denying appellant's counsel access to those communications between court and counsel they should have been ordered produced without question.

As to the "relevance" of the e-mails, it is clear that the court made substantial decisions based on information provided in e-mails, based on those which were read into the record. It is also clear that the trial court came to believe that significant facts favorable to the defendants were true which were never articulated on the record (specifically, the key factual misunderstanding regarding the number of workers on Dole's banana farms and the nature of claims authorized by Nicaraguan Law 364) and the genesis of which remains a mystery. Full disclosure of all communication between counsel for the petitioners in this coram vobis proceeding and the court in the proceeding from which the court drew most of the evidence it relied on and in which it formed most of the beliefs which framed its decision should be automatic, not a matter of discretion.

When the motion was made again a year later the court reiterated the same four bases for its ruling and denied it again. (13CV 3336-3337)

Some of the e-mail communications between Dole's counsel and the court were put on the record in *Mejia.* (Ex. 211, p. 7701, Ex. 215, p. 7800, Ex. 218, p. 7840, Ex. 219, p. 7853, Ex 221, p. 7882) Many others were not, although it's impossible to know how many. As the trial court described the process:

> I never knew what I was going to open in an e-mail, because I would receive e-mails from various attorneys, this was

> an e-mail chain that was sent out to all counsel and myself, usually on a weekend somebody would send me a long e-mail setting forth alleged events that had taken place in Nicaragua in the last day or two before that...
>
> Ex. 228, p. 8104

The e-mails contained substantive representations of fact and they affected the course of the litigation and the findings made by the court, as evidenced by the court's own comments:

"I thought long and hard about your e-mail from last night..." (Ex. 212, p. 7720)

"Your e-mails are lucid and articulate, but they contain hearsay and so I'm trying to -- and **we need to deal with the e-mails right now as though they're the God's own gospel.** But anything that we could have in the future that is according to the Evidence Code I would really appreciate." (Ex. 215, p. 7802, emphasis added.)

As a matter of denying appellants access to relevant evidence for purposes of defending themselves against Dole's accusations the court's rulings were simply another log on the fire, and as with the prohibition on investigating the secret evidence, abuses of discretion.

As to preventing appellants from securing an adequate record on appeal the issue is more complex. Ordinarily, in a civil action failure to produce a

complete record is a default by the appellant. (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574) In this case, however, appellants *tried* to secure that record - both for their own use in defending against the accusations made by the coram vobis petitioners and in order to have an adequate record for this court. The documents sought - e-mail communications between those petitioners and the court in the *Mejia* case - were in the possession of defendants. Counsel for the *Mejia* plaintiffs were not before the court in this case and had no obligation to provide any copies they might have.

Having come "late to the game" appellants' counsel did not have direct access to the documents; but defendants' counsel did. Production of the e-mails would have been a routine clerical task; no issues of privilege or burden would appear to be present. Appellants made a timely motion to have them produced, and another motion later on to try to get them preserved for the record on appeal and were prevented from doing so by the court. The lack of those documents in the record on appeal is not due to any default by plaintiffs, and the fact that an inadequate record appears as to those documents should not inure to the detriment of the targets of the extraordinary writ upon which the ruling appealed from was based. Appellants submit that under these circumstances the lack of a complete appellate record is an error of the court, not a default by appellants, and that the failure of the court to allow appellants to have a complete record for this court's review is a separate element of the denial of due process in this case.

B. None of the requirements of coram vobis have been met by Dole's showing, even if that evidence was true.

"A writ of error coram vobis is considered to be a drastic remedy...." which can only be issued if specific criteria are met. (*In re Rachel M.* (2003) 113 Cal.App.4th 1289, 1296.) Among the requirements are the following:

- Petitioner must show that the facts upon which he relies *were not known to him* and could not in the exercise of due diligence have been discovered by him at any time substantially earlier than the time of his motion for the writ (*People v. Kim* (2009) 45 Cal.4th 1078, 1093, emphasis added, *In re Derek W.*(1999) 73 Cal.App.4th 828, 832, *In re Rachel M. supra* 113 Cal.App.4th at p. 1296)

- The new evidence either compels or makes probable a different result in the trial court *(Philippine Export & Foreign Loan Guarantee Corp. v. Chuidian* (1990) 218 Cal.App.3d 1058, 1092, *In re Rachel M., supra*, 113 Cal.App.4th at p. 1296)

- The new evidence is not presented on an issue adjudicated in the trial court because factual issues that have been adjudicated cannot be reopened except on motion for new trial or for reconsideration (*People v. Shipman* (1965) 62 Cal.2d 226, 230); and

- The new evidence was unavailable to the petitioner because of extrinsic fraud that prevented the petitioner from having a meaningful hearing on the issue in question *(Los Angeles Airways, Inc. v. Hughes Tool Co.* (1979) 95 Cal.App.3d 1, 9)

Defendants did not and cannot meet any of those criteria in this case.

a. Standard of review. Different aspects of the coram vobis analysis trigger different standards of review. First, if the court agrees with appellants' previously stated arguments that evidence used against them in the coram vobis proceeding was not properly admissible, e.g., the John Doe depositions and declarations to which appellant's objected - the adequacy of properly admissible evidence - if any - should be tested against the legal prerequisites of coram vobis. If not, all of the evidence should be assessed using the substantial evidence standard. The abuse of discretion standard applies to the court's issuance of the writ on the basis of the evidence thus tested. (*People v. Kim, supra*, 45 Cal.4th 1078 ,1095)

But the primary thrust of appellants' argument is that the trial court utilized the wrong legal tests to determine how it should rule - e.g., substituted "did not have admissible evidence in hand" for "facts were unknown to" and holding that generalized "fraud" committed by third parties in connection with other cases was sufficient to justify vacating appellant's judgment even if their

own cases were correctly decided by the jury. The issue of whether the legal standards used by the trial court meet the requirements of coram vobis as a matter of law is reviewed de novo. (*Crocker National Bank v. City and County of San Francisco* (1989) 49 Cal.3d 881, 888)

11. All of the facts upon which Dole based its petition were known to Dole before or during trial and could have been brought to the attention of the court before judgment was entered.

There is no rule more central to post-judgment jurisprudence than that any issue which could have been addressed at trial must be addressed at trial or it is waived, and may not be raised for the first time after entry of judgment. "It is essential to the availability of the remedy of coram nobis or coram vobis that **the mistake of fact relied upon for relief was unknown to the applicant at the time of the trial,** and could not by the exercise of reasonable diligence have been discovered by him in time to have been presented to the court ... A reason assigned for the rule is that if the applicant for the writ has knowledge of the fact, and such fact if divulged would be for his benefit, he should not be permitted to conceal it, gamble upon the issue, and, being disappointed therewith, ask the court to relieve him from the consequences of his own intentional or negligent act." (*People v. Shorts* (1948) 32 Cal.2d 502, 514, emphasis added)

The first step defendants and the trial court took to avoid the basic

requirement that the evidence upon which they rely must have been unknown to them before judgment was entered was to redefine it as a vague rule of "diligence" with the legal prerequisite changed from "the new evidence must have been **unknown** to the petitioner" to a new standard which would allow a coram vobis petition based on documents which were in defendants' possession before trial and testimony from witnesses who had been interviewed before trial, as long as that evidence was not already in "admissible" form at that point. (7 AA 1397) There are two intrinsic problems with this recasting of fundamental coram vobis law. First, it conflicts with all pre-existing case authority, and second, the only reason the documents and testimony were not "admissible" at the time of trial was because defendants chose not to make them admissible. Affirming this theory of coram vobis would be a significant alteration and expansion of the applicability of the writ.

The question of the petitioner's "diligence" only arises when the petition claims *not to have known* of the facts upon which he relies in his petition at the time of trial, in which case he must justify his failure to learn of the facts sooner, and show that he learned of them and brought them facts to the attention of the court at the earliest possible opportunity. But where the petitioner *actually knew* the facts upon which he relies in his petition before judgment was entered "diligence" is irrelevant. Failure to bring those facts to the attention of the trial court is fatal to any post-judgment attack on the judgment based on those facts. "... **it must appear that the new matter**

averred is truly newly discovered by the defendant, not merely newly disclosed." (*People v. Shorts, supra*, 32 Cal.2d at p. 514.) Dole has presented no "new facts" in support of its petition which were unknown to it before judgment was entered. Dole's petition fails this first, basic requirement of coram vobis law.

Changing the "knowledge" requirement to allow a post-judgment petition based on facts *actually known* to the petitioner but not yet in the form of "admissible evidence" at the time of trial would create an exception which would swallow the rule. Evidence is rarely "admissible" over objection on its own; some effort must be undertaken to make documents, witness statements and other evidence meet the legal requirements for admissibility over objection. Documents must be authenticated, witnesses statements must be presented in accordance with one or more rules of evidence, etc. Unless and until the interested party does so the evidence is not "admissible" if contested by the adverse party. (Of course, if the opposing party does not object to the evidence, it is "admissible" regardless of whether those steps are taken or not. *Russell v. Geis* (1967) 251 Cal.App.2d 560, 570.) What happened in this case is that defendants had possession of the documents and statements from witnesses that they relied on in the coram vobis proceeding but elected not to even try to have admitted into evidence at or before trial, although they could have done so. Instead, they elected to "conceal it, gamble upon the issue, and, being disappointed therewith, ask the court to relieve him from the

consequences of his own intentional or negligent act." (*People v. Shorts* supra, 32 Cal.2d at p. 514)

a. The requirement that a litigant must bring every defense it knows of to court before judgment or be barred from raising them in that same case later should be most rigorously followed when a litigant has a series of trials in which it can choose to withhold or reveal its defenses for tactical reasons. This was just one of many DBCP cases defendants anticipated, arising from numerous countries around the world. A jury verdict in this case that the plaintiffs had worked on Dole's farms and had been exposed to DBCP but *Dole was not liable* was the best possible outcome for defendants. Dole hotly contested whether the type of exposure to DBCP the plaintiffs had had could cause any damage at all. (42 RT 6466, 6477-6478 50 RT 7977; Plaintiff's Ex. 12) A dismissal based on the plaintiffs not even having worked on Dole's farms would have done did little good for defendants in the overall context of the numerous lawsuits pending over Dole's use of the chemical. Dole could "pick and choose" which defenses to try in each case that came up.

Because Dole's decision not to raise the claims raised in its coram vobis petition at trial was an internal, strategic decision by defendants' counsel we cannot investigate it. That's why the rule is ironclad: failure to bring all known claims to the trial court's attention at trial bars any future use of those

claims in that case. If a litigant knows about the evidence they have two choices: raise it at trial, or be barred from ever using it in that case. Because it faced multiple lawsuits, Dole had the option of "rolling the dice" to see if it could win this case with the jury, and if that didn't work, bring up its fraud claims in the next case - which is exactly what it did.

But appellants don't have that luxury. This is the only lawsuit they will ever be parties to. They don't have another case coming down the line. They put their entire case on in front of the jury in their one trial. Allowing defendants a second bite at this same apple is both a violation of express and unambiguous precedent, it is fundamentally unfair to the non-corporate litigants.

b. Every document relied upon by defendants and cited in the dismissal order as evidence in support of defendants' claims was in Dole's possession before trial and could have been used in cross-examining appellants at trial. The order appealed from cites two types of documents as support for its ruling: the "work certificates," and the "refresher guides" or "manuals." (See statement of decision paragraphs 42 and 44, 7 AA 1363-1364) The "work certificates," as noted above, were used by plaintiff's counsel to weed out false claimants, and there is no suggestion that they were ever offered as evidence in this case or that they had any effect on the fact-finding process whatsoever. But ignoring all that, the fact remains that they were

documents in appellant's files which were produced to defendants in ordinary discovery long before trial.

If the documents signify "fraud" by appellants, defendants could have confronted appellants with those documents at their depositions and/or at trial and cross-examined them about them. There was nothing preventing them from being "admissible" evidence other than defendants election not to do so.

At least one copy of the "refresher guides" was in Dole's possession long before trial. (Ex. 69, pp. 3413, 3435-3436, 3517, Plaintiff's Ex. 3.10, p. 468, 3.11, p. 480) As with the work certificates, Dole could have simply set the document in front of appellants at their depositions and/or at trial and asked them about them. They didn't. Furthermore, knowing the exact title of the document: "Orientacion de refrescamiento de hacienda bananera[35]" they could have served a document production demand on plaintiffs to have their counsel produce any such documents in their possession. They didn't. There were any number of ways that Dole could have made this document "admissible." Dole simply elected not to do so until after they lost the trial.

35

This is the title on the document Dole filed publicly (unsealed) in this case - Ex. 330)

c. Every significant John Doe witness cited in Dole's petition and the court's dismissal order as providing evidence of "the fraud" was interviewed by Dole's agents in Nicaragua before trial. John Does 11, 12, 13 and 14 were first interviewed between November 2005 and May 2007 (Plaintiff's Ex. 3.8, p. 431, 437, 439, 443) John Doe 15 was first interviewed in August 2005 (Plaintiff's Ex. 3.9, p. 451) John Doe 16 in January 2006 (Plaintiff's Ex. 3.10, p. 468) and John Doe 17 in June 2006 (Plaintiff's Ex. 3.11, p.475.) The two John Doe witnesses [redacted] (as described above in section III.A.3.c) were first interviewed in August 2004 and April 2007. (Plaintiff's Ex. 3.15, p. 514, 523) The John Doe witnesses who weren't interviewed before the *Tellez* trial were for the most part witnesses who only had evidence specific to one or more plaintiffs in *Mejia,* such as John Doe 9, [redacted]

The only reason the evidence they had to provide wasn't presented to the court before or at trial instead of after the verdict was rendered was that Dole *elected not to do before trial what it did after trial*: disclose to the trial court what Dole thought the witnesses would testify to and seek the court's assistance in converting their interviews into "admissible evidence." Dole's counsel at the time of trial, Frederick McKnight, was candid about the fact that Dole made a conscious decision *not to secure* this evidence in "admissible" form before trial: "Dole was very concerned that if we sought to obtain

declarations or depositions at this time under these circumstances it could disrupt the fragile network of individuals who had at least been willing to come forward with information during interviews and cause them to cease cooperating altogether." (Ex. 188, p. 6926) Regardless of how credible one views that self-serving justification to be, it contains an unambiguous admission: Dole *decided* not to do anything to present this evidence at the time of trial. It deliberately delayed doing so. Nothing prevented Dole from taking those steps other than its own tactical decision.

Because the decision not to assert this claim before trial was an internal tactical choice made by defendants and their counsel it cannot be effectively investigated. Mr. McKnight's after-the-fact self-serving justification for not raising the claim at trial is untestable. That is why the rule is that to use a "new fact" in coram vobis the litigant must establish that it was "unknown" at the time of trial. There is no exception for excuses or justifications for not bringing known claims to court: it is a rule of *knowledge*. "Petitioner must show that the facts upon which he relies *were not known to him...*" (*In re Derek W.*(1999) 73 Cal.App.4th 828, 832, *People v. Shorts* (1948) 32 Cal.2d 502, 513, emphasis added) Dole made no attempt to present the evidence represented by the witnesses' MOI's to the trial court until after they lost the trial.

What's more, Dole didn't even present the evidence it had available *in*

the United States. [redacted]

[redacted] There was no part of Dole's fraud allegations which [redacted] did not testify in support of at his deposition, and no reason why Dole could not have put him on the stand to let the jury determine if he was "credible." Dole simply elected not to do so.

d. Dow is in privity with Dole and cannot escape the bar on post-judgment raising of factual claims known to Dole before trial simply because it defaulted all factual investigation and defense to Dole under the indemnification agreement between the two defendants. As noted above, in 1978 Dole indemnified Dow against any claims arising out of the use of DBCP as a condition of Dow's continued supply of the chemical to Dole after it was determined to harm people:

> [Dole] "will assume the entire responsibility, liability, and risk arising out of or in connection with its use of "Fumazone" purchased from DOWINTAL and will indemnify and hold harmless DOW, ... from and against any and all losses, expenses, demands, and claims made against any of them by

> any... third party whatsoever because of any injury or alleged injury to person or persons (including death) or damage or alleged damages to property, arising out of or in connection with the use and application of said "Fumazone" purchased from DOWINTAL, and further agrees to take over and pay the cost of DOW's defense in any such action.
> ... DOW or DOWINTAL shall have the option to assume its own defense, in which case STANDARD FRUIT COMPANY shall reimburse DOW or DOWINTAL for the reasonable cost of such defense...
>
> (Plaintiff's trial Ex. 122)

While some distinctions existed between the two defendants at trial due to the different legal bases of liability under which they were sued, for purposes of post-trial attack on the judgment Dow's position can for the most part be summed up in two words: "me too."

> ...Dow incorporates by reference Dole's petition and its supporting papers. As set forth in its accompanying request, Dow respectfully requests that this Court take judicial notice of the records of this Court that have been filed by Dole. ...
> Further, ... Dow incorporates by reference Dole's memorandum of points and authorities in support of its petition.
>
> (Dow's coram vobis petition, 3 AA 398-399)

However, in an attempt to circumvent the prohibition on post-judgment attacks based on information known to the petitioner before trial, Dow has asserted the argument that because it left all of the pre-trial factual investigation to Dole, it was not barred from relying on that evidence in a post-

trial attack on the judgment because Dow itself did not have possession of the information before trial. (AA 672-674) This argument is supported by the only exhibit filed by Dow in the coram vobis proceeding, a declaration from Dow's counsel in which he states that Dow did not participate in Dole's pretrial investigations and that Dole provided him with some of the MOI's before trial but not those relating to the John Doe witnesses. (Ex. 272, p. 10157) Of course, this argument is inapposite to the "work certificates" which were produced to all defendants well before trial and were cited as a basis for the trial court's coram vobis ruling. It only applies to the secret John Doe witnesses and the testimony and evidence they provided to Dole before trial.

The bar on use of facts known at trial to support a post-trial attack on a judgment is a form of estoppel. (*Babcock v. Antis* (1979) 94 Cal.App.3d 823, 832.) It has its genesis in the principal that a litigant has a responsibility to bring all of its claims to the attention of the court at trial, or those claims are deemed to have been conceded. And that estoppel binds all persons who are in privity with the party which had the information and elected not to use it at trial.

> The term "privity" refers to some relationship or connection with the party which makes it proper to hold "privies" bound with the actual parties. 'Who are privies requires careful examination into the circumstances of each case as it arises.'
>
> *(Martin v. County of Los Angeles* (1996) 51 Cal.App.4th 688, 700)

> Privity 'refers [ ] to such an identification in interest of one person with another as to represent the same legal rights [citations] and, more recently, to a relationship between the party to be estopped and the unsuccessful party in the prior litigation which is 'sufficiently close' so as to justify application of the doctrine of collateral estoppel.
>
> *Mooney v. Caspari* (2006) 138 Cal.App.4th 704, 718

Because the post-judgment interests of Dow and Dole were identical given the terms of the indemnification agreement between them, Dow is in privity with Dole with regard to the post-judgment coram vobis attack on the judgment and is equally estopped to rely on the evidence Dow left to Dole to secure before trial.

• **Alternatively, Dow was not diligent**. To allow Dow to evade the bar on post-trial argumentation of facts known to its co-defendant and indemnitor before trial after Dow allowed Dole to carry the burden of investigation, safe in the knowledge that Dole was the party who would ultimately be financially responsible for any resulting judgment would allow tag-team defense tactics in derogation of the fundamental principles of coram vobis precedent. Dow's positions is in essence a form of intentional non-diligence; it made no effort to discover the relevant facts because it was free to rely on its indemnitor doing it.

e. The trial court's proper rulings on motions in limine did not prevent defendants from presenting the evidence supporting their current

claims of fraud at trial. The trial court's written dismissal order contains the assertion that Dole was "effectively prevented from bringing its suspicions of fraud to the court and the jury by rulings in limine in which this court excluded certain evidence from the record which could have provided support for the suspicion." (CV Dismissal order, 7 AA 1392) But when the court was considering plaintiff's motions in limine 4 and 7 *Dole did not tell the court about the evidence in its possession* which might have made the court rule another way. In fact, Dole did not even argue either motion, and Dow's limited argument did not suggest anything remotely related to defendant's current claims of "fraud." (7RT BB24-27, 98) Dole did not cite the "work certificates" in connection with the in limine motions. Dole did not present the "refresher guides" in its possession to the court when the in limine motions were made. At no time during the trial did Dole ever mention the statements it had taken from the witnesses it would later bring forth as John Doe witnesses. When Dole brought John Doe 17 to the United States in the middle of the trial they did not put him on the stand.

The in limine rulings did not prevent Dole from making its fraud case at trial; Dole did not even allege as an affirmative defense the fraud claims it had filed in *Dole v. Gutierrez* in 2003 (Plaintiff's Ex. 27) Dole made no effort to tell the court what evidence it had which might have caused the court to allow its admission. The only thing that prevented Dole from making its case at trial was Dole's decision not to do so.

12. There is no evidence that any factual issue underlying the judgment was wrongly decided other than the court's improper readjudication of the jury's findings as to two appellants based on its reassessment of the significance of their poor job of describing at trial events which happened 30 years earlier.

For all of the drama over the Nicaraguan DBCP cases and the accusations regarding the plaintiffs in that country, there were very limited factual issues as to the six appellants and this case here in California. In terms of basic factual disputes there were only two questions: did they work on a Dole banana farm, and did they suffer from azoospermia or oligospermia? As noted above, the medical testing of each of the plaintiffs in the cases filed in California was performed here, by American labs, and is not in any way suspect. So the only factual question left as to appellants was whether they worked on a Dole banana farm in the 1970's or not. The six appellants can be divided into three groups:

1. Diaz Artiaga. In its oral ruling the trial court noted as to Diaz Artiaga: "this plaintiff probably was employed on a Dole-related banana plantation between 1970 and 1980" (12 CV 2428) (The court found that he was a "plaintiff-coach" at that point, but once that claim was debunked the court simply omitted all mention of Diaz Artiaga in the written decision.)

2. Mendoza Gutierrez, Calero Gonzalez, and Lopez Mercado. The

court deemed Dole's evidence against these three appellants to be "equivocal." (See decision, paragraph 56, 7 AA 1370)

3. Claudio Gonzalez and Rojas Laguna. The court found that notwithstanding the jury's special verdict to the contrary (Ex. 16, p. 468) these appellants had not worked on a Dole banana farm based on their poor performance in testifying about the details of that employment, and, as to Rojas Laguna, [redacted]. (7 AA 1369-1370, Ex. 34, p. 794.)

As to the first four appellants, the court's findings are not adequate to justify vacating the judgment. The standard is that the new evidence "will either compel or make probable a different result in the trial court." (*Daniels v. Robbins* (2010) 182 Cal.App.4th 204, 228, *In re Rachel M., supra* 113 Cal.App.4th at p. 1296, *Philippine Export & Foreign Loan Guarantee Corp. v. Chuidian, supra,* 218 Cal.App.3d at p. 1092) A finding that the jury's verdict was based on a factual determination which was "probably" *correct*, or as to which the new evidence is at best "equivocal" clearly cannot meet that standard.

As to the last two appellants, the trial court's findings violate the other fundamental principle of coram vobis law: reassessing the findings of the jury based on the same evidence the jury saw. "The proffered new evidence [can]

not [be] presented on an issue adjudicated in the trial court because factual issues that have been adjudicated cannot be reopened except on motion for new trial or for reconsideration." *In re Rachel M., supra* 113 Cal.App.4th at p. 1296)

13. Evidence of fraudulent conduct involving claims of other people (e.g., the Nicaraguan DBCP claims filed in Nicaragua) is not grounds for vacating the judgment won by these appellants in this case under coram vobis precedent.

The trial court did not, however, claim to base its order vacating the judgment on a finding that the judgment in this case was not actually the correct resolution of the factual claims of the parties. Rather, the court held that the "different result" of the case would be because: "The evidence of forgery, fabrication of evidence, subornation of perjury and witness tampering by plaintiffs' agents would compel the trial court to grant a new trial or dismiss the lawsuit on the ground of misconduct" - even without any showing that any of those things proved that appellants either were not infertile or that they had not worked on a Dole banana farm. (7 AA 1395-1396) Indeed, the court's order amounts to a declaration that no Nicaraguan can ever sue Dole in an American court, regardless of the validity of that claim, period. But that is an unwarranted expansion of coram vobis law which directly violates established precedent.

The clearest precedent for the principle that for a judgment to be set aside under coram vobis the fraud alleged to have occurred must be shown to have affected the outcome of *this case* arises from the Rampart police scandal of the 1990's, when it was discovered that dozens of Los Angeles police officers had engaged in an ongoing practice of "planting evidence, filing false police reports, committing perjury, and creating nonexistent confessions" (*People v. Germany* (2005) 133 Cal.App.4th 784, 791) As many of the individuals who suffered adverse criminal judgments due to that conduct had completed their punishment and were no longer in custody by the time the scandal became public, habeas corpus was not available as an avenue to attack the judgments. Some turned to coram vobis. But that writ is not available simply because fraud was committed, even where it was shown that fraud was committed by individuals in parity with one side of the litigation, as the police are with the prosecution in a criminal case.

Only if it could be proven that a crooked police officer caused a criminal judgment to be entered in a specific case by committing fraud which affected the outcome of *that case* was the defendant in that case entitled to post judgment coram vobis relief. (*Mendez v. Superior Court* (2001) 87 Cal.App.4th 791, 801.) The Legislature later enacted a statute[36] to address that

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[36] Penal Code section 1473.6 provides as follows (emphasis added.):

(a) Any person no longer unlawfully imprisoned or restrained may prosecute

specific issue, but again, limited the availability of relief to those who could prove that the rampant and despicable fraud of the rogue police officers actually caused an invalid judgment to be entered in the defendant's case. Proof of fraud generally, even where a known bad apple officer was central to a case, is insufficient to support a request for relief under the post-Rampart statute. (*People v. Germany*, supra 133 Cal.App.4th at p. 791, Penal Code section 1473.6, subdivision (a)(3))

Stated simply, the fact that John Does [redacted] filed phony DBCP claims in Nicaragua under Nicaraguan law, or that lazy or dishonest capitans got a dishonest man to sign "work certificates" for men who actually worked at a different farm than the one he worked on does not justify vacating the

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a motion to vacate a judgment for any of the following reasons:
(1) Newly discovered evidence of fraud by a government official that completely undermines the prosecution's case, is conclusive, and points unerringly to his or her innocence.
(2) Newly discovered evidence that a government official testified falsely at the trial that resulted in the conviction and that the testimony of the government official was substantially probative on the issue of guilt or punishment.
(3) Newly discovered evidence of misconduct by a government official committed in the underlying case that resulted in fabrication of evidence that was substantially material and probative on the issue of guilt or punishment. **Evidence of misconduct in other cases is not sufficient to warrant relief under this paragraph.**
(b) For purposes of this section, "newly discovered evidence" is evidence that could not have been discovered with reasonable diligence prior to judgment.
(c) The procedure for bringing and adjudicating a motion under this section, including the burden of producing evidence and the burden of proof, shall be the same as for prosecuting a writ of habeas corpus

judgment won by appellants in a jury trial in our courts under our law. But that is the central holding of the trial court's order. That holding is legal error.

14. The things done by third parties which are cited as proof that appellants were implicated in "the fraud" did not in any way affect the process or the outcome of the trial in this case.

The specific items which supposedly "connect" appellants to "the fraud" are: the "work certificates" prepared by third parties and placed in some of their client files in Nicaragua; the fact that they had fertility tests performed by some Nicaraguan labs which were alleged to have produced phony reports for some, unidentified, other plaintiffs, and the fact that their discovery responses were drafted - or, to use the invidious term preferred by Dole and included in the court's findings: "manufactured" - by their lawyers. (7 AA 1369-1370)

But none of those things are tied in any way to anything connected with the litigation or outcome of appellants' trial. The "work certificates" created by third parties were designed as a means of weeding out false claimants for the benefit of the plaintiff's lawyers, not as trial or even discovery evidence of where the plaintiffs had worked, and were never offered into evidence or seen by the jury. There was no question as to the actual medical condition of appellants; if other people's tests were actually falsified by one or more Nicaraguan labs it had no effect on this case. And the fact that appellants'

interrogatory responses were drafted by their lawyers is hardly evidence of "fraud" - particularly in the absence of any showing that any of their answers were inaccurate.

If the evidence which is supposed to support the vacation of these appellants' judgment is sufficient to support a coram vobis writ, no judgment can be considered truly "final."

15. What the trial court interpreted as evidence of fraudulent "coaching" of witnesses is in fact the kind of testimony which is described in an ABA book as an answer given by "witness after witness over the years" simply because they haven't been prepared *well enough* for their testimony by their lawyers.

At the heart of this proceeding is the trial court's assessment of ambiguous events as constituting proof of "fraud." As to appellant Lopez Mercado, the court found this to be evidence of improper "coaching" and thus indicative of fraud:

"Mr. Lopez was also evasive about whether he was prepped for his deposition, first responding that he had not met with his lawyers to prepare, then correcting himself after a break to say that he had met with his attorneys for five to eight hours to prepare." (7 AA p. 1371, fn. 95)

Compare that with the following:

> A good defense counsel may ask the question with sarcasm or a sneer: **"Isn't it true that you met with the prosecutor?"** If the witness is not prepared, you can almost see what flashes through his mind: "Well, yes, I met with her but I didn't do anything wrong and no one told me what to say, but he's making it look bad and maybe I shouldn't have met with her, and now the jury won't believe me if they think that happened." So from this tortured thinking, **witness after witness over the years has reacted in fear and answered "no"** to that sort of simple question. What they are trying to do is tell the truth: I wasn't told to say anything wrong. What they have actually done is lied under oath. (Small, Preparing Witnesses, American Bar Association, 3rd Ed., 2009, page 80 (emphasis added))

Any experienced lawyer or judge would have recognized Lopez' testimony (and its correction) for what it was: evidence that the witness was not adequately prepared for his deposition, not evidence that he was "coached." It is a simple and obvious ploy, which a judge should not be fooled by. Yet this court was.

The court also ascribed failure to recall events by a witness who had had a stroke and remembered very little as evidence of "coaching" (7 AA 1371, fn 95, Similarly, the court's decision cites testimony by a plaintiff, Mr. Quinones, who was brain damaged and testified that he worked on a banana farm "from 1978 to 1970," prompting this line of questioning:

Q. Mr. Quiñonez, the brain lesion that you have that you've told us about today, does that sometimes cause you to get confused?

A. Yes.

Q. Has your brain lesion ever caused you to believe that you did something that you really didn 't do?

A. Yes.

Q. You told Mr. Dominguez a minute ago that you worked at Maria Elsa from 1978 until 1970. Do you remember that?

A. Yes.

Q. Now, you were seven years old in 1970. Do you really believe you worked at a banana farm when you were seven years old?

...

A. Yes.

–Ex. 99, p. 4698

While Dole's counsel has reported taking great pride in this skillful cross-examination of a brain-damaged Nicaraguan farm worker, all it really proves is that an attorney representing this plaintiff would have a responsibility to carefully prepare him for deposition. Indeed, the ABA-published book referenced above would advise a lawyer to go over the facts with the plaintiff and even do a "dry run" of his testimony, preferably with a camera and a transcript, and then review the transcript with the witness. (Small, Preparing Witnesses, American Bar Association, 3rd Ed., 2009, page 38-41) A brain-damaged witness might well perceive such *recommended* actions as training him to recite his testimony "like a parrot."

If a court is inclined to see fraud, it will see fraud, even in events which are routine, or evidence of nothing more or less than an attempt to properly prepare a vulnerable witness for testimony.

C. The trial court's offensive derogation of Nicaragua, its people, judges, lawyers and judicial processes represents an injudicious inclination to perceive wrongdoing in events in a foreign country which the court simply did not understand and undermines the credibility of our judicial system.

The one aspect of due process which has not been discussed is the right to "a fair hearing before an impartial judge." (*In re Carlsson, supra*, 163 Cal.App.4th at p. 291) While appellants do not join the chorus of voices from Nicaragua and elsewhere which have denounced the trial court as corrupt, the trial court's perception of events in that country, and specifically, its ready acceptance and republication of claims of corruption and bribery of the lawyers and judges in that nation based on dubious and unverifiable secret testimony represents a willingness to accept and embrace assertions of evil made against strangers to the court *behind their backs* which falls below the standard of objectivity and fairness an American court should adhere to.

In remarks that the trial court interpreted as a "threat to the court" Antonio Hernandez Ordeñana commented on the fact that the trial court had referred to Nicaraguans in "crude terms" and had not even allowed them to defend themselves against secret accusations. (See section II.F.44.c, above)

The language of the trial court which the Nicaraguan attorney was referring to should be read in its entirety by this court:

> In Nicaragua we seem to have a social ecosystem that's evolved. There have been several factors, and I want to go through what factors have come together, to make this particular odd social ecosystem which we've had the opportunity to view for the last few days. The Sandinista Revolution changed the system of government there. I'm not quite sure what it's been replaced with. I know there is a government there. I have no idea how well it's really functioning. More on that later.
>
> We have the infamous Law 364 which presumes, basically, that if somebody says they've been exposed to DBCP because they were once a farm worker, and claims that they are sterile, well, then, they're entitled to compensation.
>
> 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 just to walk into the courtroom. I'm lucky that we work here. Our courts are free.
>
> And eight days to deliver all the evidence? It took us four and a half months of day-in-and-day-out trials in the Tellez case for 12 people, to allow all parties to thoroughly review and allow the jury to consider the evidence. It couldn't have been done in eight days, and, yet, this law allows in Nicaragua five hundred to a thousand plaintiffs to be processed at one time in eight days. And finally, the judge rules within three days after that.
>
> What other factors came together to allow this unique social ecosystem? A judiciary without scruples, apparently; extreme poverty; the lack of compulsory process for discovery; the inability of an order that I make to be carried out in another country down there.
>
> In the United States, there's comity between the various

states here that allows me to make an order and have a judge in North Dakota follow through. The Hague Convention allows discovery between courts within the United States and England and France, Germany, Japan, all sorts of places. The Pan-American Convention allows for discovery with many of the nations in this hemisphere. But not so for Nicaragua. There is a lack of a respect for law, apparently, down there that I've seen that has been part of the confluence of factors that have come together to allow this unique social ecosystem to evolve.

I've been scratching my head for the last few days and wondering what new life form, what creature has been spawned from these factors.

Changing gears for just a minute, in Greek mythology there was a chimera, who was a mythical creature with the head of a lion -- actually it was a fire-breathing she monster, which some in this case might describe me as being that person or that critter, but that's for another day.

Anyway, a chimera was a fire-breathing she monster with a head of a lion, a body of a goat, and a tail of a snake. A truly fearsome creature. True, there were lesser amalgamations of body parts, we have the flute-playing pan who had the head and torso of a man and the body of a goat, and Medusa, sprouting a head of snakes where her hair should be.

Here, we also have a chimera that is really truly heinous and repulsive. It's been created from separate organisms cemented together by human greed and avarice.

Well, you might be asking what kind of organisms have been cemented together to form this strange chimera? These organisms are really groups of people or classifications of people. It's made up of groups of attorneys who actually designed this creature, which is the neural system, the brain of this creature. These attorneys have been both in Nicaragua and some in the United States.

There have been groups of men, called captains, or

recruiting captains, who have been the arms and the eyes for this monster, who reached out and grabbed the groups of men to make spurious claims that they are sterile arising from a chemical called DBCP, manufactured by U.S. companies such as Dow and Amvac, and used by U.S. companies such as Dole.

These men have alleged hours of make-believe toil in stinky, smelly wet fields where pipes of DBCP irrigation burst all over them, causing them to wade, perhaps almost even swim, through the contaminated waters. They claim that they toiled away as farm laborers and irrigators while being rained upon by DBCP or swimming in it.

There have been groups of medical personnel providing sham laboratory reports indicating sterility where none really exists; groups of fathers denying paternity of their own children, posing as lonely men coming into the court, saying that they had no solace in their old age because they have no children. They have denied to their children their paternity and claim they have no comfort from their offspring, from their own loins, in their old age.

There are groups of corrupt Nicaraguan judges devouring bribes and to award judgments based on trumped-up allegations and facts.

This chimera even has a cancer within it. Some members, I think mainly the captains, feed on the weaker members, the plaintiffs, the impoverished, demanding that these workers pay to go to meetings, pay to go on field trips to banana plantations, pay for training manuals, pay to watch videos, pay for everything they do. Lots has been promised, but very little has actually been delivered.

This chimera has an enforcement arm, The Group of 8. We heard a little bit about The Group of 8, I heard some about it yesterday, Mr. Edelman talked about it today, but it appears to be a group of individuals from the various law firms in Nicaragua who were there to ride herd on these cases, to bring

them from their creation in somebody's mind in the law offices in Chinandega, the offices of the banana workers, on through training and on into courts like this one or courts in Nicaragua, and perhaps with the hope of courts elsewhere in this country.

There is a pervasive atmosphere of fear and extreme danger...

The fact that the trial court misunderstood basic elements of the Nicaraguan "Law 364" has been touched upon above, as well as the court's gratuitous exaggeration and distortion of the factual claims made by the plaintiffs in the California cases. And pretty much everything the court said about how Nicaraguan Law 364 was actually implemented was wrong.[37] The provisions cited do appear in the law, but in fact were not imposed by the courts in the DBCP cases which were actually tried in that country; no multi-million dollar deposits were ever required or made, the trials weren't completed in eight days, etc. (See Ex. 177, p. 6521, 6527) More to the point: as this court undoubtedly is well aware, judges don't write the laws, they simply deal with them as best they can. And honest judges can and do disagree about the best way to implement or interpret laws passed in this country; no doubt that is true in Nicaragua as well.

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Actually, much of what it said about American courts was wrong as well; the *Tellez* trial evidence and argument was not presented "day-in-and-day- out" for 4 ½ months" but rather took place on 40 days spread out over three months. And the assertion that our courts are "free" would no doubt come as surprise to trial counsel inured to paying filing fees, motion fees, daily reporter fees, etc.

But it is the trial court's gratuitous and factually unsupported disparagement of Nicaragua's "social ecosystem" - its people, its political and legal institutions, its bench and its bar, including the bald assertion that its judges are corrupt, "without scruples" and take bribes - based on nothing but the secret evidence this court approved and determined to be both credible and consonant with *our country's* concepts of "due process of law," which shocks the conscience. "The trial of a case should not only be fair in fact, but it should also appear to be fair. And where the contrary appears, it shocks the judicial instinct to allow the judgment to stand." (*Webber v. Webber* (1948) 33 Cal.2d 153, 155)

> As noted in *Hernandez v. Paicus* (2003) 109Cal.App.4th 452, 462:
>
> > "We scrupulously guard against bias and prejudice, actual or reasonably perceived, not only to prevent improper factors from influencing the fact finder's deliberations, but to vindicate the reputation of the court itself. ... We must also keep in mind ...that the source of judicial authority lies ultimately in the faith of the people that a fair hearing may be had. Judicial behavior inimical to that necessary perception can never be countenanced...." (Citing *Catchpole v. Brannon* (1995) 36 Cal.App.4th 237, 253)

A number of cases in this state have addressed the phenomenon of a trial court expressing intemperate opinions adverse to a litigant outside of the context of an overt financial conflict of interest. In addition to *Catchpole v. Brannon* (sex discrimination case) and *Hernandez v. Paicus* (malpractice suit

brought by unauthorized immigrant) *Hall v. Harker* (1999) 69 Cal.App.4th 836 (court expressed contempt for lawyers) and *In re Marriage of Iverson* (1992) 11 Cal.App.4th 1495 (gender bias in dissolution proceeding) have all found evidence of bias in a trial court's comments during the proceedings. Where the comments of a trial court demonstrate actual bias against a class of persons such that a fair trial was prevented, reversal is warranted. (*People v. Freeman* (2010) 47 Cal.4th 993, 1006, fn. 4.)

Uncritically accepting and rewarding attacks on foreign judges and legal processes based on secret evidence is a bad precedent. In this case the trial court's findings as to the perceived shortcomings of Nicaraguan judicial officers and proceedings was based on a profound lack of knowledge and fundamental misunderstanding of the law and legal processes of those courts, fed by the testimony of secret witnesses recruited by a party with much to gain from convincing the court that everyone in Nicaragua involved in the DBCP litigation adverse to defendants was corrupt, venal, vicious and unworthy.

Even after the source of the testimony the court had believed about the Montserrat meeting and the rest of the "chimera conspiracy" was exposed as a deliberately and wildly deceitful con man during the course of the coram vobis hearings the trial court refused to address its previous assertions about the Nicaraguan "organisms" it had previously described. Not only did the court find that evidence that John Doe 17 had fabricated the Montserrat

conspiracy meeting out of whole cloth failed to mean that the taking of his deposition by counsel with some knowledge of his mendacity and the truth of the matters he had testified about in secret was warranted; the court expressed the belief that such a deposition would fail to even rise to the level of "the reasonable possibility[] of locating information that will lead to the discovery of admissible evidence." (7 CV L89-90) And when appellants urged the court to forthrightly address the dubious nature of those claims in its ruling in this case (AA 1156-1160) it elected instead to simply not mention them. The court's findings that Nicaraguan judges are all corrupt, take bribes, and participate in overt conspiracies have never been expressly withdrawn.

16. The trial court formed opinions and made rulings based on erroneous beliefs about Nicaraguan law and legal procedure.

As discussed above in section II.F.41.a, the trial court was laboring under a major misapprehension of fact regarding what claims were authorized to be brought under Nicaraguan Law 364, as well as the number of workers and residents on Dole's banana farms from 1973 through 1980. But that's not the only misunderstanding the trial court had about that law. In addition to reciting the harsh procedural provisions of Law 364 without acknowledging that they were never actually imposed on any defendants, in its written decisions in both *Mejia* and this case the court has asserted that: "Under Special Law 364, essentially anyone who obtains the two required lab reports stating he is sterile and who claims to have been exposed to DBCP on a banana

farm is entitled to damages...." (Ex. 98, p. 4640, almost identical statement in CV dismissal order at 7 AA 1376) But that's not true. "Claiming" to have been exposed to DBCP on a banana farm is not sufficient; in the *Osorio* case, a number of claimants lost because they failed to produce satisfactory *proof* that they had actually worked on Dole's farms. (e.g. Jose Cecilio Chevez Rodriguez Ex. 312, p. 12171)

The trial court's express findings that many Nicaraguan judges were corrupt did not end with its oral findings in *Mejia.* The written ruling in that case reiterated similar comments and added specific accusations of corruption of specific Nicaraguan judges based on secret testimony. (Ex. 98, p. 4638-4640, 4645-4646) The oral findings in this case contained more of the same (12 CV 2409-2410) and the written findings as well. (7 AA 1359)

The trial court's accusation that DBCP plaintiffs are "suing Dole and Dow for the general conditions of poverty in Nicaragua and illness in Nicaragua and blaming them for all the suffering of the Nicaraguan people" (7 AA 1377) has no basis in fact as to any suit brought in this court or any other. It is simply editorializing about the perceived shortcomings of an entire nation of people as seen through the court's eyes. Appellant Carlos Enrique Diaz Artiaga did not sue defendants "for the general conditions of poverty in Nicaragua." He sued them because *he* is biologically unable to father children (as confirmed by American medical personnel) and because, as the court itself

found to be true, he worked on a Dole banana farm at a time when Dole intentionally was spraying a chemical over the banana plants which Dole knew to cause that exact physical condition. An American jury found that Dole's use of DBCP caused *his* injury and awarded *him* compensation, both general damages and, as to Dole, punitive damages - not for "Nicaragua's poverty and suffering," but for his own personal injuries. (Ex. 16, p. 471-478, 482-485) The same is true for the other five appellants.

The court's jaundiced assessment of the people of Nicaragua and their right to bring a lawsuit in this country over the injuries caused by an American corporation whose conduct was so outrageous that it caused an *American* jury to assess punitive damages finds an eerie parallel in the comments of the trial judge in *Hernandez v. Paicius, supra*, 109 Cal.App.4th at 457-458 about the rights of undocumented immigrants to seek redress for injuries suffered through the negligence of an American citizen in this country. That sort of general bias against the "social ecosystem" of an entire nation has no place in a lawsuit in which redress of the rights of *individuals* are sought.

17. The trial court has accepted and republished pejorative characterizations of objectively inoffensive and indeed entirely proper and appropriate procedures and events.

The trial court accepted and adopted as its own the characterization of two Nicaraguan legal procedures as proof of "the fraud": the defamation

complaint filed by Antonio Hernandez Ordeñana against Dole's agent Francisco Valadez and the process of obtaining sworn testimony in Nicaraguan courts by means of the pliego de absolucion de posiciones procedure. An objective assessment of those two Nicaraguan proceedings juxtaposed with the trial court's characterization of them is informative.

a. Hernandez Ordeñana's slander complaint. As a member of the supposed "enforcement arm" of the chimera conspiracy, Antonio Hernandez Ordeñana would be expected to direct the beating and killing of witnesses and investigators. Yet no such physical assaults ever happened. What Hernandez Ordeñana *did* do was two fold: he filed a slander complaint against a Dole operative who was recruiting secret witnesses who were, in fact, testifying falsely against him; and he spoke up in public, denouncing the conduct of Dole's agents and the rulings of the trial court. The legal proceeding was described in the court's order: "Ordeñana took advantage of a corrupt Nicaraguan judiciary to bring trumped up and retaliatory criminal charges against Dole investigator Francisco Valadez..." (7 AA 1367)

But an objective look at the "corruption" of the Nicaraguan judiciary and legal process does not support that invidious characterization. Dole and the court made much of the fact that the "slander and insult" complaint Hernandez Ordeñana filed against Dole's investigator was categorized as a "criminal" complaint. But legal terminology does not always mean the same

thing in different countries. Dole's expert described it as "it's a suit, a lawsuit. They have a lesser category. I'm trying to think of the name. It is illegal behavior of a lesser degree of severity." (Ex. 139, p. 6066) The functioning of the legal action, as described by Dole's expert witness, is this:

- It is not prosecuted by a government prosecutor, but by the lawyer for the accuser. (Ex. 53, p. 1143)
- A "preliminary hearing" is set, at which the court will try to help negotiate a settlement. If not, the case will proceed to trial. (Ex. 53, p. 1143)
- The plaintiff is required to disclose to the defendant all evidence and witnesses he intends to present before the trial. (Ex. 48, p. 1064-1068)
- The plaintiff must prove his case beyond a reasonable doubt. (Ex. 53, p. 1145)
- The maximum penalty is a fine, amounting to a few hundred dollars. (Ex. 139, p. 6069)

In short, the "criminal" proceeding looks a lot in substance like a typical American intentional tort case, except with less at stake.

The upshot of what happened in the "corrupt" Nicaraguan judiciary was that Dole's agent asked for and received a continuance over Hernandez Ordeñana's objection. (Ex. 51, p. 1108, 1126) He was provided with notice of the specific claims against him and the evidence upon which they were based and the witnesses who might testify so as to prepare his defense (Ex. 48,

p. 1064-1068) and in the end the case was apparently settled (the nature of the resolution of the case is not reflected in the file) and Dole's agent continued to work in Nicaragua regularly for more than a year. (Plaintiff's Ex. 12b, p. 1618) If that's an example of how a "corrupt" judicial system operates in Nicaragua they're really not very good at corruption.

As to the charges being "trumped up and retaliatory" - as set forth above in sections II.D.17, II.D.22 and II.D.23, Dole's agents *were* in fact recruiting witnesses who *were* spinning a tale of a vast nationwide conspiracy in secret and placing Hernandez Ordeñana as a member of it. While the credulous trial court in Los Angeles believed every word of that story and construed any attempt to disprove it as "witness tampering" the story was in fact false. Regardless of whether Hernandez Ordeñana was entitled to prevail on his slander suit on the specific allegations made under Nicaraguan law, his basic complaint with Dole's agents was not "trumped up." They *were* engaged in a very real process of recruiting Nicaraguans for the task of testifying falsely in a manner designed to harm him.

b. The Nicaraguan legal procedure of pliego de absolucion de posiciones is simply a process of subpoenaing witnesses to appear in open court under oath to answer a list of questions proposed by a litigant. The trial court's characterization of that process as "lack[ing] any semblance of credibility" displays contempt and disdain for the entirely transparent

processes of another country's legal system. The trial court's dismissal of testimony given in open court under oath in the Nicaraguan legal procedure called pliego de absolucion de posiciones ("absoluciones") appears in the ruling appealed from at 7 AA 1379-1380. The court notes that the witnesses are subpoenaed to court to answer a list of questions "written by an interested party...the witness may not be represented by counsel...and cross-examination is not allowed....Dole had no notice of the ...proceedings... In light of concerns about the absoluciones procedure...the court finds the absoluciones lack any semblance of credibility."

This finding comes from the court which authorized the secret "John Doe" deposition process which it found to comport with *American* concepts of due process of law - a procedure which produced the story of the Montserrat conspiracy meeting which it found to have been proven true by the standard of clear and convincing evidence "and probably much higher." The court found that *secret* testimony, insulated from any possibility of adverse consequences to the witness for testifying falsely, and tested by nothing but the court's belief that, having "...seen it all and ...done it all and ... heard it all.... I think I'm good at spotting a lie" had superior reliability than testimony given in open court by witnesses aware that anyone who had knowledge of the truth or falsity of their testimony could expose any lies they told.

The absolucione procedure is different from American discovery

process, to be sure (although it does bear a significant similarity to the process of deposition by written questions authorized by Code of Civil Procedure section 2028.) But "different" does not necessarily mean "unworthy." And the factors which the court cited as demonstrating the procedure's flaws hardly prove a lack of reliability. Having questions drafted by an interested party is what *we* do in *our* system of law. It is extremely rare that a witness is represented by counsel. None of the John Doe witnesses were represented by counsel and indeed, the attorneys who represented some John Doe witnesses at the time of their depositions were not even notified that their clients had been summoned to testify in a case which was related to the matter in which they were represented, a process which does not appear to have caused the court any concern. (Plaintiff's Ex. 1.2, p. 40-41.)

It is true that the process does not allow for follow-up questions or cross-examination, which limits its utility. In order to ask additional questions it appears that a witness would have to be resubpoenaed to testify again, at a later date - as appears to have happened. (See Ex. 386, p. 13855, a list of what Dole's agents represent as the absoluciones taken by an attorney for Hernandez Ordeñana; Julian Pastor Chavarria Delgado deposed on 09/18/09 and again on 11/27/09)

The extent of the trial court's willingness to characterize anything that happened in Nicaragua in a manner which is offensive and disrespectful of that

nation and its legal processes is illustrated by the court's characterization of the *absolucion* process found at 7 AA 1399: "Ordeñana [sic] and his agents... have *coerced* suspected John Doe witnesses into appearing for *absoluciones*... Each of these new threats and instances of *witness tampering* is, in itself, a separate and independent ground for the court to exercise its inherent authority to terminate litigation." (Emphasis added.) The trial court is saying that the very act of *subpoenaing a witness* to testify in open court in Nicaragua constitutes "coercion," and that seeking to obtain sworn testimony in open court in that country is properly viewed in our courts as "witness tampering."

The real problem with the absolucione procedure was simply that it was not controlled by Dole or the trial court. Witnesses could be compelled by Dole's *opponents* to testify in open court about the matters Dole had arranged here to have whispered in secret, and did not have to get permission from the trial court to do so. That is the process our court found to "lack any semblance of credibility" while approving of the secret testimony of witnesses selected by Dole's agents and made "comfortable" to lie under oath for an American court without any fear of repercussions.

c. Antonio Hernandez Ordeñana had every right to investigate who was testifying in secret and what they were saying and what they were being paid. In its written ruling, the trial court cites as support for its ruling the assertion that Hernandez Ordeñana "acknowledged that a protective order

forbade him from "investigat[ing] the identity of the John Does," [but] he did it anyway." (7AA 1374) This statement implies that the trial court believed that it had issued an order that Hernandez Ordeñana had violated, and presumably that it believed that it had the authority to do so. But there is no such order; nor could there be. An American trial judge does not have the authority to order a citizen of a foreign country who is not a party to litigation in this country to refrain from investigating whether people are telling stories about him in secret. And this court did not actually purport to issue such an order.

18. The trial court's election to engage in a wholesale condemnation of dozens of people and an entire nation's judiciary and legal system based on secret testimony hurts the credibility of our judicial system.

This is a case in which the only factual question which had to be determined by reference to evidence coming from Nicaragua was whether appellants worked on a Dole banana farm in the 1970s. Every other issue in the case was fought out on evidence which came from the United States - proof of the danger of DBCP, proof of Dole's decision to use it notwithstanding the fact that that danger had become known, the fact that appellants did suffer from physical conditions which have been proven to be caused by DBCP, the battle of experts over causation - none of those things turned on any question of fact for which the evidence came from Nicaragua.

So why did the trial court feel the need to "root out fraud," based on the fact that it "believe[d] there is a conspiracy?" Much of the evidence produced in the John Doe process was not even directed at any issue arising in any of the cases filed in California. All California claims were based on medical evidence procured and tested here in America; yet several former Nicaraguan lab techs were trotted out to testify that while they had always handled their tests for Nicaraguan lawsuits honestly they "heard" or "suspected" that others - including others who were themselves John Doe witnesses similarly pointing their fingers at "others" - were guilty of fraud.

Neither Mark Sparks, Benton Musselwhite nor Walter Gutierrez had anything to do with these cases, yet a host of accusations was whispered in secret against each of them. No evidence in this case depended in any way on any legal ruling or finding by any Nicaragua judge, yet several were savaged in secret, and one - Socorro Toruño - in the court's public rulings. (Ex. 98, p. 4645) None of those people were ever allowed to know exactly what the accusations against them were. Except as to the Montserrat conspiracy meeting story which the court felt so confident about that it was made public, none of those lawyers or judges have ever been allowed to know what this American trial court believed they had done wrong. The details and extent of the corruption and wrongdoing for which they have been tried in secret and declared guilty in public continues to be withheld from them.

The Montserrat conspiracy meeting story, however, was made public. And everyone in Nicaragua with any interest in Nemagon (DBCP) litigation - which is many people - knows that it was a hoax. Not just the people who were supposedly present, and know from personal knowledge that it never happened - everyone in Nicaragua knows it was a hoax, and a clumsy one at that. (See Ex. 362, p. 13177-13180)

This is the face of American jurisprudence which these cases have presented to the other nations in this hemisphere: a legal system where a major American corporation can received permission from an American judge to recruit witnesses to testify in secret, free to fabricate outrageous lies which can be used to justify vacating a judgment won in an open, above-board jury trial. A system where an American judge authorizes an American corporation to take a [redacted] whose flamboyant perjury was helpful to the company and spirit him out of the jurisdiction [redacted] and set him up in a life of luxury, based on no evidence but the corporation's lawyers assurance [redacted] A system where testimony given in open court is deemed to lack "any semblance of credibility" while secret testimony is deemed to constitute "clear and convincing evidence" even after virtually every aspect of the testimony which was made public and susceptible of objective verification has proven to be false. A system which allows and relies on vicious, backstabbing gossip whispered in secret against virtually every person who has opposed or inconvenienced Dole Food

Company, Inc.

In *Chevron Corp. v. Donziger*, 768 F. Supp. 2d 581- Dist. Court, SD New York 2011) Chevron, (represented by the same law firm which represents Dole here) prevailed upon a trial court to make sweeping findings in favor of the corporation based upon a scathing denunciation of the government and courts of the nation of Ecuador (Id at 614-620) That ruling was reversed in *Chevron v. Naranjo* (2nd Cir., January 26, 2012, Nos. 11-1150-cv(L) 11-1264-cv(CON) on procedural grounds, but in so doing the appellate court noted that "It is a particularly weighty matter for a court in one country to declare that another country's legal system is so corrupt or unfair that its judgments are entitled to no respect from the courts of other nations." Similarly, in affirming Judge Huck's decision not to enforce the Osorio judgment the court of appeal reviewing that decision expressly refrained from affirming the portion of his opinion which criticized the integrity of the Nicaraguan judiciary. (*Osorio v. Dow Chemical Company* (11th Cir. 2011) 635 F.3d 1277, 1279) By basing its decision on a denunciation of the judicial system and legal personnel of another nation the trial court waded into an area which it was not knowledgeable about and which exposed a willingness to accept implausibly sinister characterizations of objectively appropriate procedures and conduct.

19. Rewarding the strategy of attacking opposing counsel threatens the integrity of our judicial system.

The fact that the strategy pursued by Dole was to attack and attempt to neutralize every lawyer who represented adverse parties is clear from its actions as well as the candid statements of its "most important" witness, John Doe 17: "The biggest problem they have are the lawyers. First they went for Dominguez and now Provost." (Ex. 396, p. 14163) "...their first action is to get rid of the law firms, because they don't want lawyers, they want to have direct negotiations with the [capitans]" (Ex. 399, p 14198) The phony Montserrat conspiracy meeting story was custom-made to attack not just Dominguez and Provost, but also Carlos Gomez and Lack and Girardi and all of the Nicaraguan lawyers working with them. Every plaintiff's lawyer handling DBCP litigation in Nicaragua - every single one, including Duane Miller, however briefly - was implicated in a conspiracy to commit fraud which the court believed in at the time "beyond a reasonable doubt."

Dole filed sanction motions against MAS and appellant's current counsel as an obvious pressure tactic. (The first sanction motion Dole filed against current counsel was unceremoniously dropped from the calendar by the court *sua sponte* - 9CV 716.) MAS was in the cross-hairs of a contempt charge throughout the *Mejia* dismissal hearings. Dominguez fled *Mejia* under threat of criminal prosecution, State Bar prosecution and contempt charges by

referral of the trial court. None of those referrals ever resulted in any charges being filed against Dominguez, but the deliberate threat to his freedom, profession and pocketbook was real and substantial.

Rewarding the tactic of attacking opposing counsel poses a danger to our adversarial system of law. Our legal system relies on an adversarial testing of contested facts. If one counsel operates under constant threat of imprisonment and/or financial ruin if the court deems his efforts to be inadequately supportive of his opponents claims of "fraud" - as MAS was expressly threatened by the trial court before the *Mejia* dismissal hearings were commenced - that spirited advocacy will be destroyed and no effective testing of facts will occur - as happened in the *Mejia* dismissal hearing.

If this case were an anomaly - a "one-of-a-kind" situation which was unlikely to recur, the problem posed by the trial court's rulings in this case which rewarded an all-out assault by an American-based multi-national corporation on all opposing counsel and the judiciary and judicial system of a third world country might not be something this court would need to consider. But this is not an isolated case. The recent cases cited above demonstrate that attacking the judges and opposing counsel in any case involving evidence from a foreign country has become the strategy *du jour* of large American corporations represented by the law firms which represented Dole in this case.

Dole's counsel brags about their ability to not merely develop "defensive tactics, but rather an affirmative strategy to ultimately end the litigation." (RJN 106) Dole's counsel "ends litigation" by destroying their opponents' ability to seek judicial remedies for their clients' acts by crippling opposing counsel and attacking judges who rule against them. But however happy that might be for their clients, it does not resolve the underlying controversies. If that strategy is allowed to succeed it will merely prove to the world that the means for resolving such conflict cannot be found in our courts - leaving such resolution to whatever alternatives may be available.

This case is already a "de facto" precedent; the ruling of this court will most likely become an official precedent. This court's decision will have far-ranging implications, not simply on appellants - six elderly Nicaraguan farm workers who are not all likely to live to see the final judgment in this case - but on the credibility of the judicial system of our state and our nation both at home and around the world. If this case is not decided on the merits of the evidence presented openly and fairly under established principles of law at the jury trial of the cause, but is disposed of by judicial fiat based on dramatic secret accusations that appellants are *to this day* banned from investigating and confronting in public, the legacy of this court's decision will be wide ranging and devastating to the principle of due process and the rule of law.

CONCLUSION

It is difficult to imagine how an experienced trial court could have believed that giving a motivated corporate litigant the authority to send agents into a poor foreign country with authorization to tell potentially friendly witnesses that if they testify for the corporation the fact that they testified and everything they said would remain a secret from any of the corporation's foes forever would not result in a flood of perjury that painted whatever picture helped the corporation the most. And yet, that is what was authorized in this case. The end result of that process is that the court has issued its most extraordinary of extraordinary writs - a writ so rare that there is no published record of one having been issued since 1974 - to overturn a valid judgment in reliance on evidence which has never been exposed to the light of day, and never subjected to bona fide adversarial testing and verification.

The order vacating the judgment in this case pursuant to the writ of error coram vobis should be reversed, and this case should be returned to the status it was in when the coram vobis petitions were filed.

April 14, 2012

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Steve Condie,
Attorney for appellants